

**ESTABLISHING A “DEVELOPMENT AGENDA” FOR THE WORLD
INTELLECTUAL PROPERTY ORGANIZATION (WIPO): COMMENTARY ON
PROPOSAL BY ARGENTINA AND BRAZIL ***

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I. INTRODUCTION

1. The fortieth Series of Meetings of the Assemblies of Member States of the World Intellectual Property Organization (WIPO) will take place in Geneva from 27 September to 5 October 2004.¹ The Assemblies will address various matters including issues currently under negotiation in various WIPO committees and bodies. In particular, the Assemblies will be asked to debate and or provide direction on issues crucial to developing countries and development friendly civil society organizations.² Issues ranging from the future of the Substantive Patent Law Treaty (SPLT) negotiations, the inter-linkages between the different fora addressing the issues of genetic resources and traditional knowledge, the protection of broadcasting organizations to enforcement, all which raise important questions from a development perspective, are among the issues on the agenda.

2. Developing countries and civil society organizations continue to face a number of challenges in effectively participating at the WIPO Assemblies although there have been significant improvements to their participation in a number of individual WIPO committees and working groups. In this regard, the South Centre and the Center for International Environmental Law (CIEL) prepared in August 2004 a background paper titled *"Integrating Development into WIPO Activities and Processes: Strategies for the 2004 WIPO Assemblies"* to assist developing countries to think through the various issues on the agenda of the 2004 WIPO Assemblies.³

3. That paper reviewed the status of the various issues in the individual WIPO committees and other bodies and outlined some broad substantive as well as strategic and political questions that developing countries need to address as they prepare for and participate in the 2004 Assemblies. In particular, the background paper addressed matters relating to the SPLT, the request by the Convention on Biological Diversity (CBD) to WIPO, the possible diplomatic conference on the protection of broadcasting organizations, the PCT reform, the WIPO Policy Advisory Commission (PAC) and the WIPO Advisory Committee on Enforcement (ACE).

¹ There are seven Assemblies and other WIPO bodies that will be meeting, namely, the WIPO General Assembly, the WIPO Conference, the WIPO Coordination Committee, the Paris Union Executive Committee, the Berne Union Executive Committee, the International Patent Classification (IPC) Union Assembly and the Patent Cooperation Treaty (PCT) Union Assembly. For further details and other general information, see WIPO document A/40/INF/1 dated 29 March 2004. For the Draft Agenda and Preliminary Annotated Agenda, see documents A/40/1 Prov. 1 dated 29 March 2004 and A/40/1 Prov. 2 dated 28 June 2004 respectively. The documents are available at <http://www.wipo.int/documents/en/document/govbody/index04.htm>.

² For an overview of some of these issues see South Centre and CIEL, (2004), "Intellectual Property and Development: Overview of Developments in Multilateral, Plurilateral and Bilateral Fora", *South Centre and CIEL IP Quarterly Update*, Second Quarter 2004. Available at <http://www.southcentre.org/info/sccielipquarterly/index.htm>. Also available at http://www.ciel.org/Publications/IP_Update_Summer04.pdf.

³ See, South Centre, (2004), "Integrating Development into WIPO Activities and Processes: Strategies for the 2004 WIPO Assemblies", *South Centre Analytical Note*, SC/TADP/AN/IP/2. Available at http://www.southcentre.org/tadp_webpage/research_papers/ipr_project/wipo_ass_2004_bkgrndoc_aug04.doc.

4. In the meantime, on 26 August 2004, the delegations of Argentina and Brazil presented a proposal on 'Establishing a Development Agenda for WIPO' and requested that it be included as an item on the agenda of the Assemblies. Although this proposal has not yet been published by the International Bureau of WIPO as a formal Assembly document, it merits immediate consideration. Considering the issues it raises, it was thought prudent to analyse the proposal separately and not as part of document SC/TADP/AN/IP/2.⁴ Consequently, this Analytical Note has been prepared to assist developing countries to think through the various issues raised by the proposal with a view to engaging fully in this crucial debate. The proposal by Argentina and Brazil is annexed to this paper.

II. COMMENTARY ON THE PROPOSAL BY ARGENTINA AND BRAZIL

5. Over the last few years developing countries and independent observers have raised serious questions with respect to the implications, particularly for developing countries, of some of the main activities being undertaken by WIPO.⁵ The questions regarding WIPO activities have been raised in the wider context of the debate on the costs and benefits of intellectual property protection. At the heart of this wider debate is the question of the implications of intellectual property rules on the socio-economic and cultural development of developing countries. Although there have been some discussions on these issues at the WIPO Assemblies, such as during the discussion on the patent agenda at both the 2002 and 2003 WIPO Assemblies, there has been no focussed discussion on how WIPO should place development at the heart of its activities.

6. The proposal by Argentina and Brazil therefore constitutes the first time in the recent history of WIPO that the organization's highest body has been called upon to specifically discuss intellectual property and development. In this context, the proposal constitutes a very significant political and strategic initiative. The placing of this item on the agenda of the WIPO Assemblies and the discussion that will follow offers an unparalleled opportunity for all developing countries and development-friendly civil society organizations to, for the first time, put on WIPO's agenda the question of development. As the proposal notes in section I, "development undoubtedly remains one of the most daunting challenges facing the international community".

7. The challenge is for WIPO to specifically discuss how it should address the development challenge as has been done by the United Nations (U.N) General

⁴ *Ibid.*

⁵ The most notable recent critiques of WIPO processes include the Report of the Commission on Intellectual Property Rights (IPR Commission), See IPR Commission, (2002), *Integrating Intellectual Property Rights and Development*, IPR Commission, London; the South Centre T.R.A.D.E. Working Paper 12 by Correa and Musungu and published in November 2002 (Correa, Carlos and Musungu, Sisule, (2002) "The WIPO Patent Agenda: The Risks for Developing Countries", *T.R.A.D.E Working Papers 12*, South Centre, Geneva.); and the QUNO and QIAP Issues Paper 3: Musungu, Sisule and Dutfield, Graham, (2003), "Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organization (WIPO)", *TRIPS Issues Papers 3*, QUNO-Geneva and QIAP-Ottawa.

Assembly (the Millennium Declaration), the Sao Paulo United Nation Conference on Trade and Development (UNCTAD) eleventh Ministerial Conference (UNCTAD XI) and the World Trade Organization (WTO) in the context of the “Doha Development Agenda”. In essence therefore, while different countries may have different views on the details of the proposal, it is in the interest of all developing countries and development-friendly civil society organizations to not only support the inclusion of the proposal on the agenda of the Assemblies but also to support the basic idea in the proposal which is to have the Member States of WIPO engage in a focussed and exhaustive discussion on how WIPO should incorporate development into its various programmes and activities.

II.1 The Development Dimension and Intellectual Property Protection

8. With respect to the question of the development dimension and intellectual property, the proposal reiterates a point that has been made by many developing countries not only in WIPO but also in other major international organizations including the WTO and UNCTAD. The proposal correctly points out that “intellectual property protection can not be seen as an end in itself, nor can harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development.”

9. Indeed, this idea has been widely accepted not only by developing countries but by independent bodies such as the United Kingdom (UK) Commission on Intellectual Property (IPR Commission) and by developed country governments such as the UK government. In particular, the UK government points out that “IPR regimes can and should be tailored to take into account individual country’s circumstances”.⁶ The whole membership of the WTO, which includes a majority of the membership of WIPO, has also explicitly accepted that the development dimension is an integral part of any consideration of matters concerning intellectual property standards. Consequently, as an organization that considers itself an organization of the future, WIPO and its membership should be at the forefront of considering the means through which the development dimension should be incorporated into intellectual property policy formulation.

II.2 Integrating the Development Dimension into WIPO Activities

10. As a specialised agency of the U.N with the responsibility for taking “appropriate action... to promote intellectual activity and for facilitating transfer of technology... in order to accelerate economic social and cultural development”⁷

⁶ See the Ministerial Introduction to the U.K government’s response to the IPR Commission’s report. DFID and DTI, (2003) *The UK Government Response to The Report of the Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy”*, DFID and DTI, London.

⁷ See WIPO, *Agreement between the United Nations and the World Intellectual Property Organization*, WIPO Publication No. 111, WIPO, Geneva, 1975, article 1.

WIPO, as pointed out in the proposal should be guided, in undertaking its activities and formulating its programmes, by the development goals of the U.N. Its activities should also be aimed at contributing towards the achievement of the U.N Millennium Development Goals. Although the Director General reported at the 2003 Assemblies some activities that WIPO has undertaken to respond to the recommendations and resolutions of the U.N,⁸ that report was not specific to the development dimension and there was no exhaustive discussion on development at that session.

11. Consequently, the call by Argentina and Brazil that the “WIPO General Assembly ... take immediate action in providing for the incorporation of a “Development Agenda” in the Organization’s work program” is a timely one. Such action should also establish the basis for a continuing review of WIPO’s contribution to the achievement of the Millennium Development Goals and for the organization to participate fully in the scheduled review by the U.N Secretary General of the progress towards meeting the targets of the Millennium Development Goals in 2005.

II.3 The Development Dimension and Intellectual Property Norm-setting: Safeguarding Public Interest Flexibilities

12. A number critical issues are raised in the proposal with respect to safeguarding the public interest flexibilities in intellectual property standards. First, the proposal notes the various norm-setting activities that are on-going in WIPO in which the importance of public interest flexibilities must be fully taken into account. Among others, these include the negotiations on the SPLT and the negotiations on a possible instrument for the protection of broadcasting organizations. Secondly, the proposal specifically points to the need for WIPO to explore and discuss matters relating to open collaborative models of innovation and intellectual creativity. Although some of these issues may be covered by specific committees in WIPO and or could be the subject of individual consideration under other agenda items in the Assemblies, the issue here is broader and beyond any particular committee or treaty and warrants special consideration by the Assemblies.

13. In essence, it is in the interest of all countries, developing countries in particular, that the WIPO General Assembly provides a broad policy framework on the basis of which current and future norm-setting activities in WIPO should be carried out in the individual committees and working groups including activities in the Committee on Cooperation for Development. Because we are talking here about an organization-wide policy framework, the General Assembly through which the WIPO membership exercises overall oversight and monitoring of the programme of the organization provides the best fora for having this discussion.

⁸ See WIPO document WO/GA/30/4 dated 15 August 2003 and titled “Resolutions and Decisions of the United Nations; Reports of the Joint Inspection Unit: Report by the Director General”. Available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/doc/wo_ga_30_4.doc.

II.4 The Development Dimension and Transfer of Technology

14. The proposal places on the agenda of WIPO another critical issue for developing countries. In addition to the transfer of technology objectives and principles set out in articles 7 and 8 of the TRIPS Agreement, WIPO as a U.N agency has the responsibility “for facilitating transfer of technology related to industrial property to developing countries”.⁹ The call for WIPO to specifically discuss the question of intellectual property and transfer of technology with a view to determining which measures need to be taken in WIPO to facilitate transfer of technology is therefore a call that needs the full support of all developing countries. In this regard, as the proposal points out, while this subject has been discussed in substantively focussed ways both in UNCTAD and the WTO, such a discussion has not taken place at WIPO. The need for a focussed discussion in WIPO can not therefore be gainsaid.

II.5 The Development Dimension and Intellectual Property Enforcement

15. Enforcement is another important issue that has implications for socio-economic and cultural development. As the proposal correctly points out, enforcement for intellectual property has implications and is of importance not only for the right-holders but the society at large. For developing countries, enforcement has important implications in various ways, not the least, with respect to the use of the policy flexibilities contained in intellectual property treaties. Although the WIPO membership is currently discussing matters relating to enforcement in the Advisory Committee on Enforcement (ACE), the question of the development dimension needs to be discussed at the broader level as a cross-cutting issue. In this context, the question arises as to what enforcement in intellectual property should rightfully include.

16. A useful starting point in the current international framework of intellectual property, as pointed out in the proposal, is article 7 of the TRIPS Agreement which provides that, “the protection and *enforcement*¹⁰ of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to the socio economic welfare and to a balance of rights and obligations”. Read together with article 8 of the TRIPS Agreement, it means that enforcement measures must not only deal with counterfeiting and infringement but must also include measures to ensure the protection of public health and nutrition and the promotion of public interest in sectors of vital importance to socio-economic and technological development. In addition, enforcement should aim at preventing the abuse of rights and the resort by right holders to practices which unreasonably restrain trade or adversely affect the transfer of technology.

⁹ See article 1 of the Agreement between the U.N and WIPO, *supra* note 7.

¹⁰ Emphasis added.

17. Consequently, the WIPO General Assembly should provide a broad policy framework on the basis of which current and future activities in the ACE should be undertaken. In addition, such a framework will be crucial in addressing the enforcement provisions in future WIPO treaties and for guiding the targeting and delivery of technical assistance in this area.

II.6 Promoting “Development-oriented” Technical Cooperation and Assistance

18. Technical assistance is a key component for any policy framework aimed at ensuring that developing countries tailor their intellectual property regimes to meet their development goals. Any discussion on the development dimension in WIPO must therefore include a discussion on the role of technical assistance in ensuring that WIPO activities are carried out in a development-sensitive manner. As the proposal points out WIPO remains the main multilateral provider of technical assistance relating to intellectual property. In this regard, WIPO must be at the forefront of engaging various stakeholders in discussions on the role of technical assistance in ensuring that developing countries can fully appreciate both the costs and benefits of intellectual property protection.

19. While the technical assistance by WIPO, worth millions of dollars, has resulted in the improvement in the performance of developing countries’ intellectual property offices both in terms of infrastructure and policy-making, significant gaps, with serious development implications, still remain in many countries. In particular, there is increasing concern that despite the increase in the level of assistance and in the resources devoted to technical assistance activities in intellectual property; many developing and least-developed countries have not taken advantage of the development-friendly policy spaces within the TRIPS Agreement and other agreements. This has been interpreted to mean, in part, that various technical and capacity gaps which should have been filled still exist in these countries.

20. In particular, the IPR Commission after reviewing the current intellectual property-related technical assistance programmes by WIPO came to the conclusion that the results of the various activities under these programmes were not commensurate with the effort or the money so far spent.¹¹ While views may differ about the veracity of this statement, what is important to raise and discuss at the WIPO Assemblies is how to ensure the continuous review and improvement in the design and delivery of WIPO’s technical assistance. Ensuring the efficient use of the resources at the disposal of WIPO is in the interest of the Members of WIPO, especially developing countries.

II.7 Addressing the Concerns of all Stakeholders, in Particular Civil Society

21. The participation of civil society in policy-making both at the national and global level is today widely considered as a key to democratic policy-making. In the U.N family, in particular, the role of civil society groups is well recognised. In this

¹¹ See IPR Commission; *supra* note 5, p. 167.

regard, the proposal raises an important question about the role of civil society groups in policy and rule-making at WIPO. While issues relating to admission of observers have been discussed in the WIPO Assemblies on fairly regular basis, the core issue of ensuring equitable representation from various sectors of society has not been specifically addressed.

22. Discussing the specific role of civil society organizations as opposed to groups representing specific economic interests is therefore a task that the WIPO General Assembly should undertake. This discussion falls into a wider discussion on the subject within the U.N family and in many other international organizations and WIPO should ensure that it keeps apace with developments. The membership of WIPO should signal a clear desire for WIPO to not only continue the welcome steps already taken to enhance civil society participation but to go further.

II.8 WIPO's Development Agenda: Issues and Measures to be Considered

23. In the Annex, the proposal by Argentina and Brazil suggests various measures that the WIPO General Assembly could consider taking in order to ensure that development is at the heart of all WIPO programmes and activities. All the eight (8) proposed action points are very useful suggestions which should be given serious consideration. More importantly, however, irrespective of the merits and demerits of each proposed measure, what is important is that the ideas in the Annex constitute a very solid starting point for discussions on what concretely WIPO should be doing with respect to development. In essence therefore, Argentina and Brazil should be lauded for making the effort to concretise the development dimension in the context of WIPO.

III. CONCLUSION

24. The Argentinean and Brazilian proposal has put on the agenda of the fortieth Series of Meetings of the Assemblies of Member States of WIPO a very crucial issue for developing countries. The proposal merits very serious consideration by all the Members of WIPO. For developing countries this is paramount. The proposal constitutes the first time in the recent history of WIPO that the organization's highest body has been called upon specifically to discuss intellectual property and development. The placing of this item on the agenda of the WIPO Assemblies and the discussion that will follow offers an unparalleled opportunity for all developing countries and development-friendly civil society organizations to, for the first time, put on WIPO's agenda the question of development.

25. While different countries may have different views on the details of the proposal, it is in the interest of all developing countries and development-friendly civil society organizations to not only support the inclusion of the proposal on the agenda of the Assemblies but also to support the basic idea in the proposal which is to have the Member States of WIPO engage in a focussed and exhaustive discussion on

how WIPO should incorporate development into its various programmes and activities.

26. On the proposed issues and measures to be considered, again, irrespective of the merits and demerits of each proposed measures, what is important is to see the ideas in the Annex not as constituting a definitive list but as constituting a very solid starting point for discussions on what concretely WIPO should be doing with respect to development. In essence therefore, Argentina and Brazil should be supported in their proposal that WIPO considers concrete measures that should be taken to ensure that the organization places development at the heart of all its programmes and activities.

ANNEX: PROPOSAL BY ARGENTINA AND BRAZIL

Establishing a “Development Agenda” for the World Intellectual Property Organization

to be submitted to the 40th Series of Meetings of the Assemblies of the Member States of WIPO and to the 31st Session of the WIPO General Assembly
27 September –5 October 2004

I – Development, the most important challenge facing the international community

At the dawn of a new Millennium, development undoubtedly remains one of the most daunting challenges facing the international community. The importance of facing up to this challenge has been widely acknowledged in many international fora at the highest level. The United Nations adopted the Millennium Development Goals, which established a firm commitment by the international community to address the significant problems that affect developing countries and LDCs. The Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society, and most recently the São Paulo consensus adopted at UNCTAD XI, have all placed development at the heart of their concerns and actions. This has also been the case in the context of the current Doha round of multilateral trade negotiations of the World Trade Organization (the “Doha Development Agenda”), which was launched at the WTO’s 4th Ministerial Conference, in November 2001.

II – The development dimension and intellectual property protection

Technological innovation, science and creative activity in general are rightly recognized as important sources of material progress and welfare. However, despite the important scientific and technological advances and promises of the 20th and early 21st centuries in many areas, a significant “knowledge gap”, as well as a “digital divide”, continue to separate the wealthy nations from the poor.

In this context, the impact of intellectual property has been widely debated in past years. Intellectual property protection is intended as an instrument to promote technological innovation, as well as the transfer and dissemination of technology. Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development.

The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country's level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection.

In this regard, the adoption of the Doha Declaration on the TRIPS Agreement and Public Health at the 4th Ministerial Conference of the WTO represented an important milestone. It recognized that the TRIPS Agreement, as an international instrument for the protection of intellectual property, should operate in a manner that is supportive of and does not run counter to the public health objectives of all countries.

The need to integrate the "development dimension" into policy-making on intellectual property protection has received increased recognition at the international level. Also in the framework of the WTO, paragraph 19 of the WTO's Doha Ministerial Declaration, in setting a mandate for the TRIPS Council in the context of the Doha Development Agenda, refers explicitly to the need to take fully into account the development dimension.

III – Integrating the development dimension into WIPO's activities

As a member of the United Nations system, it is incumbent upon the World Intellectual Property Organization (WIPO) to be fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals. Development concerns should be fully incorporated into all WIPO activities. WIPO's role, therefore, is not to be limited to the promotion of intellectual property protection.

WIPO is accordingly already mandated to take into account the broader development-related commitments and resolutions of the UN system as a whole. However, one could also consider the possibility of amending the WIPO Convention (1967) to ensure that the "development dimension" is unequivocally determined to constitute an essential element of the Organization's work program.

We therefore call upon WIPO General Assembly to take immediate action in providing for the incorporation of a "Development Agenda" in the Organization's work program.

IV – The development dimension and intellectual property norm-setting: safeguarding public interest flexibilities

WIPO is currently engaged in norm-setting activities in various technical Committees. Some of these activities would have developing countries and LDC's agree to IP protection standards that largely exceed existing obligations under the WTO's TRIPS Agreement, while these countries are still struggling with the costly process of implementing TRIPS itself.

The current discussions on a draft Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents are of particular concern. The proposed Treaty would considerably raise patent protection standards, creating new obligations that developing countries will hardly be able to implement. In the course of discussions, developing countries have proposed amendments to improve the draft SPLT by making it more responsive to public interest concerns and the specific development needs of developing countries.

A consideration of the development dimension of intellectual property must be quickly brought to bear on discussions in the SCP. If discussions on the SPLT are to proceed, these should be based on the draft treaty as a whole, including all of the amendments that have been tabled by developing countries. Moreover, Members should strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States. Provisions on "objectives and principles", reflecting the content of Articles 7 and 8 of the TRIPS Agreement, should be included in the SPLT and other treaties under discussion in WIPO.

While access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy, adding new layers of intellectual property protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the Creative Commons'. The ongoing controversy surrounding the use of technological protection measures in the digital environment is also of great concern.

The provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States.

In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software.

Finally, the potential development implications of several of the provisions of the proposed Treaty on the Protection of Broadcasting Organizations that the Standing

Committee on Copyright and Related Rights is currently discussing should be examined taking into consideration the interests of consumers and of the public at large.

V – The development dimension and the transfer of technology

The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet, many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.

Even in developing countries that may have a degree of absorptive technological capacity, higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing. In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.

In this regard, a new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure an effective transfer of technology to developing countries, similarly to what has already been done in other fora such as the WTO and the UNCTAD. Among these measures, we note with particular interest the idea of establishing an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries. Such a regime could take the form of a Treaty on Access to Knowledge and Technology. It is also important that clear provisions on transfer of technology be included in the treaties currently under negotiation in WIPO.

VI – The development dimension and intellectual property enforcement

Intellectual property enforcement should also be approached in the context of broader societal interests and development-related concerns, in accordance with article 7 of TRIPS. The rights of countries to implement their international obligations in accordance with their own legal systems and practice, as clearly foreseen by Article 1.1 of TRIPS, should be safeguarded.

In setting up the Advisory Committee on Enforcement (ACE) in 2002, the WIPO General Assembly clearly rejected a “TRIPS-plus” approach to enforcement matters, by deliberately deciding to exclude all norm-setting activities from the Committee’s mandate. In undertaking any future work under its mandate, the ACE should be guided by a balanced approach to intellectual property enforcement. The ACE cannot approach the issue of enforcement exclusively from the perspective of right holders, nor have its discussions focus narrowly on curbing the infringement of IP rights. Such discussions are important, but the ACE must also give consideration to

how best to ensure the enforcement of all TRIPS-related provisions, including those that would impute obligations to right holders as well.

Particular attention should be paid to the need to ensure that enforcement procedures are fair and equitable and do not lend themselves to abusive practices by right holders that may unduly restrain legitimate competition. In this regard, we note that Article 8 of TRIPS states that corrective measures may be necessary to curb practices that may adversely affect trade and the international transfer of technology. One should also bear in mind the related provision of Article 40 of TRIPS, which addresses anti-competitive practices in contractual licenses. All of these provisions of the TRIPS Agreement should be adequately brought into WIPO's framework.

VII – Promoting “development oriented” technical cooperation and assistance

WIPO is the main multilateral provider of technical assistance in the field of intellectual property. By virtue of the 1995 agreement with the WTO, it plays an important role in providing developing countries with technical assistance to implement the TRIPS agreement. As a United Nations specialized agency, WIPO has an obligation to ensure that its technical cooperation activities are geared towards implementing all relevant UN development objectives, which are not limited to economic development alone. These activities should also be fully consistent with the requirements of UN operational activities in this field – they must be, in particular, neutral, impartial and demand-driven.

Programs for technical cooperation in IP related matters should be considerably expanded and qualitatively improved. This is important to ensure that in all countries the costs of IP protection do not outweigh the benefits thereof. In this regard, national regimes set up to implement international obligations should be administratively sustainable and not overburden scarce national resources that may be more productively employed in other areas. Moreover, technical cooperation should contribute to ensuring that the social costs of IP protection are kept at a minimum.

WIPO's legislative assistance should ensure that national laws on intellectual property are tailored to meet each country's level of development and are fully responsive to the specific needs and problems of individual societies. It also must be directed towards assisting developing countries to make full use of the flexibilities in existing intellectual property agreements, in particular to promote important public policy objectives.

VIII – A member-driven Organization open to addressing the concerns of all stakeholders, in particular civil society

A balanced system of intellectual property protection should service the interests of all sectors of society. Given the broad public policy implications of intellectual property, it is crucial to involve a commensurately broad range of stakeholders in the discussions on intellectual property, both at the national and international levels, including in all norm-setting activity.

Currently, in WIPO, the term NGO is used to describe both public interest NGOs and user organizations. This creates confusion and does not seem consistent with existing UN practice, as implemented in most of the UN specialized agencies. It is thus necessary, in WIPO, to take appropriate measures to distinguish between user organizations representing the interests of IP right holders and NGOs representing the public interest.

Subsequently, WIPO should foster the active participation of public interest non-governmental organizations in its subsidiary bodies to ensure that in IP norm-setting a proper balance is struck between the producers and users of technological knowledge, in a manner that fully services the public interest.

IX - Conclusion

A vision that promotes the absolute benefits of intellectual property protection without acknowledging public policy concerns undermines the very credibility of the IP system. Integrating the development dimension into the IP system and WIPO's activities, on the other hand, will strengthen the credibility of the IP system and encourage its wider acceptance as an important tool for the promotion of innovation, creativity and development.

The General Assembly is invited to make comments to this document and to decide on the proposals contained in the Annex.

ANNEX

“WIPO DEVELOPMENT AGENDA”: ISSUES AND MEASURES TO BE CONSIDERED

Without prejudice to further initiatives, the following proposals, *inter alia*, could be considered by the General Assembly for the implementation of the suggested “WIPO Development Agenda”.

1) Adoption of a high-level declaration on intellectual property and development

The Declaration could be adopted by the General-Assembly itself or by a specially convened international conference on intellectual property and development. The Declaration should address the development concerns that have been raised by WIPO Member States and the international community at large.

2) Amendments to the WIPO Convention

In order to ensure that development concerns are fully brought into WIPO activities, the Member States may consider the possibility of amending the Convention Establishing the World Intellectual Property Organization (1967). The amendment would explicitly incorporate the development dimension into WIPO’s objectives and functions. Since Article 4 (“Functions”) of the WIPO Convention relates its Article 3 (“Objectives”), paragraph (i) of Article 3 of the WIPO Convention could be amended to read as follows:

“(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, *fully taking into account the development needs of its Member States, particularly developing countries and least-developed countries*”

3) Treaties under negotiation

Treaties under negotiation in WIPO, such as the SPLT, should include provisions on the transfer of technology, on anticompetitive practices as well as on the safeguarding of public interest flexibilities. Moreover, those treaties should include specific clauses on principles and objectives. The language provided in Articles 7 and 8 of the TRIPs Agreement is an adequate starting point, taking into account, however, that WIPO treaties do not expressly deal with “trade-related issues”.

4) Technical cooperation

We urge the Program and Budget Committee, in its next sessions, to establish consistent pluriannual programs and plans for cooperation between WIPO and developing countries aiming at strengthening national intellectual property offices, so that they may effectively become an acting element in national development policy.

Those programs should be guided, moreover, by the principles and objectives set out in Section VIII above.

5) Intellectual property and transfer of technology

We propose the creation of a Standing Committee on Intellectual Property and the Transfer of Technology, for the consideration of measures to ensure an effective transfer of technology to developing countries and LDCs.

6) Joint WIPO-WTO-UNCTAD international seminar on intellectual property and development

WIPO could jointly organize an international seminar with the WTO and UNCTAD on intellectual property and development, with the active participation of all relevant stakeholders, including public interest NGOs, civil society and Academia.

7) Participation of civil society

WIPO must take the appropriate measures to ensure the wide participation of civil society in WIPO's activities, changing WIPO's terminology with regard to NGOs.

8) Working Group on the Development Agenda

Without prejudice to the previous proposals, a Working Group on the Development Agenda could be established to further discuss the implementation of the Development Agenda and work programmes for the Organization on this matter, reporting to the 41st WIPO General Assembly.



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