



Implementing the WIPO Development Agenda: Next Steps Forward

Introduction

The 2007 General Assembly of World Intellectual Property Organisation (WIPO) adopted the recommendations for action in relation to what is called the 'WIPO Development Agenda.' The WIPO development agenda is a landmark in the history of the efforts led by developing countries to integrate development, IP and innovation policies. It took three years to negotiate and agree on the 45 proposals that make up the WIPO Development Agenda. The 2007 General Assembly of WIPO also created a new body called the Committee on Development

and IP (CDIP) with a mandate to:

- a. develop a work program for implementation of the adopted recommendations;
- b. monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose it shall coordinate with relevant WIPO bodies;
- c. discuss IP and development related issues as agreed by the Committee, as well as those decided by

Executive Summary

WIPO Member States agreed to a new agenda to guide the organizations work on development and intellectual property (IP). The challenge now is to effectively implement the agenda to achieve concrete results and change. Key recommendations for developing countries on the next phase of the WIPO Development Agenda are to: 1) uphold at WIPO and other multilateral fora a holistic approach to development and IP; 2) consistently assert a member-driven process and integration of development in all activities of the WIPO; 3) ensure the implementation of the totality of the recommendations, and give effect to each agreed proposal; 4) request and monitor that the WIPO fully observes all the agreed proposals, particularly those that require change in its current work methods and activities; 5) identify concrete, specific actions necessary to exercise the agreed proposals; and 6) develop and support the holistic approach to development and IP through coherent national policy.

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the General Assembly.¹

The CDIP commences its work in March 2008. The process of implementing the WIPO Development Agenda requires specific performance by both the WIPO as an institution and the member states. The WIPO is presumed to be already implementing the 19 of the 45 agreed proposals that members selected for immediate implementation, and thus members can expect review of the progress during the first meeting of the CDIP.

This Policy Brief examines the factors that are fundamental to achieve the policy goals and provide a strategic base for technical input to the implementation of the WIPO Development Agenda.

I. The Foundation: A Holistic Approach to Development and IP

The WIPO Development Agenda is a significant contribution to integrate development, IP and innovation policies. It is the first strategic and comprehensive effort by developing countries in recent history to revisit the activities and role of the WIPO in light of its basic objective, beyond promoting, uncritically, the protection of IP rights.² To date, the most important outcome is the advancement at WIPO of a framework that defines the relationship between development and intellectual property in a holistic manner, highlighting various dimensions, under clusters that are close to development and innovation challenges than different categories of IP subject matter.

Allusion to 'development' in IP rights discussion traditionally reflected a particular perspective that over-emphasises the contribution of IP-related technical assistance. It rests on the misguided assumption that increased IP protection is in any instance a central element for innovation, dissemination of knowledge and economic growth in developing countries. The development problem is mistakenly identified as the lack of education on IP rights and lack of capacity to implement international obligations,³ rather than, for example, relating to the challenges of access to knowledge and

technology.

The conceptual framework of the WIPO Development Agenda requires WIPO to adjust its role and activities in light of a broader understanding of the complex relationship between IP rights, innovation, and socio-cultural and economic development. The WIPO as an institution is mandated to fully incorporate development concerns in developing global IP policy, not merely as needs for technical assistance and capacity building.

The holistic approach to IP and development is incorporated in the 45 agreed proposals that make up the WIPO development agenda. Since the 45 agreed proposals are listed in different clusters, the first step in implementation is to synthesis and pulls together the approach to development issues. The following are some of the main elements advanced:

- a) *The common development goals pursued within the UN system*, including those contained in the Millennium Declaration. The WIPO development agenda further request WIPO to intensify its cooperation on IP related issues with UN agencies and other relevant international organizations.⁴ The UN agencies advance human development, sustainable development, education and science, health and industrial development. WIPO would be required to reflect the complex polices issues of development by advancing cooperation with UN agencies;
- b) *Innovation and Access to Knowledge*: The agreed proposals promote a proactive agenda for WIPO, as a specialized UN agency, within its core competence of promoting creative intellectual activity and facilitating the transfer of technology to accelerate economic, social and cultural development.⁵ In promoting creative intellectual activity, WIPO must consider all other potential models and mechanism in addition to promoting the protection of IP rights. Accordingly, the implementation of the WIPO Development Agenda requires the examination of the potentials of open and collaborative models, supporting development of national scientific and technologi-

cal infrastructure, identifying the particular needs of small and medium size enterprises and institutions dealing with scientific research and cultural industries.⁶ A further contribution of the WIPO Development Agenda is to initiate discussions on how to facilitate access to knowledge and technology to foster creativity and innovation;

- c) *Norm-Setting* at WIPO shall be inclusive, member driven and take into account different level of development and balance the costs and benefits of IP protection and enforcement.⁷ For norm-setting processes to take into account different levels of development, future IP instruments must be designed with the purpose of contributing to and not hampering the attainment of development goals. The process should be 'supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.'⁸ WIPO is required to consider the benefits of maintaining rich and accessible public domain *vis-à-vis* the provision of exclusive rights conferred by IP rights and to develop norms supporting the public domain.⁹ Considering development challenges will also include, framework for the utilisation of existing flexibilities within the international IP system to address development challenges, safeguarding national implementation and transition periods, limitations and exceptions to rights conferred by IP, addressing the issues of technology transfer and competition;
- d) *Intellectual Property Impact Studies*: The WIPO will undertake various impact studies with basic policy parameters that ensure a structured, formalized and objective studies to lead to informed policy making;¹⁰
- e) *Pro-Development Technical Assistance and changing the method of work in WIPO*: Development issues are not at periphery of the activities of the organisation. Development will be integral part of all activities of WIPO. Various recommendations are also designed to ensure transparency, neutrality and accountability in WIPO activities.¹¹ WIPO members developed a clear guiding

framework, establishing that technical and legislative assistance by WIPO shall be development oriented; demand driven and transparent; take into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States.¹² Ensuring demand-driven technical and legislative assistance would require careful needs assessment that can be monitored at each stage, and assessed if the assistance followed a pro-development approach. WIPO would conduct adequate consultation through a member driven process, ensure wider participation of civil society, takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders and develop an effective yearly review and evaluation mechanism for its development oriented activities.¹³

In summary, according to the agreed proposals 'development' shall be understood as the achievement of development goals pursued within the UN system. Accordingly, WIPO is required to play a proactive role to support national scientific and technological capability; foster access to knowledge; explore all possible mechanisms for innovation; consider the option of leaving knowledge under public domain, and preserve the knowledge that is already under public domain; ensure the design of norm-setting and all of its activities to effectively promote development. Finally, WIPO shall maintain a member-driven process.

II. Clusters and Proposals for Immediate Implementation

The 45 agreed proposals of the WIPO Development Agenda fall within six clusters.

Cluster A: Technical Assistance and Capacity Building;

Cluster B: Norm Setting, Flexibilities, Public Policy and Public Domain;

Cluster C: Technology Transfer, Information

and Communication Technologies (ICT) and Access to Knowledge;

Cluster D: Assessment, Evaluation and Impact Studies;

Cluster E: Institutional Matters Including Mandate and Governance;

Cluster F: Other Issues (Enforcement of IP rights).

The next step in the process of implementing the development agenda at WIPO is to ensure that these elements are translated in to specific, workable actions that can be subjected to evaluation. To ensure the final outcome meets the expectations of developing countries, it is critical that the process of implementing the 45 agreed proposals is framed by the holistic understanding of development and IP. The fact that painful compromises have been made in reaching the 45 agreed proposals and that there are diverse, competing interests in the transformation of an organisation such as WIPO, are reminders of the long road ahead.

One notable challenge could be the interface between the clusters and a number of recommendations addressing similar questions under different clusters. The broad themes of the clusters guide the implementation of the specific recommendations under each cluster. While Cluster A provides important guidelines and principles on pro-development technical assistance, Cluster D requires the development of an annual review and evaluation mechanism for the assessment of all of WIPO's development oriented activities, including those related to technical assistance with specific indicators and benchmarks. Cluster E also requires undertaking a review of current WIPO technical assistance activities in the area of cooperation and development as a matter of institutional mandate and governance. WIPO should implement and give effect to each recommendation based on the broad theme of each cluster. Developing

countries also need to give full effect and maximize the potential developmental benefits of each recommendation.

Many of the 45 agreed proposals also contain language that currently provides some scope for interpretation. For example, recommendation 34 requests WIPO to 'conduct a study on constraints to intellectual property protection in the informal economy, including the tangible costs and benefits of IP protection in particular in relation to generation of employment.' The recommendation allows the analysis of the effect of IP rights on employment and the informal sector. It could also be interpreted as suggesting a claim on informal sector as a challenge to enforcement of IP rights. Because of this, a decisive factor in the implementation of the WIPO De-

velopment Agenda is the identification by developing country members of concrete, specific actions required to exercise the agreed proposals.

Member states agreed that 19 of the agreed proposals will be 'immediately implemented'. The listing of the 19 agreed proposals for immediate implementation, however, should not be considered as according priority or special status for the recommendations included in the list. Arrangements are already made for the implementation of all of the agreed proposals under the mandate of the Committee on Development and IP and the development of work plans.

For effective realization of the WIPO Development Agenda, member states must lead and maintain oversight of the work plan for implementation of the totality of the recommendations. It is clear that under some of the agreed proposals WIPO is required to observe and abide by what is agreed. For example, recommendation 44 requires that 'formal and informal meetings or consultations relating to norm-setting activities in WIPO, organized by the International Bureau, upon request of the Member States, should be held primarily in Geneva, in a manner open and transparent to all Members.' WIPO has to abide by the recommendation without expecting an action plan. However, this is not the basis to exclude the recommenda-

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tion from oversight by the CDIP. Member states have to monitor the implementation of the agreed proposals by WIPO under each proposed meeting for norm-setting. The recommendation also restates that the initiation of processes for norm setting rests with the political power of the member states as in any other international organisation.

III. The Importance of Developing Country Leadership and Oversight

The agreed way ahead to implement the 45 agreed proposals will face a fair share of road bumps. The first is the likely reluctance of the WIPO as an institution and some of its more powerful member states to give full effect, in practice, to the core mandate of WIPO as a specialised agency of the UN. A second obstacle is the fact that compared to the original 111 proposals that were proposed, the agreed 45 reflect a modest success in terms of the initial aspirations and expectations of developing countries. These obstacles, and ideas on how to address with them, are further elaborated below.

While WIPO is required to change its ways by the development agenda, there is still a need to ensure that WIPO does not conduct 'business as usual' but actually adjusts its activities in light of the agreed proposals.¹⁴ One of the areas to watch over is the relationship between WIPO, other UN agencies and international organisations. Concerns about the activities of the WIPO Secretariat in relating to other UN agencies were evidenced in the discussions on approval of the agreement for cooperation between the WIPO and the UN Food and Agriculture Organisation (FAO), which seemed to understate the importance of the role of member states in critically reviewing of the terms for cooperation before approval.¹⁵ One example where member oversight at WIPO worked well in this area was the thorough process of responding to the request by the Convention on Biological Diversity (CBD) to examine the interrelation of access to genetic resources and disclosure requirements.

Developing countries should be particularly vigilant of the relationship between the WIPO and the WTO. Recommendation 40 requests WIPO to specially intensify its cooperation on IP related

issues with the WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs. While the WIPO and the WTO have an agreement on technical assistance provision, the relationship goes far beyond this issue. The WIPO Development Agenda can be linked to the operation, implementation and review of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). For example, the studies that WIPO may conduct on the possible links and impacts of current standards of IP protection on development could influence the discussions at the WTO on the review of the TRIPS Agreement as provided for in Article 71 and paragraph 19 of the Doha Ministerial Declaration of the WTO (2001).

Collective leadership and oversight by developing countries is essential to ensure that WIPO fully embraces the UN approach to 'development' as a UN specialised agency and to implement recommendation 12 to 'further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.'¹⁶ Developing countries have to implement and request the consideration of the agreed proposals in their participation at various activities of the WIPO. During the 2007 meeting of the Advisory Committee on Enforcement of WIPO, developing countries pushed for consideration of the contribution of right holders in enforcement, the need to take into account limitations and exceptions and the issues of piracy of traditional knowledge and genetic resource. The summary of the meeting by the Chair indicated that a delegated requested for the work of the Advisory Committee on Enforcement to be framed in accordance with recommendation No. 45 of the WIPO Development Agenda.¹⁷ The recommendation requires approaching intellectual property enforcement in the context of broader societal interests and especially development oriented concerns.

IV. Coherence in National Policies and Practice

The WIPO Development Agenda is primarily concerned with transforming the multilateral process for norm-setting, technical assistance, and activities of the WIPO to contribute to addressing development challenges. In as much as member states expect changes in WIPO, its impact can only be significant if national policy-making in the area of IP rights follows a holistic approach to development and IP that is designed in light of broader national innovation and development policies and objectives.

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The WIPO Development Agenda is a response on part of the developing countries to the political, economic and cultural challenges they face with respect to the international IP system and norm-setting process. But one of the main drawbacks is that some developing countries, while pursuing a pro-active agenda to bring change to the international system to take into account their concerns, are following a different approach in their national IP policy making.

Many developing countries are yielding to the international pressure on IP protection by signing free trade agreements, adjusting national laws according to TRIPS-plus standards and giving a prominent role to government in the enforcement of IP rights.¹⁸ However, a growing number of developing countries are also increasingly making use of flexibilities available within the international IP system, such as the use of compulsory licences to improve access to medicines. For India IP policy evaluation is not to be left for WIPO or the multilateral processes. It established the National Institute of Intellectual Property Management (NIIPM) that will function as the think tank of the government on IP regime in line with the international standards while at the same time safeguarding national interests. The Institute will provide policy inputs based on analytical and empirical research to facilitate government decision-making in the

area of IP policy and legislation.¹⁹

Given the strong linkage between the national and international policy arenas, the effective implementation of the WIPO Development Agenda requires internal policy coordination that drives a coherent national level stance on IP and development that is echoed in the participation at international organisations.²⁰ Greater coherence also improves the ability to carry out sound and credible impact studies on IP and development and evidence-based international norm-setting. Developing countries could explore the potential for cooperation in governance on IP norm-setting as a means to improve coherence and build their power base to improve their participation in multilateral fora.²¹ The need for increased cooperation among developing countries in the WIPO Development Agenda process was clearly felt at the initial stage of the negotiation when WIPO experienced the proliferation of proposals from developing countries on similar issues.

V. Conclusion

The implementation stage of the WIPO Development Agenda is a critical one. Significant work is yet to be done at WIPO to bring about much needed change to the organization and its activities.

Developing countries may consider the following for effective implementation of the WIPO Development Agenda:

- ✓ Uphold at WIPO and other multilateral fora the holistic approach to intellectual property and development that supplants the previous entrenched approach that uncritically assumes a positive relationship between strong IP protection and development
- ✓ Ensure on the member-driven nature of the process;

- ✓ Request and monitor that the WIPO fully observes all the agreed proposals that pertain to its role, particularly those that require change in the current work methods and activities;
- ✓ Ensure the implementation of the totality of the recommendations, and give effect to each agreed proposal;
- ✓ Identify concrete, specific actions necessary to exercise the recommendations;
- ✓ Establish mechanisms to improve co-operation and coordination among developing countries and build support from civil society stakeholders;
- ✓ Integrate the holistic approach to IP and development into national policies and practices. Pro-developmental outcome of the development agenda must not be restricted to WIPO, but must be embedded in IP policy making at the national level.

End Notes

1. See, Report of the WIPO General Assemblies 2007, WIPO document A/43/16 pg. 153-160 Annex A and Annex B for the full list of the recommendations. The recommendations are cited below by their numbers.
2. South Centre, Establishing a “Development Agenda” for the World Intellectual Property Organization (WIPO): Commentary on Proposal by Argentina and Brazil, Analytical Note, SC/TADP/AN/IP/3, p. 2.
3. See Barbosa, et. Al, “Slouching Towards Development in International Intellectual Property,” 2007 Michigan State Law Review, 119.
4. WIPO, General Assembly (2007), A/43/16, Annex A, Recommendation 40.
5. See WIPO, Agreement between the United Nations and the World Intellectual Property Organization, WIPO Publication No. 111, WIPO, Geneva, 1975, article 1.
6. WIPO, General Assembly (2007), A/43/16, Annex A, Recommendations 4, 11, 16, 24 and 36.
7. Id., Recommendation 15.
8. Id., Recommendation 22.
9. Id., Recommendations 16 and 20.
10. Id., Recommendations 35 and 37.
11. Id., Recommendation 14. See also WTO Document IP/C/W/495/Add.2.
12. Id., Recommendations 1 and 13.
13. WIPO, General Assembly (2007), A/43/16, Annex A, Recommendation 33.
14. Tansey, Geoff, “Fear over Growing WIPO-FAO links,” GRAIN, Seedling, July 2007, pp. 56 and 57.
15. Report of the WIPO Coordination Committee, WIPO document WO/CC/55/3
16. WIPO document A/43/16, Annex A, Recommendation 12, emphasis added.
17. WIPO (2007), WIPO/ACE/4/10.
18. Biadgleng and Munoz Tellez, “The Changing Structure and Governance of Intellectual Property Enforcement”, Research Papers 15, South Centre, 2008.
19. Government of India Ministry of Commerce and Industry, Department of Commerce, Press Release, 17 August 2007, New Delhi.
20. Abdel-Latif, Ahmad, “Developing Country Coordination in International Intellectual Property Standard-Setting”, 24 Working Paper, South Centre, 2005.
21. Biadgleng, Ermias Tekeste, “Analysis of the Role of South-south Cooperation to Promote Governance on Intellectual Property Rights and Development”, Research papers 14, South Centre, 2007.



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