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MAINSTREAMING OR DILUTION? INTELLECTUAL PROPERTY AND DEVELOPMENT IN WIPO

Nirmalya Syam



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ABSTRACT

In 2007 Member States of the World Intellectual Property Organization (WIPO) unanimously adopted a set of 45 recommendations which constitute the WIPO Development Agenda. Developing countries sought to give new direction to WIPO through the Development Agenda, away from the pursuit of facilitating and strengthening protection, acquisition and enforcement of intellectual property (IP) rights as an end in itself towards an approach that would be sensitive to the impact of IP on development, both in terms of opportunities as well as costs. This paper explores whether development considerations have been adequately addressed by WIPO since its creation as the United International Bureau for the Protection of Intellectual Property (BIRPI) in the nineteenth century. The paper also analyses whether the implementation of the WIPO Development Agenda adopted in 2007 has shaped the current vision of the WIPO Secretariat and its Member States to address the impact of IP on development; and whether implementation of the Development Agenda has facilitated the use of IP law and policy as a tool that responds to advancing innovation, industrial, health, agricultural, education and other development policies in developing countries. The paper finds that the approach towards IP in WIPO continues to be dominated by a perspective that pursues acquisition, protection, management and enforcement of IP rights as an end in itself. Conflicting interpretations of development orientation have adversely impacted the implementation of the Development Agenda in the spirit in which the developing countries had proposed the Development Agenda. The paper recommends developing countries to undertake cross regional coordination to enhance their level of engagement on IP and development, advance specific suggestions for achieving greater impact on addressing development challenges through specific activities including projects in the areas of technical assistance as well as norm-setting, pursue governance reforms in WIPO to ensure greater representation of developing countries in the decision making bodies of WIPO and in the staff composition of the WIPO Secretariat, amend the WIPO Convention to align its mandate on IP promotion to the development needs and challenges of its Member States and the development goals of the United Nations (UN), and also pursue a review of the relationship between the UN and WIPO as a UN specialized agency in the UN Economic and Social Council.

En 2007, les États membres de l'Organisation mondiale de la propriété intellectuelle (OMPI) ont adopté à l'unanimité une série de 45 recommandations qui forment le Plan d'action de l'OMPI pour le développement. Les pays en développement ont cherché, au travers de ce Plan d'action, à donner une nouvelle orientation à l'Organisation en remettant en cause l'idée que l'établissement de règles visant à faciliter et à renforcer la protection, l'acquisition et le respect des droits de propriété intellectuelle constitue une fin en soi, pour adopter une approche qui tienne davantage compte des répercussions des principes qui régissent la propriété intellectuelle sur le développement, aussi bien en termes d'opportunités que de coûts. Le présent document s'interroge sur la place des considérations relatives au développement au sein des discussions qui ont lieu à l'OMPI depuis sa création au XIXe siècle sous l'appellation de Bureaux Internationaux réunis pour la protection de la propriété intellectuelle (BIRPI). Il tente de déterminer si la mise en œuvre du Plan d'action de l'OMPI

pour le développement adopté en 2007 a eu une incidence sur la vision actuelle du Secrétariat de l'OMPI et de ses États membres en ce qui concerne l'impact des règles en matière de propriété intellectuelle sur le développement, et si la mise en œuvre du Plan a favorisé l'utilisation des lois et politiques relatives à la propriété intellectuelle en tant qu'outil permettant d'encourager les innovations, les politiques industrielles, sanitaires, agricoles, éducatives et autres dans les pays en développement. Il fait le constat que l'OMPI continue de considérer la propriété intellectuelle uniquement du point de vue de l'acquisition, de la protection, de la gestion et de la mise en œuvre des droits de propriété intellectuelle. Des interprétations contradictoires sur les orientations à suivre en matière de développement ont eu des répercussions négatives sur la mise en œuvre du Plan d'action et remis en cause l'esprit dans lequel il avait conçu par les pays en développement. Le document recommande aux pays en développement de collaborer sur le plan régional afin de renforcer leur participation dans les discussions sur les aspects de la propriété intellectuelle liés au développement, de proposer des solutions concrètes permettant de renforcer l'impact des mesures prises pour faire face aux défis en matière de développement, sous la forme d'activités spécifiques telles que la mise en œuvre de projets dans les domaines de l'assistance technique et l'établissement de normes, de poursuivre les réformes en matière de gouvernance au sein de l'OMPI afin d'assurer une plus grande représentation des pays en développement dans les organes de décision et au Secrétariat, de promouvoir une modification de la Convention de l'OMPI afin d'inclure dans son mandat les questions liées au développement et ainsi répondre aux besoins et défis auxquels sont confrontés ses États membres et aux objectifs des Nations Unies en matière de développement, et de réformer les liens entre les Nations Unies et l'OMPI en tant qu'institution spécialisée des Nations Unies au sein du Conseil économique et social.

En 2007, los Estados miembros de la Organización Mundial de la Propiedad Intelectual (OMPI) adoptaron por unanimidad un conjunto de 45 recomendaciones que constituyen la Agenda para el Desarrollo de la OMPI. A través de la Agenda para el Desarrollo, los países en desarrollo trataron de dar un nuevo rumbo a la OMPI, alejándose del empeño por facilitar y fortalecer la protección, la adquisición y el cumplimiento de los derechos de propiedad intelectual (PI) como un fin en sí mismo para avanzar hacia un enfoque sensible a la influencia de la PI en el desarrollo, tanto en términos de oportunidades como de costos. Este documento analiza si la OMPI ha abordado de manera adecuada las consideraciones relativas al desarrollo desde su creación como las Oficinas Internacionales Reunidas para la Protección de la Propiedad Intelectual (BIRPI) en el siglo XIX. Asimismo, el documento examina si la aplicación de la Agenda para el Desarrollo de la OMPI, adoptada en 2007, ha configurado la visión actual de la secretaría de la OMPI y de sus Estados miembros para hacer frente a las consecuencias de la PI en el desarrollo; y si la aplicación de la Agenda para el Desarrollo ha facilitado el uso de la legislación y las políticas sobre PI como una herramienta que responde al fomento de la innovación, la industria, la sanidad, la agricultura, la educación y otras políticas de desarrollo en los países en desarrollo. El documento concluye que el enfoque de la PI en la OMPI sigue estando dominado por una perspectiva que tiene como principal prioridad la adquisición, la protección, la gestión y el cumplimiento de los derechos de PI como un fin en sí mismo. Las interpretaciones contradictorias de la orientación al desarrollo han repercutido negativamente en la aplicación de la Agenda para el Desarrollo en el espíritu en el que los países en desarrollo la habían concebido. En el documento se recomienda a los países en desarrollo llevar a cabo una coordinación interregional para aumentar su nivel de participación en la PI y el desarrollo; presentar sugerencias concretas para lograr una mayor repercusión a la hora de

afrontar los desafíos en materia de desarrollo mediante actividades específicas, incluidos proyectos en los ámbitos de la asistencia técnica y el establecimiento de normas; realizar reformas en la gobernanza de la OMPI para garantizar una mayor representación de los países en desarrollo en los órganos de toma de decisiones de la organización y en la composición del personal de su secretaría; modificar el Convenio de la OMPI para adaptar su mandato sobre la promoción de la PI a las necesidades y los desafíos de desarrollo de sus Estados miembros y a los objetivos de desarrollo de las Naciones Unidas (ONU); y también plantearse una revisión de la relación entre la ONU y la OMPI como organismo especializado de la ONU en el Consejo Económico y Social de las Naciones Unidas.

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I. INTRODUCTION

The relationship between intellectual property rights (IPR) and development has been a topic of constant discussion in various international fora. The question whether strengthening the levels of intellectual property protection in developing countries encourages scientific and technological inventions or artistic creations have been central to this discourse. There is broad consensus that the contribution of IP protection and innovation varies by industries and the level of innovation capacity of any country. Nonetheless, the global legal regimes on IP have witnessed a constant ratcheting up of the levels of IP protection that is required of developing countries, resulting in ever constricting room for policy space to address development challenges. From the Paris and Berne Conventions in the 19th century to the WTO TRIPS Agreement and subsequent bilateral or regional trade and investment agreements of the present times, global strengthening and expansion of IP protection has been the common thread. The only isolated exception to this has been the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty). The expansion of IP regimes have focused on achieving globally harmonised levels of stronger proprietary rights over knowledge based products and processes. In this context, developing countries have had to constantly seek opportunities to carve out policy space to mitigate the impact of strengthened IP protection over access to IP protected knowledge that is necessary for achieving development goals in the area of public health, food security, industrial development, mass education, etc. Today, the challenges created by excessive IP protection are not exclusively confronted by the global South, but also by low income populations in developed countries. Development concerns relating to IP that have been traditionally raised in the multilateral fora by developing countries have been increasingly echoed in recent years by patients groups, disability advocacy groups, the farming community, and the academic and research community in the global North.¹

While development concerns vis-à-vis IP protection and enforcement have become a truly global issue affecting peoples in both the South and the North, the global expansion of IP protection and enforcement has been increasingly educated as necessary for achieving development goals. Advancement of commercial interests by fostering the development of legal regimes that facilitate the global acquisition, protection and enforcement of proprietary rights has been justified on the promise of development.

The World Intellectual Property Organization (WIPO) has been a leading forum for advancing this agenda of global promotion of IP protection and enforcement. Developing countries have attempted to balance this agenda by aiming to integrate development considerations into the design and implementation of norm-setting as well technical assistance and capacity building activities undertaken by WIPO. A series of proposals in this regard by

¹ Attempts to introduce TRIPS plus legal regime for strengthening IP protection and enforcement such as the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) or the Comprehensive Trans-Pacific Partnership (CTPP) Agreement have been strongly resisted by the civil society groups from the developed countries. See, for example, the statement by Universities Allied for Essential Medicines (UAEM) on the TPP - "Providing extended protection for pharmaceutical monopoly that reduce the ability of generic competitors to enter the market, the TPP sets a disturbing precedent for global commerce that will have long-term effects on the price of lifesaving medications around the world." UAEM Statement on TPP. Available from <https://uaem.org/press/press-releases-statements-by-uaem/uaem-statement-on-tpp/>.

developing countries led to the adoption of a set of 45 recommendations by the WIPO General Assembly in 2007, known as the WIPO Development Agenda Recommendations. More than a decade since the adoption of the Development Agenda, many projects and studies have been approved by the Member States of WIPO and carried out by the WIPO secretariat, in order to implement these recommendations. An independent review of the implementation of the Development Agenda recommendations undertaken in 2016 reported that:

The impact of the work carried out in the context of the DARs on the development of Member States, particularly in countries with weak capabilities and incipient enabling environments in support of creativity and inventiveness could not be determined within a short span of time. It would take time to translate the content of numerous studies and different activities carried out under the aegis of the CDIP into tangible and measurable outcomes. With the instruments available, the Review Team found that it was premature to assess their impact.²

Despite the lack of evidence of its impact, the findings of the independent review reveal a general degree of satisfaction among some Member States of WIPO with regard to implementation of the Development Agenda.

The independent review report points out that a deeper analysis of the impact of the activities for implementation of the WIPO Development Agenda recommendations ought to be undertaken in the future. Such an analysis should take a broader view of the long running discourse on IP and development that precedes the establishment of WIPO. It should be based on an understanding of IP in the context of developing countries' realities and expectations. It should locate the Development Agenda in the context of the quest of developing countries for the establishment of a New International Economic Order (NIEO),³ initiatives undertaken in the UN to address development challenges and concerns in respect of the IP system, the establishment of WIPO and its recognition as a UN specialized agency, unsuccessful normative initiatives undertaken in WIPO by developing countries and attempts by developed countries to achieve harmonisation of IP laws to facilitate the acquisition, protection and enforcement of IP rights in developing countries.

This paper traces the IP and development discourse that led to the adoption of the Development Agenda, as well as the post Development Agenda discourse. Section II describes the origin and the salient organisational features of WIPO in the context of initiatives undertaken by developing countries in the UN to address development issues relating to IP, and also describes contrasting initiatives undertaken by developing countries to pursue greater flexibilities in the IP regime, and the pursuit of harmonisation negotiations by developed countries. Section III describes the immediate events that were driving factors behind the pursuit of the Development Agenda, the proposals that were advanced by developing countries and how agreement was reached on the 45 agreed recommendations that formally comprise the Agenda. Section IV describes the Development Agenda endeavours to

² See WIPO; document CDIP/18/7, p. 23. Available from http://www.wipo.int/edocs/mdocs/en/cdip_18/cdip_18_7-main1.pdf.

³ See Mohamed Bedjaoui, *Towards a New International Economic Order* (New York – London, Holmes & Meier Publishers, 1979), pp. 230-232, available from <http://unesdoc.unesco.org/images/0003/000358/035806eo.pdf> (pointing to the unequal relationship and dependence of developing countries for technology and know-how on developed countries as a major issue that developing countries sought to address through the establishment of NIEO).

ensure that WIPO activities in the area of norm-setting and technical assistance go beyond global promotion of IP protection per se, support development goals and address issues such as transfer of technology. It also explains how the lack of clarity on fundamental concepts used in the Development Agenda recommendations leads to conflicting interpretations of development orientation, which has impacted the implementation of the Development Agenda in the light of the intent of its proponents. Section V describes the post Development Agenda discussions in WIPO and explores the activities undertaken in the area of promotion of TRIPS flexibilities, technical assistance, norm-setting, promotion of the public domain, and governance reforms. Section VI presents conclusions and recommendations. It points to the need for greater cross regional coordination among developing countries in WIPO to enhance the level of engagement on IP and development, advance specific suggestions for achieving greater impact on addressing development challenges in the areas of technical assistance as well as norm-setting, pursue governance reforms in WIPO to ensure greater representation of developing countries in the decision making bodies of WIPO and in the staff composition of the WIPO secretariat, amend the WIPO Convention to align the mandate of WIPO on IP promotion to the development needs and challenges of its Member States and the development goals of the UN, and also pursue parallel initiatives in the UN such as a review of the relationship between the UN and WIPO as a UN Specialized Agency.

II. WIPO AND THE GLOBAL PROMOTION OF IP PROTECTION

The history of the origin of WIPO shows that the establishment of WIPO was fundamentally a response to the demand from developing countries for the United Nations to address development issues in the context of IP protection. The establishment of WIPO was driven, in effect, by the objective of seeking legitimacy as an organisation that is accountable to its Member States, the majority of whom were newly independent developing countries with aspirations of economic development to which the IP system was expected to be responsive. However, while the new organisation gained legitimacy as an intergovernmental organisation of Member States, the primacy of the existing IP conventions administered by its predecessor, the United International Bureau for the Protection of Intellectual Property (BIRPI), and the primacy of States that were parties to these treaties, was retained in the governance structure of the newly established WIPO. Following its establishment, the membership of developing countries in these IP treaties steadily increased without any substantial revision in the focus on pursuing IP protection as an end in itself. While WIPO became a UN specialized agency, its approach to the development goals of the UN system was made subject to the objective stated in the WIPO Convention – that of promoting IP protection globally. Demands from developing countries for substantive revision of some of the provisions of the existing IP treaties were unsuccessful as discussed below.

WIPO is a unique United Nations specialized agency⁴ that is financially independent from its 191 Member States, and yet plays a very influential role in the development of global norms on IP as well as design and implementation of national IP laws that have a bearing on other public policy considerations.

As a UN specialized agency WIPO is mandated to take appropriate action for promoting intellectual creativity and facilitating transfer of technology related to industrial property to the developing countries in accordance with its basic instrument – the WIPO Convention – and other treaties and agreements administered by it.⁵ Under Article 3 of the WIPO Convention, the objectives of WIPO are twofold: 1) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization; and 2) to ensure administrative

4 UN Specialized Agencies are legally independent international organisations with their own rules, membership, and financial resources, who are brought into relationship with the UN through negotiated agreements. These organisations are recognised as specialized agencies under Article 57 of the UN Charter on the basis of the relationship agreement with the UN Economic and Social Council (ECOSOC) under Article 63 of the UN Charter. The ECOSOC may coordinate the activities of the specialized agencies through consultation and recommendations to such agencies and through recommendations to the UN General Assembly and Member States of the UN, and may take appropriate steps to obtain regular reports from the agencies as well as reports on steps taken to give effect to its recommendations to the agencies.

5 See Agreement between the United Nations and the World Intellectual Property Organization, UN-WIPO, 27 September-17 December 1974, 956 U.N.T.S 405. Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%20956/v956.pdf>. Art.1 of the Agreement recognised WIPO as a specialized agency “... responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competencies and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Development Organization, as well as the United Nations Educational, Scientific and Cultural Organization and of other agencies within the United Nations system.”

cooperation among the Unions i.e. intellectual property treaties whose administration is assumed by WIPO.

Currently, the WIPO Secretariat administers 25 IP treaties besides the WIPO Convention. These treaties concern substantive protection of specific IP rights,⁶ international filing of applications for grant or registration of IP rights,⁷ and treaties concerning classification of information relating to specific types of IP rights.⁸ The WIPO Secretariat also facilitates discussions among its Member States on further development of new international normative instruments relating to IP in the form of new treaties, amendments of existing IP treaties or through soft law instruments such as joint recommendations or model laws. It also provides technical and legal assistance to its Member States for the implementation of applicable IP treaties, the design of national IP law and policy, capacity building and automation of national IP offices, and training on management and enforcement of IP rights. The WIPO Secretariat's technical assistance support is also extended to Members of the World Trade Organization (WTO) that seek to implement the obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).⁹

The WIPO Secretariat also provides filing and search and examination services under the treaties facilitating international filing of applications for registration or grant of IP rights. It also offers alternative dispute settlement services relating to IP disputes through the WIPO Arbitration and Mediation Center.¹⁰ These services generate the more than 90 per cent of WIPO revenues which enables it to be financially self-funded.

However, the recognition of WIPO as a UN specialized agency is also subject to the competencies and responsibilities of the UN and its other agencies, particularly the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), the United Nations Industrial Development Organization (UNIDO) and the United Nations Educational, Scientific and Cultural Organization

⁶ WIPO administers 15 IP protection treaties. These are the Beijing Treaty on Audiovisual Performances; the Berne Convention for the Protection of Literary and Artistic Works; the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods; the Marrakesh Agreement to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled; the Nairobi Treaty on the Protection of the Olympic Symbol; the Paris Convention for the Protection of industrial Property; the Patent Law Treaty; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Singapore Treaty on the Law of Trademarks; the Trademark Law Treaty; the Washington Treaty on Intellectual Property in Respect of Circuits; the WIPO Copyright Treaty; and the WIPO Performances and Phonograms Treaty.

⁷ WIPO treaties that establish a global protection system for international filing of applications for specific IP rights are the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure; the Hague Agreement Concerning the International Registration of Industrial Designs; the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration; the Madrid Agreement Concerning the international Registration of Marks; Protocol Related to the Madrid Agreement Concerning the International Registration of Marks; and the Patent Cooperation Treaty.

⁸ The IP classification treaties are the Locarno Agreement Establishing an International Classification for industrial Designs; the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; the Strasbourg Agreement Concerning the International Patent Classification; and the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks.

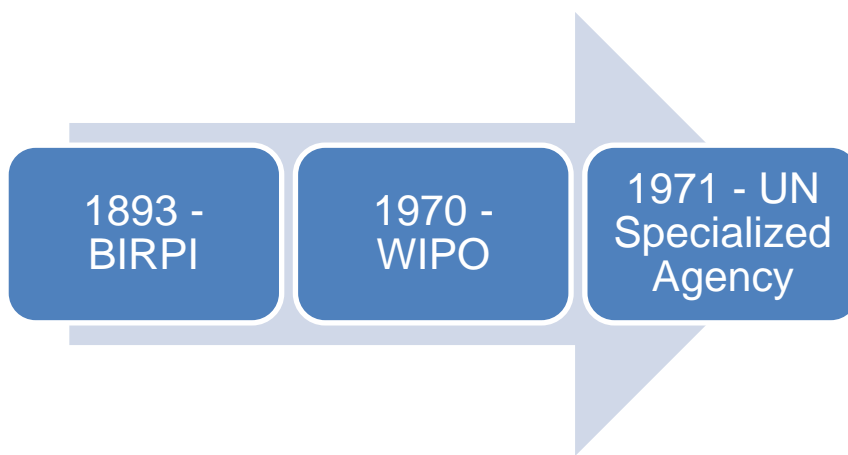
⁹ See World Intellectual Property Organization - World Trade Organization, Agreement between WIPO and the WTO, 22 December 1995, 35 I.L.M. 754 (1996). Available from https://www.wto.org/english/tratop_e/trips_e/intel3_e.htm.

¹⁰ Available from <http://www.wipo.int/amc/en/center/background.html>.

(UNESCO). This means that work of WIPO with regard to activities for promoting intellectual creativity and facilitating transfer of technology in developing countries must defer to the work of these UN agencies. This means that **though WIPO is a specialized agency of the UN, it does not have exclusive competency on intellectual creativity and transfer of technology over other UN agencies.**

II.1 The Origin of WIPO

It is pertinent to undertake a historical review of the genesis of WIPO in order to understand the context in which the WIPO Development Agenda was eventually adopted. This section traces the history of WIPO and its predecessor – the United International Bureau for the Protection of Intellectual Property (BIRPI) – which was established in 1893 with its headquarters in Berne, Switzerland, and the consistent marginalisation of development issues in their discussions. The marginalisation of development issues ultimately led to the demand by developing countries for adoption of the WIPO Development Agenda.



Following its establishment in 1970, WIPO succeeded BIRPI by merging the secretariats of two international IP treaties – the Paris Convention for the Protection of Industrial Property of 1883 (hereinafter the Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (hereinafter the Berne Convention).¹¹ The majority of BIRPI Member States at the time of its establishment were developed countries. The membership of BIRPI increased significantly since the late 1950s with decolonization and the emergence of newly independent States in Asia and Africa.¹²

It is noteworthy that the funding and administration of BIRPI, including the appointment of its director, was under the control of the government of Switzerland. At its inception, BIRPI had a small secretariat that was focused primarily on the collection and dissemination of information and statistics about the IP laws of various States. BIRPI also acted as the international registry for trademarks for 9 countries that had adopted the 1891 Madrid Agreement Concerning the International Registration of Marks. In this capacity, BIRPI, also known as the International Bureau, collected fees from applicants seeking to register trademarks under the international registry and divided the same among members of

¹¹ Available from <http://www.wipo.int/about-wipo/en/history.html>.

¹² Chidi Ougumanam, *Intellectual Property in Global Governance: A Development Question* (New York, Routledge, 2012), p. 55.

the Madrid Union after deducting its administrative expenses.¹³ BIRPI in practice functioned with great independence from its Member States and was significantly influenced by private interest groups of IP right holders which conceptualized many ideas that were promoted by BIRPI as proposals for revision of the IP treaties it administered.¹⁴

BIRPI's programme was largely concentrated on the territorial extension of the Paris and the Berne Conventions, and the preparation of model laws for countries. Gradually, BIRPI assumed administrative functions for seven international IP treaties.¹⁵ As the membership of developing countries increased, they raised issues of development and technology transfer in the United Nations.¹⁶ Developing countries also resisted moves to broaden obligations under the Paris Convention, including strengthening of pharmaceutical patents and narrowing the scope of compulsory licensing.¹⁷

In response to these developments, the BIRPI Secretariat undertook a number of initiatives to effectively prevent the entry of other agencies, such as UNESCO and UNCTAD, in the global governance of the IP system.¹⁸ These initiatives included actively encouraging and facilitating developing countries in acceding to the IP treaties and seeking recognition by the UN as the exclusively competent international agency on IP matters. The Director of BIRPI, Arpad Bogsch said:

In order that their exclusive competence be recognized in the industrial property and copyright fields, each Union must become an “agency”, i.e. a generally recognized juridical and international body possessing organs fully representative of the States and a secretariat; such transformation must be effected by means of an inter-governmental agreement.¹⁹

In 1960 BIRPI relocated its headquarters from Berne to Geneva and the supervisory body of BIRPI was changed from the Swiss Government to an assembly of the contracting parties to the Paris and Berne Conventions.²⁰ This arrangement has continued in WIPO with contracting Parties to each WIPO administered treaty forming a treaty-specific assembly.

The reforms undertaken in the governing bodies of the Paris and Berne Unions were further consolidated at the Intellectual Property Conference of Stockholm, 1967, convened by

¹³ Alexander James Stack, *International Patent Law: Cooperation, Harmonization, and an Institutional Analysis of WIPO and the WTO* (Cheltenham, Edward Elgar, 2011), p. 76.

¹⁴ *Ibid.*, p. 77.

¹⁵ For a description of the activities of BIRPI see “Progressive Development of the Law of International Trade : Report of the Secretary-General of the United Nations” in Chia-Jui Cheng (ed.), *Basic Documents in international Trade Law* (Dordrecht, Martinus Nijhoff Publishers, 1990), p. 27.

¹⁶ For example, in 1961 Brazil introduced a resolution in the Second Committee of the UN General Assembly on “The Role of Patents in the Transfer of Technology to Under-developed Countries” that raised several questions about the effect of the international patent system on the economics of developing countries which requested the UN Secretary-General to produce a report that would include a survey of national patent legislations, a study of the effect of royalties paid to foreigners on balance of payments of developing countries, a study of the need to revise patent legislation in light of goals of economic development, and a recommendation regarding the possibility of convening an international conference to discuss revision of the international system. See Rajeev Dhavan, Lindsay Harris and Gopal Jain, “Conquest by Patent: The Paris Convention Revisited”, *Journal of the Indian Law Institute*, vol. 32, No. 2 (April-June 1990), pp. 131-178, at pp. 161-162.

¹⁷ James Stack, *International Patent Law*, p.78.

¹⁸ *Ibid.* Also see Dhavan, Harris and Jain, “Conquest by Patent”, p. 164.

¹⁹ Ulf Anderfelt, *International Patent Legislation and Developing Countries* (The Hague, Martinus Nijhoff, 1971), p. 100.

²⁰ James Stack, *International Patent Law*, p. 79.

BIRPI. The United International Bureau for the Protection of Intellectual Property prepared a proposal at the request of the government of Sweden for a convention establishing an international intellectual property organization (IPO Convention).²¹ The proposal addressed administrative and structural matters common to the Paris and Berne Unions and the establishment of a new intergovernmental IP organization. Separate proposals were also advanced for reforms that were specific to the Unions served by BIRPI.

The idea of such an administrative and structural reform was first proposed at a joint meeting of the Permanent Bureau of the Paris Union and the Permanent Committee of the Berne Union in October 1962, which recommended that a working party and a committee of governmental experts be convened to start preparatory work for a Diplomatic Conference to give effect to these reforms. It is noteworthy that all ten countries invited to join the working party were developed countries.²² Less than 10 developing countries participated in the meetings of the committee of governmental experts that took place in 1966 and 1967.²³ With some exceptions, the draft convention proposed by BIRPI for the Stockholm Conference was based on the views expressed by the 1966 committee of experts either by unanimity, or by a majority.

There was no agreement in the committee on the question of membership in the proposed new organization. BIRPI advanced its own proposal in this regard, suggesting that countries which were members of the Unions will be regarded as full members, while other countries which were not members of the Unions would be admitted as associate members either on the basis of their membership in the UN or in any UN specialised agency, or otherwise admitted by a qualified vote of the General Assembly of the new proposed organization.²⁴ Only full members would be members of the General Assembly. This was a clear attempt on the part of BIRPI to ensure the importance of membership in the Unions for a country to have the possibility to participate effectively in the deliberations in the new organization.

The 1966 committee of experts also requested the drafters of the proposals for the Stockholm Conference to suggest proposals on the continuation of BIRPI after the establishment of the new organization. BIRPI proposed under Article 9 of the draft convention that BIRPI shall continue as the secretariat of the new organization and shall be called the International Bureau.²⁵

It was envisaged that the proposed new organization would serve two main purposes - 1) to constitute a framework for coordinated administration of the various intellectual property Unions, and 2) to constitute a framework for the general promotion of the protection of intellectual property on a worldwide basis for and in the States which were not yet members of any of the intellectual property Unions, including through the provision of legal and technical assistance to that end. It was proposed that the administrative coordination and cooperation functions among the Unions would be carried out through a General Assembly and its Coordination Committee composed of only full members, and for the worldwide

²¹ WIPO, Records of the Intellectual Property Conference of Stockholm (1967), volume 1, 1971, p.492. Available from ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_311e-v1.pdf.

²² Ibid., p. 493. The ten countries in the working party were Czechoslovakia, France, Germany (Federal Republic), Hungary, Italy, Japan, Sweden, Switzerland, UK and USA.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid., p. 494.

expansion of IP protection the organization would act through its Conference constituted of both full and associate members. The head of the secretariat of the organization (the International Bureau) would be called the Director General who will be elected by the General Assembly.

At the Stockholm Conference, BIRPI proposed that the name of the organization be reconsidered in favour of replacing “International” with “World”, as the latter term suggested a universal vocation of the new organization in contrast to a perception of an organization that belongs to a certain number of Member States, reflected by the term “international”.²⁶

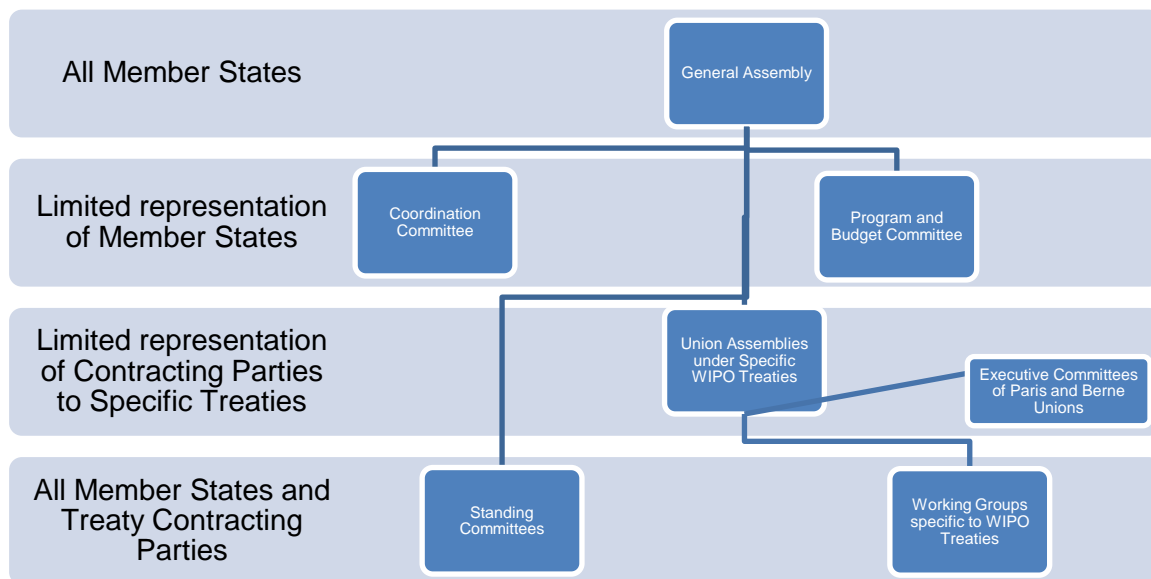
The outcomes of the Stockholm Conference adopting the WIPO Convention mirrored much of the draft text that was proposed at the conference. As proposed, the new organization was established with the dual objective of facilitating administrative coordination and cooperation among the Unions and for promoting globally the protection of IP. There is no mention in the WIPO Convention of any objective of promotion of development objectives. Public policy objectives such as promotion of access to health technologies, ensuring food security, development of technological capacities, access to educational and reading materials, etc. were not mentioned or even referred by implication anywhere in the text.

Article 4 of the WIPO Convention lays down seven specific functions in furtherance of the two objectives of WIPO: 1) promoting the development of measures designed for efficient protection of IP throughout the world and to harmonise national legislations in this field; 2) performing the administrative tasks of the Paris Union and its five Specialised Unions and the Berne Union; 3) assuming or participating in the administration of any other international agreement designed to promote the protection of IP; 4) encouraging the conclusion of international agreements designed to promote the protection of IP; 5) assisting cooperation to States requesting legal-technical assistance in the field of IP; 6) assembling and disseminating information concerning the protection of IP including carrying out studies in this field and publishing their results; and 7) maintaining services facilitating the international protection of IP and providing for registration of IP rights, where appropriate. Thus, WIPO was tasked with promotion of norm-setting, provision of legal and technical assistance and knowledge creation and sharing functions in order to promote worldwide the protection of IP. Along with this in build mandate of IP expansionism, WIPO also marked a significant shift towards provision of IP registration services, which has become a major focus of WIPO activities and also acts as a sustained source of revenue generation that, as noted, effectively makes the organization financially independent from its Member States.

II.2 Governance Structure of WIPO

In order to enable meaningful and impactful engagement with IP and development issues it is necessary that developing countries are able to participate in the key decision-making bodies of WIPO. The decision making bodies of WIPO are comprised of the WIPO Conference, the General Assembly, the Coordination Committee, and standing committees on substantive IP issues. However, the governance structure of WIPO has effectively limited the participation of developing countries in the major decision-making bodies of the organisation, particularly in the Coordination Committee and the Program and Budget Committee.

²⁶ Ibid., p. 498. The committee of experts had considered whether to call the new organization the “World Intellectual Property Organization” or the “International Intellectual Property Organization” and had agreed in favour of the latter nomenclature by a narrow vote.



II.2.1 *The WIPO Conference*

While the WIPO Convention did not make a distinction between full members and associate members as was proposed in the draft text by BIRPI, such distinction was retained in substance by establishing a governance structure as proposed by BIRPI which effectively gave the full members – members of the Paris or Berne Unions – exclusive rights to participate in the General Assembly.²⁷ WIPO Member States that were not parties to either of the Paris or Berne Conventions could only participate in the WIPO Conference. The WIPO Conference was only empowered to discuss and adopt recommendations on matters of general interest in the field of IP while having regard to the competence and autonomy of the Unions, adopt the biennial budget of the Conference and decide on the admission of observers.²⁸ In 2003, the Assemblies of the Member States of WIPO adopted a decision to amend the WIPO Convention and abolish the WIPO Conference, making the General Assembly the representative body of all WIPO Member States.²⁹ The amendment is yet to enter into force.

²⁷ At present 8 out of the 191 Member States of the WIPO are not members of either the Paris or the Berne Unions. These are - The Cook Islands, Eritrea, Ethiopia, Maldives, the Marshall Islands, Myanmar, Somalia and Timor Leste. However, in terms of the WTO TRIPS Agreement the Paris and Berne Conventions will be applicable to 2 of these countries - Maldives and Myanmar - as these are WTO members (Myanmar can make use of the transitional exemption for least developed countries under the TRIPS Agreement). 15 WIPO Member States are not members of the Paris Union and 9 WIPO Member States are not members of the Berne Union. 1 country (The Federated States of Micronesia) is not a WIPO Member State but a contracting party to the Berne Union.

²⁸ Art.7, Convention Establishing the World Intellectual Property Organization. (1967). *International Legal Materials*, 6(4), 782-805. doi:10.1017/S0020782900050646

²⁹ See World Intellectual Property Organization, *WIPO Intellectual Property Handbook* (Geneva, 2004), p.12. Available from http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf. Also see, WIPO, Final Texts of Proposed Amendments to the Convention Establishing the World Intellectual Property Organization, document A/39/2. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_39/a_39_2.pdf.

II.2.2 Coordination Committee

A Coordination Committee established by the WIPO Convention is composed of members of the Executive Committees of the Paris and Berne Unions. Switzerland participates in the Coordination Committee in an *ex officio* capacity. One-fourth of WIPO Member States that are not party to either of the Unions could only participate in the Coordination Committee on an *ad hoc* basis insofar as the Coordination Committee considered matters directly relating to the programme and budget of the WIPO Conference, the agenda of the Conference, or proposals for the amendment of the WIPO Convention.³⁰ The 2003 amendment of the WIPO Convention deleted this provision to enable the participation, in the Coordination Committee, of countries that were not members of these Unions. However, this amendment has not been ratified. Thus, the current full membership of the Coordination Committee is comprised of 87 Member States which includes 43 members of the Paris Union Executive Committee, 42 members of the Berne Union Executive Committee, 1 *ex officio* member and 1 *ad hoc* member elected from 6 WIPO Member States that are currently not parties to the Paris or Berne Unions.³¹

As most of the states that were parties to the Paris and Berne Unions when WIPO was established were developed countries, the composition of the Coordination Committee effectively gave the developed countries a significantly greater representation in the Coordination Committee and its decision making. Though the accession of developing countries to the Paris and Berne Unions has increased since the establishment of WIPO, this increase has not been adequately reflected in the composition of the full membership of the Coordination Committee. Since 2011, five seats in the Coordination Committee have remained unfulfilled. The Asia and the Pacific Group has submitted a proposal noting that the current composition of the Coordination Committee is not fairly proportioned and representative of the size of the regional groups in WIPO, with the African Group, the Asia and the Pacific Group and the Central European and Baltic States (CEBS) being particularly under represented. The proposal calls for ensuring that the five vacant seats in the Coordination Committee are allocated to better reflect the WIPO membership and the relative size of the regional groups in WIPO, and also the accessions to the Paris and Berne Unions since 2011.³²

II.2.3 General Assembly

The General Assembly appoints the Director General, receives and approves reports, gives the Director General all necessary instructions, reviews and approves reports of the Coordination Committee and issue instructions to the committee, adopts the biennial budget expenses common to the Unions, approves measures recommended by the Director General concerning administration of international agreements under the responsibility of the International Bureau (WIPO Secretariat), and adopts the financial regulations of WIPO.³³

³⁰ See Art. 6 (1) (a) and 8 (1) of the WIPO Convention. States Parties to the WIPO Convention that are not members of any of the Unions can only participate as observers in the General Assembly.

³¹ See WIPO, document A/57/3.

³² See WIPO, document A/58/9 Rev.

³³ WIPO, *Intellectual Property Handbook*, p. 8.

II.2.4 The Assemblies of the Member States

The WIPO Conference, the WIPO General Assembly, the assemblies of the 10 Unions and 6 other WIPO treaties, the WIPO Coordination Committee and the Executive Committees of the Paris and Berne Unions meet annually. This meeting of various assemblies and executive bodies relating to WIPO or its specific treaties are known collectively as the Assemblies of the Member States of WIPO (WIPO Assemblies). The discussions are organised on the basis of a consolidated agenda with each item being discussed and decided upon by the relevant applicable body. In most sessions of the WIPO Assemblies, the WIPO Conference has only discussed general agenda items relating to election of chairs and vice-chairs, admission of observers and adoption of the program and budget.

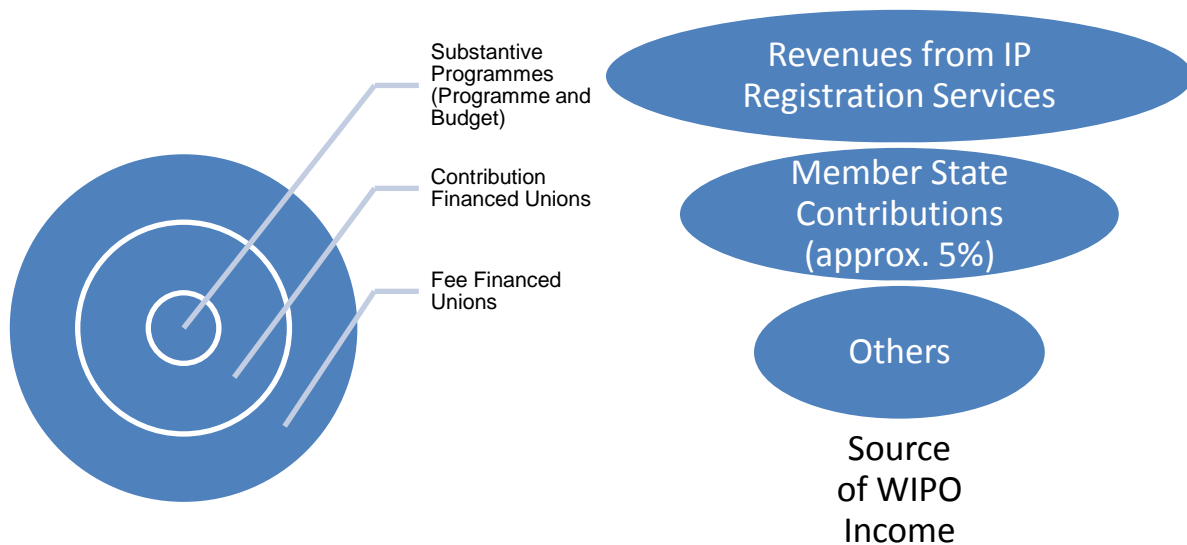
II.2.5 Ad Hoc and Standing Committees

The WIPO General Assembly has established five permanent intergovernmental committees and one ad hoc intergovernmental committee pertaining to various issues which meet between the annual meetings of the WIPO Assemblies. These are the Standing Committee on the Law of Patents (SCP); the Standing Committee on Copyright and Related Rights (SCCR); the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT); the Committee on WIPO Standards (CWS), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) the Program and Budget Committee (PBC), and the Independent Advisory Oversight Committee (IAOC). Participation of Member States is restricted in the PBC, which is a critical body that determines the programmatic priorities and budgetary allocations for the same in WIPO. Currently, only 53 Member States are represented in the PBC with a disproportionately higher share of the seats allocated to developed countries.³⁴

II.3 Financial Architecture of WIPO

Addressing development concerns in relation to IP is also impacted by the extent to which financial resources are allocated to support activities that address development challenges and how WIPO substantive programmes are designed to implement activities that address development issues. It is important to note that the WIPO Secretariat is not reliant on financial contributions from its Member States. On the other hand, much of the income of the organisation is generated from fee based IP services that actually benefit IP right holders who are predominantly from developed countries.

³⁴ World Intellectual Property Organization, document WO/GA/49/20. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_49/wo_ga_49_20.pdf (Proposal of the Asia and the Pacific Group on the composition of the Program and Budget Committee).



The WIPO Convention provides for two types of budgets of WIPO: 1) the budget for expenses common to the Unions and 2) the budget of the WIPO Conference. The Assembly of each Union would determine the contribution of that Union based on consideration of that Union's interest in the common expenses. In addition to contributions from the Unions, the budget is financed by charges for services rendered by the International Bureau, sale proceeds for publications, gifts, bequests, subventions, rents, interests and other miscellaneous income of WIPO.

The budget of the Conference was conceived to provide for expenses for holding sessions of the Conference and the cost of legal-technical assistance programmes. This was to be financed by contributions of States Parties to the WIPO Convention that were not part of the Unions, any sums made available to this budget by the Unions, sums received for services rendered in the field of legal-technical assistance, and gifts, bequests and subventions made to WIPO for this purpose.

The 2003 amendment of the WIPO Convention that abolished the WIPO Conference also deleted the provision referring to a separate budget for expenses common to the Unions and the budget of the Conference and clarified that the income and expenses of the Unions shall be reflected in the budget of the organisation as such, thus effectively replacing the separate budgets with a unitary budget.³⁵

Every biennium, the WIPO secretariat presents a draft Program and Budget for approval of Member States. This document presents a unitary view of the budget by reference to programmes and results, and in the annexes it presents the union view of sources of funding.³⁶ Only about 5 per cent of the budget of WIPO is financed through contributions by Member States with the rest of the budget being supported by revenues raised from various IP registration services and arbitration and mediation services offered by WIPO. Member State

³⁵ WIPO, *Intellectual Property Handbook*; WIPO, document A/55/INF/10. Available from www.wipo.int/edocs/mdocs/govbody/en/a_55/a_55_inf_10.pdf (Submission by the US on its understanding of the unitary contribution system).

³⁶ See Catherine Saez, "At WIPO, A Singular Explanation of a 'Non-Unitary' Budget", *Intellectual Property Watch*, 8 October 2015. Available from www.ip-watch.org/2015/10/08/at-wipo-a-singular-explanation-of-a-non-unitary-budget/.

contributions are assessed on the basis of a classification system that places a WIPO Member State into one of 14 classes, based on a sliding scale determined by a country's capacity to pay, with specified contribution units allocated for each class.

Since 1994 WIPO has been following a unitary contribution system based on a 1993 decision of the WIPO General Assembly. Under this system each Member State of WIPO pays a single contribution, in accordance with the contribution class to which it belongs, rather than paying on the basis of the WIPO treaties to which it is a member.³⁷ The objective of introducing a unitary contribution system was to ensure that a member's contribution remains the same regardless of how many WIPO treaties it joins.³⁸ Thus, WIPO has six contribution financed Unions and four fee funded Unions – the Hague, Lisbon, Madrid and Patent Cooperation Treaty (PCT) Unions.³⁹ The budgets of the fee funded Unions remain separate as required under their respective treaties.

According to the WIPO Director General (DG), the authority for allocation of the revenues generated by the fee funded Unions to the common expenses of all the Unions are made on the basis of approval by Member States of the biennial Program and Budget of WIPO.⁴⁰ The allocations of income to the Unions (including the WIPO Convention) is done under the following methodology:

- Income from Member State contributions are allocated to the six contribution-financed unions.
- Revenues from the fee funded Unions are allocated to those Unions.
- Earnings from WIPO publications is allocated to the contribution financed Unions and the fee funded Unions on the basis of the estimated publications revenue for each of the Unions.
- Income from the WIPO Arbitration and Mediation Center is allocated to the Unions based on estimations by the Program Manager.
- Investment revenues are allocated based on the proportionate level of reserves and treasury balances for each Unions.
- Miscellaneous income is allocated equally across all Unions.⁴¹

Expenditures are allocated to the Unions in four categories: 1) direct expenses for specific programmes directly related to the Unions; 2) indirect Union expenses for activities of other WIPO programmes that may have a linkage with the Union; 3) direct administrative expenses for the support of activities under specific Unions; and 4) indirect administrative expenses for administrative support to programmes that are indirectly linked to the Unions.⁴² In this way, the income from both Member State contributions and fees from IP registrations under the fee funded Unions is allocated across various WIPO programmes as direct or indirect expenses.

³⁷ Available from http://www.wipo.int/treaties/en/contribution_classes.html. WIPO has six Unions that are funded by contributions from Member States - the Paris Convention, the Berne Convention, the Strasbourg Convention, the Nice Convention, the Locarno Convention and the Vienna Convention.

³⁸ WIPO, document A/55/INF/10.

³⁹ Ibid.

⁴⁰ Saez, "At WIPO".

⁴¹ World Intellectual Property Organization, *Program and Budget for the 2018/19 Biennium*, p.201. Available from http://www.wipo.int/export/sites/www/about-wipo/en/budget/pdf/budget_2018_2019.pdf.

⁴² Ibid.

All the WIPO programmes are aligned to a set of expected results under a results based management framework. The expected results correspond to the strategic goals of the organisation. These strategic goals are set in the Medium-Term Strategic Plan (MTSP) of WIPO, which is a strategic plan for a six year period that is developed by the WIPO Secretariat. The MTSP based planning was introduced by the WIPO Secretariat in 2010. However, it should be noted that the MTSP merely presents the vision of the WIPO Secretariat as it is only taken note of, rather than being approved by Member States.⁴³

Based on the strategic goals set in the MTSP, the WIPO Program and Budget lays down expected results corresponding to these strategic goals.⁴⁴ These expected results are then linked to specific WIPO programme outputs and outcomes. The budget, consisting of Member State contributions and revenues from fees, are then allocated across these expected results and apportioned between the various programmes contributing to a specific expected result. One programme may be contributing to several expected results and their corresponding strategic goals. It is significant that though the Program and Budget including the expected results is approved by Member States, these are based on strategic goals that are set by the WIPO Secretariat.

The Program and Budget presented by the Secretariat is approved by the General Assembly upon the recommendation of the Program and Budget Committee. The PBC was formed by a decision of the General Assembly in 1998 by merging two erstwhile bodies – the Budget Committee and the Premises Committee, and mandated the new committee to discuss matters relating to programme, budget, premises and finance. The PBC also deals with personnel resources and governance matters. The membership to the PBC is limited currently to 53 countries, but there are no rules governing the membership, reappointment or term limits in the PBC. Some developed countries have been members of the PBC since its establishment.⁴⁵

After the approval of the budget, the Director General is also authorised to transfer during any financial year the budgetary appropriations from one programme to another up to 5 per cent of the annual budgetary appropriation of the receiving programme or to one per cent of the total budget, whichever is higher.⁴⁶ The Director General is also authorised to make upward or downward adjustments to the budgetary appropriations for the operations of the PCT, Madrid and The Hague systems and for WIPO programmes that provide administrative support to these operations. These adjustments are made in accordance with a methodology and formula approved by the respective assemblies of these fee funded

⁴³ The MTSP for the period 2016-2021 advances nine strategic goals - 1) balanced evolution of the international normative framework (Strategic Goal I); 2) provision of premier global IP services (Strategic Goal II); 3) facilitating the use of IP for development (Strategic Goal III); 4) coordination and development of global IP infrastructure (Strategic Goal IV); 5) world reference source for IP information and analysis (Strategic Goal V); 6) international cooperation on building respect for IP (Strategic Goal VI); 7) addressing IP in relation to global policy issues (Strategic Goal VII); 8) a responsive communications interface between WIPO and its Member States and all stakeholders (Strategic Goal VIII); and 9) an efficient administration and financial support structure to enable WIPO to deliver its programmes (Strategic Goal IX). World Intellectual Property Organization, document A/56/10, p. 3. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_56/a_56_10.pdf.

⁴⁴ World Intellectual Property Organization, *Financial Regulations and Rules of the World Intellectual Property Organization (WIPO)*, Regulation 2.5. Available from http://www.wipo.int/export/sites/www/about-wipo/en/pdf/wipo_financial_regulations.pdf.

⁴⁵ See Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO): A Reference Guide* (Cheltenham, UK, Edward Elgar Publishing Ltd., 2016), pp.76-77.

⁴⁶ WIPO, *Financial Regulations*, Regulation 5.5.

Unions.⁴⁷ These provisions in the financial regulations of WIPO give considerable power to the secretariat to set and control the priorities of WIPO activities.

All unitary contributions from Member States, the fees from the services provided under the fee funded Unions, miscellaneous income and any advance for general expenditure from the working capital fund or reserve fund of WIPO is deposited in the general fund of WIPO. There are also four working capital funds for the fee financed Unions and one working capital fund for the contribution financed Unions to finance budgetary appropriations that may not be supported by available liquidity or for other purpose determined by a relevant WIPO Assembly. Surplus income at the close of a financial period is allocated to reserve funds and the purpose of their use can be determined by the relevant WIPO Assembly. The Director General can also establish trust funds and special accounts.⁴⁸ The DG may also accept voluntary contributions, gifts and donations to WIPO, but the purpose of such contributions should be consistent with the policies, aims and activities of the organisation. Such contributions are reflected under special accounts called Funds-in-Trust (FIT) which are used for purposes specified by the donor. The budget and work plan for an activity under a FIT is decided bilaterally between the WIPO Secretariat and the donor. Reports and evaluations of such activities are not routinely made available to the Member States, though the “program and budget” document now provides information on the extra-budgetary resources allocated to the programmes. To date, most of the FIT donations to WIPO have been made by developed countries for specific purposes.⁴⁹

II.4 Developing Countries’ Efforts to Revise Key IP Treaties

Decades before the adoption of the WIPO Development Agenda in 2007, developing countries had made efforts to address development concerns relating to IP by proposing initiatives to reform earlier IP treaties such as the Paris and Berne Conventions. These initiatives were undertaken through the 1970s soon after the establishment of WIPO. However, these efforts were countered by initiatives by developed countries as well as by the WIPO Secretariat to advance an agenda of global harmonisation of the standards of IP protection and adoption of global IP treaties to facilitate the acquisition of IP rights in foreign territories.

II.4.1 *Proposal for revision of the Paris Convention*

In 1974 India submitted a proposal to the WIPO Coordination Committee for the revision of the Paris Convention. This proposal was discussed along with a counter proposal by the UK on behalf of the developed countries. The Coordination Committee requested the Director General of WIPO to make budgetary provisions to create and convene an ad hoc committee of experts from both members and non-members of the Paris Union to study the possibilities of revising the Paris Convention so that it may contain, if necessary, **additional provisions of special benefit to developing countries**. The creation of this Ad Hoc Group of Governmental Experts on the Revision of the Paris Convention was approved by the Paris Union Assembly and the WIPO Conference in their 1974 sessions.⁵⁰ This decision by the WIPO Coordination

⁴⁷ Ibid., Regulation 5.6.

⁴⁸ Deere Birkbeck, *The World Intellectual Property Organization*, p. 134.

⁴⁹ Ibid., p. 144.

⁵⁰ See WIPO, Diplomatic Conference on the Revision of the Paris Convention, Basic Proposals, document PR/DC/3, p. 6. Available from http://www.wipo.int/mdocsarchives/PR_DC_1979/PR_DC_3_E.pdf.

Committee followed the adoption of a unanimous resolution at the third session of the United Nations Conference on Trade and Development (UNCTAD III) in 1972 calling for an updated study on the role of the international patent system on technology transfer.⁵¹

Three sessions of this expert committee were held between 1975 and 1976. In the third session, even countries that were not members of WIPO were invited to participate. Discussions occurred between countries divided into three groups – developed countries (group B), the Group of 77 and other developing countries (G77),⁵² and countries that belonged to the Soviet bloc (Group D). Countries that belonged to neither of the G77 or Group D were placed in Group B, except for China.⁵³ In 1977 the group of governmental experts adopted a declaration which addressed issues such as access to technology, transfer of technology and dissemination of knowledge.⁵⁴ The declaration stated that the revision of the Paris Convention should be undertaken by taking into account, inter alia, the objective to promote the actual working of inventions in each country, to facilitate the development of technology by developing countries and improve the conditions of transfer of technology from industrialised to developing countries under fair and reasonable conditions, to increase the potential of developing countries to judge the real value of inventions for which industrial property protection is sought, screening and controlling licensing contracts, improving information for local industry, and to enable Member States to take all appropriate measures to prevent abusive practices in the field of industrial property.⁵⁵

The draft text for the diplomatic conference recognised the right of developing countries to issue non-voluntary (compulsory) licenses, and forfeit or revoke a patent for non-working or insufficient working of the patented invention in their territory. It also exempted developing countries from recognising exclusive rights to an imported product that is the subject of a process patent protected in their territories, recognised the need for reduction of patent filing fees for nationals from developing countries. The draft provisions also provided longer priority periods for filing patent applications for nationals from developing countries,

⁵¹ This updated study titled “The International Patent System: The Revision of the Paris Convention for the Protection of industrial Property” was published in 1977 and called for revision of many of the basic features of the Paris Convention. The issues raised in the UNCTAD study continue to be debated in a web of sophistry in various WIPO bodies today. See Dhavan, Harris and Jain, “Conquest by Patent”, pp.165-168 (sect. II, footnote 18).

⁵² The G77 took the unequivocal position that the patent system should be designed to serve the development needs of developing countries and should be geared to create knowledge and technology to further the social objective of industrialization. In view of the economic, social and development implications of the international patent system for developing countries, the Manila Declaration and Programme of Action of the G77 stressed that UNCTAD should play a prominent role in the revision of the Paris Convention and that the conclusions reached by the experts from developing countries in the group of experts convened by UNCTAD pursuant to the resolution at the UNCTAD iii session in Santiago, Chile, should be the basis for subsequent negotiations. See Mourad Ahmia (ed.), *The Collected Documents of the Group of 77: Volume VI: Fiftieth Anniversary Edition* (New York, Oceana, 2015), pp. 116-117.

⁵³ WIPO, document PR/DC/3. Of these three groups, only Group B remains active in WIPO with very significant influence. The G77 is not active in WIPO and instead there are three regional groups of developing countries - the Asia and the Pacific Group, the African Group and the GRULAC. Countries that were formerly in Group D are part of two regional groups for Central European and Baltic States (CEBS) and the Central Asian, Caucasus and the East European Group (CACEEC). The positions of these two groups are often aligned with the position of Group B in current WIPO negotiations.

⁵⁴ This declaration became the basic document of the diplomatic conference for the revision of the Paris Convention. See Pedro Roffe, “Intellectual property, development concerns and developing countries”, in Julio Faundez and Celine Tan (eds.), *International Economic Law, Globalization and Developing Countries* (Cheltenham, UK, Edward Elgar, 2010), pp. 307-330, at p. 313.

⁵⁵ WIPO, document PR/DC/3, pp. 7-8.

and enabled developing countries to obtain information about the outcomes of corresponding patent applications filed in other countries. It also recognised that the Paris Union should contribute to the modernisation of industrial property laws and administration in developing countries, as well as to the use of patent documentation and industrial property for acquisition of foreign technology and export of domestic technologies and products.⁵⁶

However, the diplomatic conference for the sixth revision of the Paris Convention that met from 1981 to 1983 failed to reach any agreement.⁵⁷ Contrary to the orientation of the basic proposal that was being considered from the outset, in 1983 the WIPO Secretariat advanced its own proposal for a complementary treaty to the Paris Convention which side-tracked the revision process pursued by developing countries.⁵⁸ This initiative by the WIPO Secretariat marked the first of several forays seeking to advance an agenda of harmonisation of the standards of patent protection. Though the diplomatic conference for the adoption of this treaty failed, some of the provisions of this draft treaty were eventually transposed to the TRIPS Agreement which was being negotiated in parallel in a different forum – the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT).⁵⁹ Some other provisions of this draft treaty also continued to be the subject of the negotiations in WIPO for the adoption of the Patent Law Treaty (PLT) and the negotiations for a Substantive Patent law Treaty (SPLT) after the adoption of the TRIPS Agreement.⁶⁰

II.4.2 Revision of the Berne Convention

The Stockholm Conference of 1967 also broadened the scope of the Berne Convention for the Protection of Literary and Artistic Works, and introduced some special provisions for developing countries⁶¹ through the adoption of a special Protocol to exempt developing countries from some of the obligations under the Berne Convention.⁶² These exemptions were limited for a specific period of time, with the possibility of extension.⁶³

⁵⁶ Ibid., pp. 36-89.

⁵⁷ Hiroko Yamane, *Interpreting TRIPS: Globalization of Intellectual Property Rights and Access to Medicines* (Oxford and Portland, Oregon, Hart Publishing, 2011), p. 47.

⁵⁸ Pedro Roffe, "Intellectual property" (see sect. II, footnote 54). This treaty sought to supplement the provisions of the Paris Convention in relation to patent protection.

⁵⁹ For instance, the requirement under Art. 27 of the TRIPS Agreement for all WTO members to grant patents in all fields of technology, and much of the language on exceptions to this requirement, including the exclusion of plant and animal varieties and essentially biological processes for the production of plants or animals is a verbatim repetition of the language of Article 10 of the draft WIPO treaty supplementing the Paris Convention with regard to patents. The provision in the draft treaty on disclosure requirement was also reflected in the language in Art.29.1 of the TRIPS Agreement. See WIPO, *Records of the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as far as Patents are Concerned, Volume I: First Part of the Diplomatic Conference, The Hague 1991*. Available from ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_351e.pdf.

⁶⁰ Available from http://www.wipo.int/patent-law/en/patent_law_harmonization.htm.

⁶¹ Post decolonisation, many newly independent States had to undertake development efforts on a massive scale in every sector of their economies including mass education in science, technology and engineering. This required immediate access to textbooks, research journals, etc. that students and libraries could afford. In this context, developing countries were faced with massive textbook shortages. Domestic production of books was low, and the cost of importing books from publishers in the developed countries was prohibitively expensive. In this regard, "... copyright was the invisible but effective servant of Western colonial power." See Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London, Earthscan Publications Ltd., 2002), p. 75.

⁶² See Irwin A. Olian Jr., "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris", *Cornell International Law Journal*, vol.7, No. 2 (May 1974), pp. 95-104. Available from http://scholarship.law.cornell.edu/cilj/vol7/iss2/1?utm_source=scholarship.law.cornell.edu%2Fcilj%2Fvol7%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages. The Stockholm Act extended copyright

The Protocol Regarding Developing Countries allowed developing countries to make certain reservations to the Berne Convention to enable the grant of compulsory licenses for translation, reproduction and publishing a work for educational and cultural purposes, and reduce the term of copyright protection to 25 years after the death of the author.⁶⁴ Some of these provisions, such as allowing developing countries to issue compulsory licenses for translation, were similar to the provisions in the UNESCO Universal Copyright Convention (UCC),⁶⁵ but sought to loosen the restrictions on the use of such measures as they existed in the UCC. However, even these exceptions to the Berne Convention failed to adequately address the concerns of developing countries. At the same time many developed countries regarded the Protocol as contrary to the fundamental objective of the Berne Convention and therefore did not sign the Stockholm Act.⁶⁶

In this context, revisions were undertaken to both the Berne Convention and the UCC in concurrently held conferences in Paris in 1971. The revisions to the UCC brought its provisions to approximate those in the Berne Convention by specifically including rights of reproduction, broadcasting and public performance. It also introduced provisions with conditions on issuing compulsory licenses for translation and reproduction for nationals of developing countries. The Paris Act of the Berne Convention introduced restrictions on the right of developing countries to issue compulsory licenses for translation and reproduction, and strengthened the author's right to compensation.⁶⁷ The Protocol for Developing Countries was separated from the Berne Convention and a new preferential system for developing countries was created as an Appendix which formed an integral part of the Paris Act, which

protection under the Berne standards for nationals of Berne Union members for all their works, even if it were published first outside the territory of a Berne Union member. The subject matter eligible for protection was also extended to include choreographic works and pantomime acts, and works expressed by processes that are analogous to cinematography or photography. The right of reproduction was expanded to cover any manner or form of reproduction, including sound or visual reproduction.

⁶³ This was similar to the transition period that was made available to developing countries and least developed countries under Articles 65 and 66 of the TRIPS Agreement subsequently, which exempted them from implementing the obligations under TRIPS during a transition period. The transition period has been extended several times by the TRIPS Council and is still available to the least developed countries. The transition period is currently available to least developed country members of the WTO for the full TRIPS Agreement until July 2021 and specially for pharmaceutical products till 1 January 2033. Both these transition periods may be extended further. See Nirmalya Syam, "Transition Period for TRIPS Implementation for LDCs: Implications for Local Production of Medicines in the East African Community", Research Paper No. 59, (Geneva, South Centre, 2014), pp. 2-5. Available at https://www.southcentre.int/wp-content/uploads/2014/12/RP59_Transition-Period-for-TRIPS-Implementation-for-LDCs_EN.pdf.

⁶⁴ Ibid., pp. 99-100.

⁶⁵ The Universal Copyright Convention was adopted in 1952 under the United Nations Educational, Scientific and Cultural Organization (UNESCO). The UCC differed from the Berne Convention with regard to formalities requirement for copyright protection, it had lower levels of minimum protection that required under the Berne Convention, and left issues of the nature and extent of copyright protection to be determined under national laws and thus deferred to the level of protection existing under the national laws of its contracting parties. However, the UCC also deferred to the Berne Convention to ensure that the UCC did not affect the provisions of the Berne Convention or membership of the Berne Union. See Joseph S. Daubin, "The Universal Copyright Convention", *California Law Review*, vol. 42, No. 1 (March 1954), pp. 89-119. Available from <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3372&context=californialawreview>.

⁶⁶ Ibid., pp. 101-103.

⁶⁷ Ibid., pp. 104-108. This new preferential system for developing countries is generally referred to as the Berne Appendix. In both the UCC and the Berne Appendix, compulsory licenses for translation were limited for educational, research or scholarship purposes and reproduction licenses were limited to purposes relating to systematic instructional activities. Restrictions were also introduced to export of copies produced under such compulsory license.

allowed compulsory licenses for translation and reproduction with greater restrictions than under the Protocol adopted under the Stockholm Act.⁶⁸

The Berne Appendix allowed developing countries to make a reservation at the time of acceding to the Berne Convention to end the protection of the author's exclusive right to translation after ten years of protection, if the work is not available in the language of general use in that country.⁶⁹ Moreover, the compulsory licensing system under the Berne Appendix requires payment of compensation to the right holder though exception for research and study is not considered a compensated exception in a number of developed countries.⁷⁰

The operation of the exceptions and limitations under the Berne Appendix are constrained by a number of procedural requirements that makes it difficult to implement these exceptions.⁷¹ These requirements have discouraged the use of the provisions in the Berne Appendix.⁷²

Conversely, the Berne Convention itself gained prominence over the UCC and other regional treaties concerning copyright when the United States of America withdrew from UNESCO and acceded to the Berne Convention, and the inclusion of substantive provisions of the Berne Convention as obligations under the WTO TRIPS Agreement.⁷³ This also substantially diminished the weight of the Berne Appendix.⁷⁴

While the flexibilities sought by developing countries in the copyright system were marginalised, special regimes were crafted within WIPO with regard to prevention of unauthorised distribution of any programme carrying signal transmitted by satellite,⁷⁵

⁶⁸ Ibid., p. 107.

⁶⁹ Aleberto Cerda Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright", *PIJIP Research Paper no. 2012-08*, (Washington, D.C., American University Washington College of Law), p. 6. Available from <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1032&context=research>

⁷⁰ Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Leiden, Martinus Nijhoff Publishers, 2012), pp. 91-92.

⁷¹ First, developing countries have to wait for three years after first publication before a compulsory license can be issued. Second, the compulsory license cannot be issued if the right holder has already translated the work in the language concerned. Third, right holders have a six-month grace period after the filing of an application for compulsory license during which the author may provide a translation of the work in the relevant language. Fourth, the exceptions under the Berne Appendix apply only to teaching, scholarship and research and excludes issues of access for the disabled and for libraries and archives. See Ruth L. Okediji, "Fostering Access to Education, Research and Dissemination of Knowledge through Copyright", in *UNCTAD-ICTSD Dialogue on Moving the Pro-Development IP Agenda Forward : Preserving Public Goods in Health, Education and Learning* (Bellagio, 9 November – 3 December 2004). Available from http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf.

⁷² Alberto Cerda Silva, "Beyond the Unrealistic Solution", pp. 17-18.

⁷³ Ruth L. Okediji, "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System", *Singapore Journal of International & Comparative Law*, vol.7 (2003), pp. 315-385, at pp. 332-333. Available from <http://www.commonlii.org/sg/journals/SJIntCompLaw/2003/14.pdf>.

⁷⁴ The number of Contracting Parties to the Berne Convention increased from 83 in 1990 to 176 currently. Much of this increase in membership is ostensibly due to the requirement to implement the Berne Convention in terms of the TRIPS Agreement. While the membership of developing countries to the Berne Convention has expanded, only 36 developing countries have implemented or notified the intent to avail of the flexibilities offered under the Berne Appendix. See Aleberto Cerda Silva, "Beyond the Unrealistic Solution".

⁷⁵ This was achieved through the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) which has 38 Contracting Parties, most of whom are developing

extending protection for foreign producers of phonograms,⁷⁶ protection of copyright⁷⁷ and rights of performers and producers of phonograms in the digital environment.⁷⁸ In 2012, WIPO members also adopted a new Beijing Treaty on Audiovisual Performances expanding economic rights for performers of audiovisual performances.⁷⁹

The demand for greater international recognition of copyright exceptions and limitations on the part of developing countries has been a subject of constant discussion in the WIPO Standing Committee on Copyright and Related Rights (SCCR) alongside discussions for an international treaty that seeks to expand protection for broadcasting organisations. A significant normative outcome in the area of copyright exceptions and limitations was adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled which partially addresses the concerns raised by developing countries about the need for elaboration of the international legal regime on copyright exceptions and limitations to facilitate access to copyright protected works for persons with visual, print or other disabilities.

II.4.3 Development of Global IP Systems

While neutralising the developing countries' initiative to reform the Paris Convention, the WIPO Secretariat has also actively promoted the adoption and implementation of systems that can make it easy to apply for IP protection in foreign territories. This was done by encouraging the adoption of treaties that established international registries of IP rights, or harmonised formalities and procedures for application for grant or registration of IP rights. Such treaties had been adopted under BIRPI in the area of trademarks⁸⁰ and industrial designs.⁸¹ These treaties were later amended⁸² and also a new treaty for international

countries. See Summary of the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974). Available from

http://www.wipo.int/treaties/en/ip/brussels/summary_brussels.html.

⁷⁶ This was achieved under the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971). See Summary of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971). Available from

http://www.wipo.int/treaties/en/ip/phonograms/summary_phonograms.html.

⁷⁷ In 1996 the WIPO Copyright Treaty (WCT) was adopted extending additional economic rights over those recognized under the Berne Convention in relation to works in the digital environment as well as expanding the subject matter eligible for copyright protection to include computer programmes and databases. See Summary of the WIPO Copyright Treaty (WCT) (1996). Available from

http://www.wipo.int/treaties/en/ip/wct/summary_wct.html.

⁷⁸ This is done under the 1996 WIPO Performances and Phonograms Treaty (WPPT). Available from

http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html.

⁷⁹ Available from http://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html.

⁸⁰ The Madrid Agreement Concerning the International Registration of Marks (1891) was the first of such treaties under which an international registration of a mark is granted after formal examination by WIPO, which takes effect in a country that is party to the Madrid Agreement upon substantive national examination within a period of 12 months. In 1989 WIPO Member States adopted a Protocol to the Madrid Agreement under which the period for national phase decision was extended to 18 months. Available from

http://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html.

⁸¹ The Hague Agreement Concerning the International Registration of Industrial Designs was adopted in 1925 to allow registration of industrial designs in multiple territories through a single international application that is examined for formalities compliance by WIPO. An international design registration granted by WIPO takes effect in a designated Contracting Party within 6 to 12 months from the date of publication of the international registration. See Summary of the Hague Agreement Concerning the International Registration of Industrial Designs (1925). Available from http://www.wipo.int/treaties/en/registration/hague/summary_hague.html.

⁸² The Hague Agreement was amended under a Geneva Act in 1999 and the Madrid Agreement was amended through the Madrid Protocol in 1989.

registration of appellations of origin was adopted.⁸³ In 1994 the Trademark Law Treaty was adopted to standardise and streamline national and regional trademark registration procedures. The scope of this treaty was broadened through the adoption of the Singapore Treaty on the Law of Trademarks in 2006. In the area of patents, the Patent Law Treaty (PLT) was adopted in 2000 to harmonise procedural formalities requirements in patent applications and set maximum sets of requirements that may be applied by patent offices of Contracting parties to the PLT. However, the most significant development in this area under WIPO was the adoption and implementation of the Patent Cooperation Treaty (PCT).

II.4.3.1 Patent Cooperation Treaty

The Patent Cooperation Treaty adopted in 1970⁸⁴ is the largest of the global IP systems treaties administered by WIPO and generates more than two-thirds of the organisation's revenues through fees collected from patent applicants. The PCT essentially allows the filing of an international patent application in the place of multiple national patent applications. The international patent application can designate countries where national phase entry of the application may be sought by the applicant after a review of the application by designated patent offices acting as PCT International Search Authorities. This review is called the PCT international search and examination. Upon national phase entry, the patent application filed under PCT is treated as a national patent application and examined as such by the relevant national patent office.

The PCT also allows a patent applicant to delay the start of national processing of an international patent application.⁸⁵ This was done to enable a patent applicant to assess the viability of obtaining patent protection in a territory for a claimed invention before actually pursuing national search and examination.⁸⁶ The PCT system also provides the applicant with an international search and examination report⁸⁷ based on the filed international application. This report accompanies the application when it enters national phase processing. The national patent offices are not bound by the international search and examination report, but may rely on it in course of their own search and examination. However, this also allows

⁸³ See Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (2015). Available from <http://www.wipo.int/treaties/en/registration/lisbon/>. A Geneva Act amending the provisions of the Lisbon Agreement was adopted in 2015 to facilitate international registration of geographical indications in addition to appellations of origin. See Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications. Available from <http://www.wipo.int/publications/en/details.jsp?id=3983&plang=EN>.

⁸⁴ The United States played a major role in the creation of the PCT. Randy L. Campbell, "Global Patent Law Harmonization: Benefits and Implementation", *Indiana International & Comparative Law Review*, vol. 13, No. 2 (2003), pp. 605-638, at p. 609.

⁸⁵ Under the Paris Convention, a patent must be filed in a country within 12 months from the date of first filing of the application in another country. Under PCT, while the international application must be filed within this 12 month period, the national filing can be delayed to 30 months from the priority date.

⁸⁶ See Gerald J. Mossinghoff, "LECTURE: World Patent System Circa 20XX A.D.", *Yale Journal of Law and Technology*, vol.1, No. 1 (1999), p. 2. Available from <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1071&context=yjolt> (explaining that this was particularly important for pharmaceutical companies by enabling them to file a patent on a promising drug and then using the opportunity of delayed national examination in designated countries to assess the viability of pursuing a national patent in a country based on factors as such clinical trial outcomes).

⁸⁷ The international search and examination report is produced by WIPO or by patent offices that act as International Search Authority under the PCT. The international search and examination report is based on a prima facie review of the novelty, inventive step and industrial applicability of the claimed invention against the published prior art. Nevertheless, the patent eligibility of the application may vary in countries at the national phase depending on how the criteria of patentability are defined and applied.

patent offices that produce the international search and examination report in their capacity as International Search Authority (ISA) to influence the national examination of that application in a developing country.⁸⁸ Indeed, as explained by the WIPO Secretariat, one advantage of the PCT system is that “... the search and examination work of patent offices can be considerably reduced or virtually eliminated”⁸⁹

While this objective of eliminating the need for search and examination of patent applications in the national phase is not specifically mentioned in the PCT, developed countries have consistently pursued this objective in WIPO.⁹⁰ Proposals have been advanced in the PCT Working Group to discourage duplication of international phase work under the PCT system in the national phase, encouraging collaborative search and examination or work sharing between patent offices, or enabling national search and examination to be dispensed with at the option of a PCT Contracting Party.⁹¹

The accession of developing countries to the PCT has been made an obligation in various bilateral or regional free trade agreements.⁹² However, while a large number of developing countries have acceded to the PCT, the system is predominantly used by applicants from a few countries.⁹³ Moreover, the international search and examination under the PCT system is conducted only by a few patent offices, and the majority of the international search and examination reports are produced by the European Patent Office acting as an international search authority. At the same time, many developing countries that have joined the PCT system lack capacity in conducting substantive examination, though they have witnessed significant increase in the number of patent applications filed in their countries through the PCT route.⁹⁴

⁸⁸ See Peter Drahos, “Trust Me: Patent Offices in Developing Countries”, *American Journal of Law & Medicine*, vol.34 (2008), pp. 151-174.

⁸⁹ Available from <http://www.wipo.int/pct/en/treaty/about.html>.

⁹⁰ In 2001 the US submitted a proposal for reform of the PCT system with the objective of making PCT search and examination binding on PCT Contracting Parties while simplifying PCT procedures for patent applicants. See WIPO, document PCT/R/1/2. Available from http://www.wipo.int/edocs/mdocs/pct/en/pct_r_1/pct_r_1_2.pdf. Further, in 2018 the WIPO secretariat submitted a proposal before the PCT Working Group to amend the PCT Regulations to enable national patent offices to delegate their national office functions to the office of any other PCT Contracting State or an intergovernmental organization. See WIPO document PCT/WG/11/7. Available from https://www.wipo.int/edocs/mdocs/pct/en/pct_wg_11/pct_wg_11_7.pdf. Also see Sandeep K. Rathod and Dr. Feroz Ali, “Inside Views: Deference, Not Delegation! - WIPO PCT Negotiations”, *Intellectual Property Watch*, 17 June 2018. Available from http://www.ip-watch.org/2018/06/17/deference-not-delegation-wipo-pct-negotiations/#_ftn1.

⁹¹ See William New, WIPO Pushes Members on Patent Treaty Compliance; US Wants PCT II, *Intellectual Property Watch*, 4 May 2009. Available from <http://www.ip-watch.org/2009/05/04/wipo-pushes-members-on-patent-treaty-compliance-us-wants-pct-ii/>.

⁹² For example, the Comprehensive Trans-Pacific Partnership Agreement makes ratification or accession to the PCT a mandatory obligation for all countries that are party to the treaty.

⁹³ Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (New York, Routledge, 2007), p.49. According to WIPO statistics, more than 70 per cent of International Search Reports under PCT between 2000 to 2018 have been issued by EPO, USPTO and JPO. Though the number of International Search Reports from China and South Korea have significantly increased in recent years, the EPO, USPTO and JPO continue to produce more than 65 per cent of these reports between 2015 to 2018. See World Intellectual Property Organization, IP Statistics Data Center. Available from <https://www3.wipo.int/ipstats/index.htm> (accessed 15 October 2018).

⁹⁴ Sangeeta Shashikant, “The African Regional Intellectual Property Organization (ARIPO) Protocol on Patents: Implications for Access to Medicines”, Research Paper No. 56 (Geneva, South Centre, November 2014), pp. 17-21. Available from https://www.southcentre.int/wp-content/uploads/2014/11/RP56_The-ARIPO-Protocol-on-Patents_EN1.pdf (pointing out that most patent applications in the African Regional Intellectual Property Office

The expansion of the PCT system was pursued as part of a broader agenda of harmonising procedural, formal and substantive standards of patent law worldwide.⁹⁵ This agenda was pursued through norm-setting initiatives within WIPO as well as through provision of technical assistance⁹⁶ to developing countries to adopt higher standards of IP protection.⁹⁷ As described in the following section, this was one of the motivating factors that led to the submission of various proposals from developing countries for reforming WIPO and its approach, which ultimately led to the adoption of the WIPO Development Agenda recommendations.

(ARIPO) are filed through the PCT route while the ARIPO has a capacity of 12 patent examiners, and that ARIPO relies heavily on the results of the PCT or foreign search and examination results and on the EPO guidelines).

⁹⁵ See WIPO, document A/37/6. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_37/a_37_6.pdf.

⁹⁶ WIPO emerged as the leading provider of technical assistance to developing countries after the TRIPS Agreement entered into force, which required developing countries to amend their existing IP laws to bring them into compliance with TRIPS. Apart from WIPO, IP offices from developed countries also provide technical assistance to developing countries and complement the technical assistance provided by WIPO. See Jean-Frederic Morin, “Concentration despite competition: The organizational ecology of technical assistance providers”, *The Review of International Organizations* (21 August 2018), pp. 1-33. Available from <https://doi.org/10.1007/s11558-018-9322-7>.

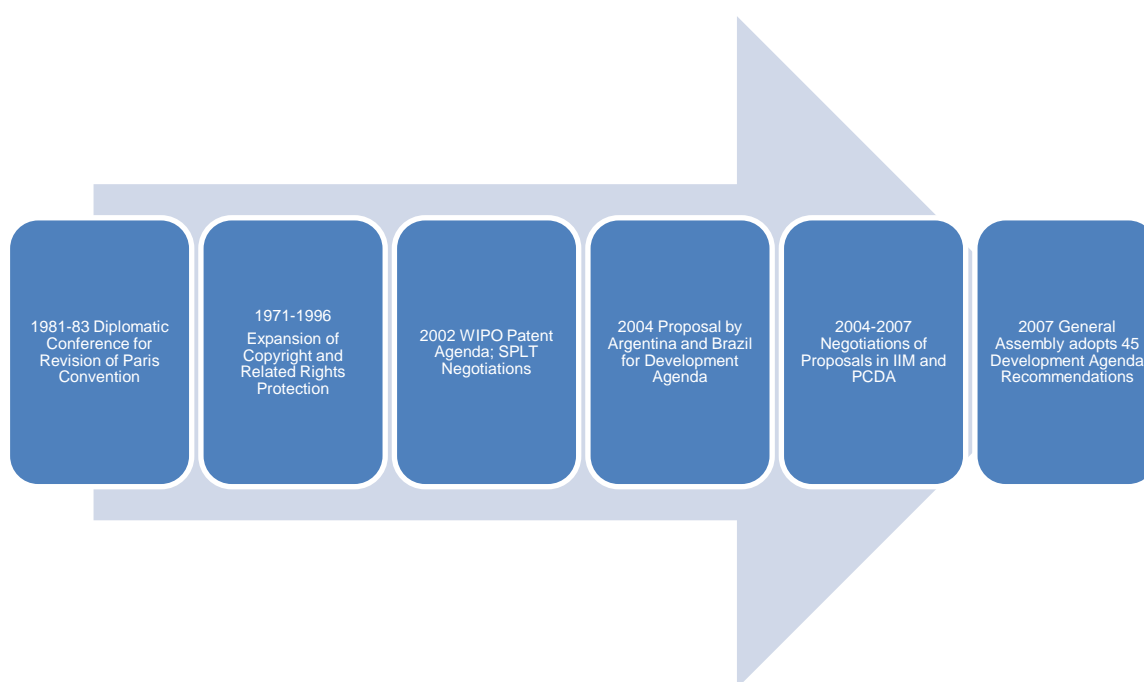
⁹⁷ See Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva, World Intellectual Property Organization, 2003), pp. 338-42. Available at http://www.wipo.int/edocs/pubdocs/en/intproperty/888/wipo_pub_888.pdf (presenting the vision of IP as a tool for development and the role of WIPO in providing technical assistance to build political will, legislative framework, institutions and an IP culture for building an IP empowered society).

III. PROPOSALS FOR A DEVELOPMENT AGENDA

Since its establishment, WIPO has concentrated its efforts in promoting expanded IP protection and enforcement around the world. It has promoted a one-size-fits-all approach to IP policies that uncritically assumed that development would follow suit as IP protection is strengthened.⁹⁸ This approach overlooked the adverse implications that IP could have on restricting the ability of developing countries to promote broad economic and social welfare and address their development challenges.⁹⁹

III.1 The WIPO Patent Agenda

A major manifestation of this perspective was the pursuit of the WIPO Patent Agenda.¹⁰⁰ The WIPO Patent Agenda stated that patent law harmonisation should be undertaken to achieve the following ends: "... to give national and regional patent authorities access to a common operational platform that permits them to cooperate, exchange information, share resources, and reduce duplication in their work."¹⁰¹ To that end, the WIPO Patent Agenda regarded full and deep harmonisation of national laws relating to patentability as essential and expressed support for the negotiation of a Substantive Patent Law Treaty (SPLT).¹⁰²



⁹⁸ See Ruth L. Okediji (2009), "History Lesson for the WIPO Development Agenda", in Neil Weinstock Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries* (New York, Oxford University Press, 2009), pp. 142-8 (describing the nature of the development paradigm in WIPO from 1964 to 2004).

⁹⁹ See James Boyle, "A Manifesto on WIPO and the Future of Intellectual Property", *Duke Law & Technology Review*, vol. 3, no. 1 (2004), pp. 2-8. Available from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1113&context=dltr>

¹⁰⁰ WIPO, document A/37/6. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_37/a_37_6.pdf

¹⁰¹ *Ibid.*, p. 3.

¹⁰² *Ibid.*, pp. 5-6.

Developing countries responded to the proposed SPLT¹⁰³ by demanding the inclusion of provisions that address their development concerns and debate the benefits of harmonisation, the balance between interests of right holders and the public interest, the relationship between patents and other public policy or regulatory areas.¹⁰⁴ The United States, Japan and the European Patent Office (EPO) presented a revised draft text of SPLT, known as the "trilateral text", that sought to limit the harmonisation agenda under SPLT to four issues – definition of prior art, grace period, novelty, and inventive step/non-obviousness.¹⁰⁵ However, developing countries opposed the trilateral proposal since it ignored their proposals, particularly the freedom to take measures relating to the protection of genetic resources, biological diversities, traditional knowledge and the environment, as well as measures to protect public health.¹⁰⁶ The SCP could not come to an agreement on the trilateral proposal.

The proposal was submitted again for the consideration of the WIPO General Assembly in 2004.¹⁰⁷ Developing countries reiterated their position that issues of interest to the developing countries should not be indefinitely postponed by limiting the discussions to a limited set of provisions in the SPLT.¹⁰⁸ The General Assembly could not arrive at a consensus and requested the WIPO Director General to undertake informal consultations.¹⁰⁹

During the informal consultations, the WIPO Secretariat played a very active role in seeking to build support in favour of the trilateral proposal. It convened an informal consultation in Casablanca, Morocco, which included representatives from developing countries involved in the SPLT discussions, without it being clarified that such participation was in an individual capacity.¹¹⁰ The partisan approach of the WIPO Secretariat was also evident in its earlier opposition to the proposals by developing countries on the SPLT text.¹¹¹

¹⁰³The initial focus of the SPLT was on the definition of prior art, novelty, inventive-step, industrial applicability, drafting and interpretation of claims and the requirement of sufficiency of disclosure. Carlos M. Correa, "An Agenda for Patent Reform and Harmonization in Developing Countries", paper presented at the WIPO SCP Open Forum on the Draft Substantive Patent Law Treaty, Geneva, 1-3 March 2006, p. 3. Available from

http://www.wipo.int/export/sites/www/meetings/en/2006/scp_of_ge_06/presentations/scp_of_ge_06_correa.pdf.

¹⁰⁴ South Centre, "Integrating Development into WIPO Activities and Processes: Strategies for the 2004 WIPO Assemblies", document SC/TADP/AN/IP/2, p. 5. Available from https://www.southcentre.int/wp-content/uploads/2013/07/AN_IP2_Integrating-Development-into-WIPO-acitivities_EN-.pdf.

¹⁰⁵ See WIPO, document SCP/10/9. Available from

http://www.wipo.int/edocs/mdocs/scp/en/scp_10/scp_10_9.pdf The proposal was based on a memorandum by the IP owners' associations that called for a phased approach to substantive patent law harmonisation, and proceed with an abridged SPLT text limited to a few issues. Also see WIPO, document SCP/10/8, pp. 2-4. Available from http://www.wipo.int/edocs/mdocs/scp/en/scp_10/scp_10_8.pdf (referring to discussions in AIPPI, AIPLA, FICPI, etc.).

¹⁰⁶ South Centre, document SC/TADP/AN/IP/2, p. 6.

¹⁰⁷ See WIPO, document WO/GA/31/9. Available from

http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_9.pdf. Also see WIPO, document WO/GA/31/10. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_10.pdf.

¹⁰⁸ For statements by developing countries in response to the proposal, see WIPO, document WO/GA/31/15, pp. 26-33. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_15.pdf.

¹⁰⁹ Ibid., p. 33.

¹¹⁰ See William New, "India Joins Opposition to Casablanca Patent Meeting Outcome", *Intellectual Property Watch*, 10 April 2005. Available from <http://www.ip-watch.org/2005/04/10/india-joins-opposition-to-casablanca-patent-meeting-outcome/> (citing a letter from India to WIPO rejecting the outcomes of the Casablanca meeting and clarifying that the representative from India who chaired that meeting participated in an individual capacity and that there was no change in India's position which was similar to that of other developing countries for inclusion of other public policy issues in the SCP discussions).

¹¹¹ See Sisule F. Musungu, Exceptions to Patent Rights and the WIPO Substantive Patent Law Treaty, Draft paper presented at the WIPO SCP Open Forum, Geneva, 1-3 March 2006, pp. 11-13. Available from

The Casablanca statement stated that there was broad agreement that the objective of future work of the SCP should focus on issues relating to improving the quality of granted patents, and reducing unnecessary duplication of work among Patent Offices. To that end, the Casablanca statement called for addressing four issues in the SCP – prior art, grace period, novelty and inventive step – and to address issues of sufficiency of disclosure and genetic resources in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)¹¹².¹¹³ This proposition was rejected by the developing countries.¹¹⁴ There was no agreement on the future work of the SCP for the next 2 years until the SCP resumed discussions for its work programme in 2008 based on a broad non-exhaustive list of issues.

III.2 Developing Countries Call for a Development Agenda

In this context, developing countries called for continuous assessment in WIPO of the implications of IP protection to pursue broad economic and social welfare for all, and the need for a balance of rights and obligations, rather than solely focusing on promotion of IP protection and enforcement. At the 2004 WIPO General Assembly, Argentina and Brazil, on behalf of the Group of Friends of Development, submitted a proposal calling for the establishment of a WIPO Development Agenda, stating that:

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.¹¹⁵

Developing countries sought to ensure that the understanding of the development dimension be broadened in WIPO and addressed across the range of its substantive and

http://www.wipo.int/export/sites/www/meetings/en/2006/scp_of_ge_06/presentations/scp_of_ge_06_musungu.pdf (describing the statements made by the WIPO Secretariat in response to proposals from developing countries for inclusion of provisions on exceptions to patent rights in the SPLT text).

¹¹² The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in 2000 as a discussion forum on intellectual property issues that arise in the context of access to genetic resources and benefit sharing, protection of traditional knowledge and protection of folklore. The mandate of the IGC is renewed every two years by the General Assembly. See WIPO, document WO/GA/26/10, p. 23. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_26/wo_ga_26_10.pdf; also see WIPO, document WO/GA/26/6. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_26/wo_ga_26_6.pdf (presenting proposal by the WIPO Secretariat for the establishment of the IGC). Since 2010 the IGC has been given a mandate by the General Assembly to undertake text based negotiations for an international legal instrument/(s) on IP and genetic resources, protection of traditional knowledge and traditional cultural expressions.

¹¹³ See WIPO, document SCP/11/3. Available from http://www.wipo.int/edocs/mdocs/scp/en/scp_11/scp_11_3.pdf (presenting the statement adopted at the end of the informal consultations in Casablanca on 16 February 2005).

¹¹⁴ See William New, "Agreement Out of Reach in WIPO Patent Harmonisation Talks", *Intellectual Property Watch*, 3 June 2005. Available from <http://www.ip-watch.org/2005/06/03/agreement-out-of-reach-in-wipo-patent-harmonisation-talks/>.

¹¹⁵ See WIPO, document WO/GA/31/11, p. 1. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf.

technical assistance activities and debates.¹¹⁶ They placed the need for balance, flexibility and a robust public domain at par with promotion of IP protection in all WIPO matters.¹¹⁷

Based on the proposal by Argentina and Brazil, the 2004 WIPO General Assembly convened inter-sessional intergovernmental meetings (IIM) to examine proposals by Member States relating to the establishment of the Development Agenda.¹¹⁸ The process of discussion and selection of proposals for implementation took two years. Discussions among Member States on specific proposals were conducted through three sessions of the IIM and three sessions of a Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA).

At the conclusion of the three IIMs in 2005, 40 specific action-oriented proposals were drawn from various papers submitted by Member States. Some examples of the proposals that were submitted during the IIM process were the following:

1. Proposal to amend the WIPO Convention to include explicit language on the development dimension.
2. Proposal to establish a WIPO Standing Committee on Intellectual Property and Technology Transfer.
3. Proposal for a treaty on access to knowledge and technology.
4. Proposal to restructure and improve technical assistance.
5. Proposal to establish an independent WIPO Evaluation and Research Office (WERO).
6. Proposal to undertake independent, evidence-based “Development Impact Assessments” (DIAs) with respect to norm-setting activities.
7. Proposals on measures to ensure wider participation of civil society and public interest groups in WIPO.
8. Proposal to formulate and adopt principles and guidelines for norm-setting activities in WIPO.¹¹⁹

It is interesting to note that during the IIM process, the WIPO secretariat provided technical inputs to certain developing countries in drafting a proposal that advocated maintaining the status quo in WIPO.

An overview of the proposals submitted in the IIMs demonstrates that the Development Agenda was not being approached at that point of time as a limited set of recommendations. Rather, the Development Agenda was being pursued through a multi-pronged approach which included amending the WIPO Convention, establishing new institutional mechanisms, undertaking new norm-setting initiatives, adopting measures to enhance transparency and accountability of the WIPO secretariat, enhancing civil society participation in WIPO deliberations, and developing principles and guidelines for norm-setting activities.

¹¹⁶ Ibid., p. 7.

¹¹⁷ Neil Weinstock Netanel, “Introduction: The WIPO Development Agenda and its Development Policy Context”, in Weinstock Netanel (ed.), *The Development Agenda*, p. 3 (sect. III, footnote 98).

¹¹⁸ Available from <http://www.wipo.int/ip-development/en/agenda/background.html>.

¹¹⁹ See Sisule F. Musungu, “Rethinking Innovation, Development and Intellectual Property in the UN : WIPO and Beyond”, TRIPS Issues Papers 5 (Ottawa, Quakers International Affairs Program, 2005), pp. 13-18. Available from <http://quakerservice.ca/wp-content/uploads/2011/07/TRIPS53.pdf>.

At the first meeting of the PCDA in 2006 developing countries had proposed that in order to formulate practical and concrete outcomes on the Development Agenda, the issues raised under various proposals should be prioritized and organized under different time-frames. It proposed that in the short term the General Assembly could draw concrete recommendations for immediate action on the issues that were identified as priorities in the short term. The PCDA agreed on a set of actions on issues that required a longer and more in-depth discussion. It also noted that proposals which were not addressed in the context of the short-term process should be referred to the General Assembly or some other existing or new competent body in WIPO.¹²⁰ This suggests that developing countries called for the adoption of a set of recommendations by the General Assembly for those proposals which could be addressed in the short-term, and acknowledged the need to continue further discussions on other proposals in an appropriate forum within WIPO.

However, the United States favoured an approach of categorizing various proposals that enjoyed broad support under various clusters, and discarding from further consideration other proposals that did not enjoy broad support. This approach was ultimately adopted when the Chair in consultation with regional groups grouped 111 proposals into five clusters.¹²¹

In the first session of the PCDA in 2006, the Chair called for specific proposals for implementation, clustered under six topics.¹²² At the second session of the PCDA, the Group of Friends of Development submitted a proposal on the way forward which clearly stated that in their view the clustering of 111 proposals did not replace previous proposals that had been submitted to the General Assembly and the IIMs.¹²³ It was agreed that the 111 proposals would be discussed cluster by cluster and in that process other relevant proposals could be brought in. In spite of this agreement not to adopt a basket approach, towards the end of the

¹²⁰ WIPO, document PCDA/1/5. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_5.pdf.

¹²¹ However, the Chair had clarified to the Member States that no proposal would be discarded in the process of clustering them. See WIPO, document PCDA/1/6. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_6.pdf.

¹²² WIPO, Summary by the Chair, Provisional Committee on Proposals Related to a WIPO Development Agenda, Geneva, 2006. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_www_56972.pdf.

¹²³ The proposal suggested that the PCDA should recommend to the General Assembly to adopt a high-level declaration on intellectual property and development, specifically issue a declaration to clarify the mandate of WIPO as a UN specialized agency, adopt specific principles on technical assistance and adopt guidelines and disciplines based on those principles, agree on the promotion of model approaches on how to implement relevant provisions on anti-competitive practices, flexibilities and limitations of TRIPS and the WIPO agreements, set up financial mechanisms to promote development friendly technical assistance, adopt specific principles, guidelines and correlative treaty provisions relating to WIPO norm-setting activities, include specific provisions in treaties and norms on issues such as safeguarding national implementation, promotion of technology transfer, use of flexibilities, preservation of policy space, etc., set up a mechanism for Development Impact Assessments (DIA) for norm-setting and technical assistance activities, separate WIPO Secretariat's norm-setting functions from technical assistance, agree on promotion and development of alternative innovation protection models, agree to launch negotiations on a Treaty on Access to Knowledge and Technology, initiate negotiations on a multilateral agreement to place the results of publicly funded research in the public domain or find other means of sharing such research at affordable cost, develop guidelines on transfer of technology, establish a new WIPO body for promoting transfer of technology, formulate recommendations on policies and measures that industrialized countries could adopt for promoting transfer and dissemination of technology to developing countries, devise a mechanism by which countries affected by anti-competitive practices could request developed countries where errant firms are located to take enforcement action against them, ensure wider participation of public interest groups in WIPO discussions, and restrict the mandate of the Advisory Committee on Enforcement to exchange of information and exclude norm-setting. See WIPO, document PCDA/2/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_2/pcda_2_2.pdf.

second session of the PCDA the Chair introduced a proposal selecting certain proposals as having received emerging consensus in the PCDA, largely reflecting those supported by developed countries. That proposal was rejected by many developing countries. The PCDA could not agree on making any recommendation to the General Assembly and transmitted all proposals to the General Assembly. The Chair's proposal was submitted as a formal proposal by Kyrgyz Republic.¹²⁴

In the context of this impasse, the 2006 WIPO General Assembly decided that the PCDA should continue to discuss all the 111 proposals over two sessions. It was decided that 40 of these proposals that were drawn from the Chair's proposal submitted at the second session of the PCDA and later adopted as a proposal by the Kyrgyz Republic would be discussed at the third session of the PCDA, and the remaining 71 proposals would be discussed at the fourth session of the PCDA.¹²⁵ It was also decided that the proposals would be streamlined to reduce duplication, separate proposals that are actionable from those which were declarations of general principles and objectives, and to note proposals which related to existing activities of WIPO.¹²⁶

At the third meeting of the PCDA, Member States agreed on 24 out of the 40 proposals discussed.¹²⁷ After intense negotiations, the fourth session of the PCDA agreed on another 21 proposals out of the remaining 71 proposals which marked agreement on 45 proposals. These 45 adopted proposals were forwarded by the PCDA to the WIPO Assemblies and were adopted by the Assemblies in 2007 as a set of recommendations. These 45 recommendations are formally called the WIPO Development Agenda.

¹²⁴ Martin Khor and Sangeeta Shashikant (eds.), *Negotiating a 'Development Agenda' for the World Intellectual Property Organisation (WIPO)* (Penang, Third World Network, 2009), pp. 214-229.

¹²⁵ See Malini Aisola, Debate on WIPO Development Agenda, *IP Disputes in Medicine*, 16 February 2007. Available from <http://www.cptech.org/blogs/ipdisputesinmedicine/2007/02/debate-on-wipo-development-agenda.html>.

¹²⁶ Khor and Shashikant (eds.), *Negotiating a 'Development Agenda'*.

¹²⁷ *Ibid.*, p. 272.

IV. THE WIPO DEVELOPMENT AGENDA RECOMMENDATIONS

The Development Agenda recommendations that were finally adopted by the WIPO Assemblies placed the 45 recommendations into six clusters: technical assistance and capacity building (cluster A); norm-setting, flexibilities, public policy and the public domain (cluster B); technology transfer, information and communication technologies (ICT) and access to knowledge (cluster C); assessment, evaluation and impact studies (cluster D); institutional matters including the mandate and governance (cluster E) of WIPO; other issues (enforcement) (cluster F).¹²⁸

Nineteen recommendations were identified for immediate implementation on the basis that WIPO was already implementing related activities which could be appropriately modified or strengthened to meet the concerns addressed by relevant DA recommendations; the activities could be carried out by using existing human resources and without allocation of additional financial resources.¹²⁹

While IP protection is part of the mission of WIPO, it is not the only element. WIPO is a specialized UN agency. By virtue of its 1974 agreement with the United Nations, it should be fully guided by the broad development goals of the United Nations, which now includes the new sustainable development goals (SDGs). The Development Agenda brings this aspect at the centre of deliberations in WIPO.

Some of the main agreements reached under the Development Agenda were: WIPO should make effective use of flexibilities in IP agreements in the context of technical assistance and norm-setting activities; norm-setting should be balanced and give greater attention to the role of the public domain; WIPO technical assistance activities should be responsive to development needs of developing countries and LDCs and WIPO should facilitate such technical assistance; there should be capacity building of developing countries and LDCs to deal with IP-related anti-competitive practices; the capacity of national IP institutions and users should be developed to foster innovation in developing countries; there should be annual review and evaluation of development-oriented activities; and there should be enhanced participation of developing countries in WIPO decision-making processes.

It is important to note that until the very end of the PCDA process the form in which the proposals that would constitute the Development Agenda would be adopted was not clear. Member States focused their discussions in the third and fourth sessions of the PCDA on streamlining those included in the list of 111 proposals. The text of the WIPO Development Agenda merely enumerated the 45 recommendations finally adopted according to their respective clusters. There was no statement of objectives or principles or preambular language which could provide guidance for interpreting these recommendations in the light of the Development Agenda. In the absence of such guidance regarding the purpose of the Development Agenda, the recommendations have been susceptible to non-contextualised interpretations of the objectives of the Development Agenda between developed and developing countries. As observed by a commentator, the Development Agenda's

¹²⁸ Available from <http://www.wipo.int/ip-development/en/agenda/background.html>.

¹²⁹ The 19 recommendations are recommendations 1, 3, 4, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 35, 37, 42, and 44.

recommendations contain no clear benchmarks to direct future discussions beyond the impasse evident in previous talks.¹³⁰

IV.1 Conflicting Understanding of Development

During the negotiations on the Development Agenda, there was apparent consensus between both developed and developing countries on the importance of development, but the term development was never defined. Rather, the various proposals submitted by developed and developing countries suggested that they had different conceptions of development. Thus, the Development Agenda recommendations have been implemented in a context where there is no agreement on the key terminology, its use and meaning. Developed countries regarded IP protection as an inherently pro-development activity and therefore the mandate of WIPO to promote IP protection worldwide was deemed as automatically fostering development. On the other hand, developing countries viewed development from a broader perspective as something more than technological development, expansion of trade or macroeconomic growth, but as a process that should include technological development of developing countries as well as address the human dimension through seeking improvements in health, public welfare, nutrition and education for everyone. However, developed countries viewed these human aspects of development as probable by-products of technological and macroeconomic growth that IP would foster.¹³¹ Some countries viewed the Development Agenda from this perspective as a tool to reduce the input costs for their emergent industries.¹³²

Thus, while the Development Agenda's recommendations sought to mainstream the development dimension in WIPO, what was meant by the “development dimension” or “development orientation” was not spelled out. Consequently, the diverse interpretations of development that had cast a shadow on the negotiations of the Development Agenda have continued to condition its implementation.

More than a decade since the adoption of the Development Agenda, there is a clear polarization of views on what the WIPO Development Agenda fundamentally stands for. On the one hand, the Development Agenda recommendations can be seen as guidance for a paradigm shift in the approach of the WIPO secretariat and Member States towards advancing balanced international norms and national IP systems in line with broader development goals. The WIPO Development Agenda recommendations aim to ensure that in all WIPO activities, including norm-setting and technical assistance, the positive and adverse implications of IP protection and enforcement are considered, and that policy space for addressing development needs of developing countries and LDCs is maintained, including by promoting the use of flexibilities within existing multilateral IP treaties. While technical assistance is rightly a central topic of the WIPO Development Agenda recommendations, it is not a call for “more of the same” content of technical assistance. The WIPO Development Agenda recommendations call for transformation of the approach to technical assistance away from only assisting in making use of IP as a tool for economic development assuming uncritically that benefits derive from more IP protection and enforcement, towards providing more

¹³⁰ See Amanda Barratt, “The curious absence of human rights: Can the WIPO Development Agenda transform intellectual property negotiation?”, *Law, Democracy & Development*, vol.14 (2010), pp. 1-43, at pp. 15-16.

¹³¹ *Ibid*, pp. 38-41.

¹³² Christopher May, “The World Intellectual Property Organization and the Development Agenda”, *Global Governance*, vol. 13, No. 2 (August 2007), pp. 161-170, at p. 165.

nuanced and fact-based guidance on the complex effects of the use of IP tools and tailoring IP protection levels to each country's specific requirements based on its level of development. This view is largely shared by developing countries and LDCs.¹³³

On the other hand, developed countries view the WIPO Development Agenda as limited to strengthening the WIPO Secretariat's work on the promotion, protection, use and enforcement of IP. Essentially this implies continuation of the "business-as-usual" WIPO technical assistance and cooperation that existed before the adoption of the Development Agenda. Developed countries consider that implementation of the Development Agenda should focus on identifying ways and means to stimulate the use of IP as a tool for development. This view denies any consideration of the potential adverse effects of IP and the related problems in the current international IP regime and national IP systems, as well as gaps in the current WIPO approach to norm-setting and technical assistance. Thus, it rejects the notion that WIPO should change course to help drive the multilateral IP system and national IP policies, laws and regulations to be more balanced and development-oriented.¹³⁴

A comprehensive review and evaluation of the Development Agenda's implementation requires recalling its vision and purpose. From the outset, the vision and purpose of the Development Agenda was clear to proponents that introduced concrete language to guide the exercise of identifying specific actions for implementation.¹³⁵ In contrast, developed countries did not want to commit to a transformative Development Agenda. Thus, in light of the diverging views on what the WIPO Development Agenda should achieve, a shared vision of the development was not captured in the final agreement. In this process, many of the original proposals by developing countries were rejected and others were watered down.

Box 1

Principal Ideas behind the Development Agenda

- Policy space for national governments must be respected. Allowing them to find right balance in IP policies and laws to pursue public policy goals and development paths that are suitable to their own needs. This is the basis for normative differentiation between the obligations of developed and developing countries under any new treaties.
- Allowing for variances among countries' national IP systems is necessary to reflect their distinct development needs and policy choices.
- Need for recognition that IP protection can produce benefits as well as costs.
- Promoting access to and diffusion of technology and know-how goods and services is just as important as promoting their creation.
- The goal should be to work towards a balanced and effective international IP regime, not pursue ever higher international standards of protection for IP.
- Efforts at building a balanced IP system should equally focus on creating an even playing field that secures the protection of IP for right holders and also safeguards public interest.

¹³³ See Box 1, sect. IV, p. 33.

¹³⁴ See Catherine Saez, "WIPO General Assembly Highlights Positions on Key IP Policy Issues", *Intellectual Property Watch*, 29 September 2014. Available from <http://www.ip-watch.org/2014/09/25/wipo-general-assembly-highlights-positions-on-key-ip-policy-issues/>.

¹³⁵ WIPO, document CDIP/5/9 Rev. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_9_rev.pdf.

- The international IP system should allow sufficient flexibility for countries to pursue science and technology policies suitable for their level of technological development. For LDCs in particular, it should support, rather than hinder, the accumulation of technological capabilities.
- Guidelines for engagement of WIPO with donors, e.g. funds in trust.
- Increased participation of developing countries and LDCs in norm-setting discussions.
- Equal treatment to observers from civil society and private interest groups.

Source: Martin Khor and Sangeeta Shashikant (eds.), *Negotiating a 'Development Agenda' for the World Intellectual Property Organisation (WIPO)* (Penang, Third World Network, 2009).

The Development Agenda does not reject the possibility of IP as an instrument to fuel innovation and creativity under some local conditions, but it places the need for balance, flexibility and a robust public domain at par with promotion of IP protection in all WIPO matters affecting developing countries.¹³⁶

In 2010, eighteen developing countries (Algeria, Brazil, Cuba, Djibouti, Ecuador, Egypt, Guatemala, India, Indonesia, Iran, Malaysia, Pakistan, the Philippines, South Africa, Sri Lanka, Sudan, Uruguay and Yemen) had formed a cross-regional group known as the Development Agenda Group (DAG) to contribute to mainstreaming the development dimension in all areas of WIPO work. As observed by the DAG:

The adoption of the Development Agenda at the General Assembly of the WIPO in 2007 was a milestone in achieving the historic aspiration of developing countries for a paradigm shift in the international perspective of intellectual property (IP): a shift from viewing IP as an end in itself, to viewing it as a means to serve the larger public goals of social, economic and cultural development. This vision has refuted the universal applicability of 'one size fits all IP protection models' or the advisability of the harmonization of laws leading to higher protection standards in all countries irrespective of the levels of development. This vision also entailed an organizational transformation of WIPO from a technical, treaty-administering body servicing primarily intellectual property right-holders, to a truly representative agency of the United Nations (UN) assisting Member States in achieving their development goals through a balanced and calibrated use of intellectual property.

IV.2 Mandate of WIPO beyond Promotion of IP Protection

Three Development Agenda recommendations specifically seek to align WIPO activities to the development goals of the United Nations. Recommendation 44 recalls the status of WIPO as a UN specialized agency. Recommendation 22 specifies that WIPO norm-setting activities should be supportive of the development goals of the UN. Recommendation 40 calls upon WIPO to intensify cooperation with UN agencies.

The 1974 Agreement between WIPO and the UN notes in Article 1 that *WIPO is responsible for promoting creative, intellectual activity and for facilitating the transfer of technology related to industrial property to developing countries in order to accelerate*

¹³⁶ Weinstock Netanel, "Introduction: The WIPO Development Agenda", p. 3 (sect. III, footnote 117).

*economic, social and cultural development, subject to the competencies and responsibilities of the UN and its organs, particularly UNCTAD, UNDP and UNIDO.*¹³⁷ This means that the activities of WIPO on promotion of IP protection in terms of its mandate must be consistent with the approach towards IP and development issues pursued by UN agencies that also have competencies and responsibilities in this field.

In furtherance of this vision, the Development Agenda Group had proposed that expansion of the development dimension in WIPO should encompass the following:

- (a) WIPO should promote norm-setting activities to facilitate access to knowledge and technology for developing countries and support a robust public domain.
- (b) WIPO norm-setting initiatives should be oriented toward preserving national policy space, safeguard national implementation of IP rules and enable countries to devise relevant policies to support their own economic development.
- (c) WIPO should undertake initiatives to bring balance to the international IP system by encouraging full understanding and use of flexibilities, exceptions and limitations as well as special provisions, options or safeguards that are essential to meet the needs of developing countries.
- (d) WIPO technical assistance should not be limited to generating IP awareness and capacity building in national IP Offices to facilitate more efficient award and protection of IP rights, but should focus on promoting domestic innovation, fostering a development-oriented IP culture and provide balanced advice on appropriate national IP strategies based on available flexibilities, exceptions and limitations.
- (e) WIPO technical assistance and capacity building activities should support the development of national scientific and technological infrastructure in developing countries.
- (f) WIPO should explore alternative non-exclusionary mechanisms for fostering creativity, innovation and the transfer of technology rather than focus on IP as the only instrument for promotion of innovation and creativity.
- (g) WIPO should undertake specific measures to facilitate transfer of technology to developing countries in manners that are appropriate to their economic, social and cultural development.
- (h) The approach of WIPO towards enforcement of IP must be informed by other public policy and development priorities.
- (i) WIPO must ensure that it has transparent, neutral and effective management.¹³⁸

However, not all Member States share this vision. At the WIPO General Assembly in 2014, the United States sought to reassert the primacy of the WIPO mandate with a focus on promotion of IP protection throughout the world. The US declared that it regretted that the Development Agenda had been used to block progress towards promoting protection of IP and called for rethinking the function of the Development Agenda so that WIPO could continue to carry out its substantive work, focused on promotion of IP and supporting development through the use, protection and enforcement of IP.¹³⁹

¹³⁷ WIPO, *Intellectual Property Handbook*, p. 5 (sect. II, footnote 29).

¹³⁸ WIPO, document CDIP/5/9 Rev.

¹³⁹ Available from <https://geneva.usmission.gov/2014/09/22/u-s-statement-at-opening-of-wipo-general-assembly/>.

IV.3 Technical Assistance beyond IP Protection and Enforcement

The proposal for a WIPO Development Agenda also focused specifically on technical assistance to redress the prevalent misconception in the WIPO Secretariat to view development issues in a restrictive sense as limited to technical assistance for enhancing protection and enforcement of IP.¹⁴⁰ The technical assistance provided to developing countries by the WIPO Secretariat also focused narrowly on increasing IP protection and enhancing IP enforcement.¹⁴¹ The WIPO Secretariat provides technical assistance to developing countries in the form of legislative advice, suggesting draft laws, organising workshops, seminars and training courses. A major challenge with regard to technical assistance on IP for many recipient countries is the lack of local experts to evaluate the suitability of the technical or legislative advice to local economic, social and cultural conditions. Moreover, the experts with whom the WIPO Secretariat interacts are selected on the basis of their legal and technical knowledge of IP, while other specialized knowledge domains relating to a country (e.g., public health, biodiversity, anthropology, etc.) are ignored.¹⁴²

The WIPO Development agenda recommendations sought to address this challenge by providing certain guidelines to be applied while providing technical assistance. It laid down the principle that technical and legislative assistance by the WIPO Secretariat shall be development-oriented and demand driven, taking into account the priorities and special needs of developing countries and LDCs, and the different levels of development between countries.¹⁴³ The Development Agenda also recognised that to do this, development considerations need to be mainstreamed in WIPO substantive and technical assistance activities and debates,¹⁴⁴ and that there is a commensurate need to increase human and financial resource allocation for technical assistance programmes in the WIPO Secretariat for promoting a development-oriented IP culture,¹⁴⁵ while also developing national institutional capacity among technical assistance recipients to make them more efficient and also promote a fair balance between IP protection and the public interest.¹⁴⁶ It also required the WIPO Secretariat to develop a mechanism of effective yearly review and evaluation of the development-oriented activities of WIPO, including in the area of technical assistance,¹⁴⁷ and also develop the capacity of WIPO to perform objective assessment of the impact of its activities on development.¹⁴⁸ It also called for cooperation on IP related issues pertaining to development programmes with UN agencies, WTO and other international organisations,¹⁴⁹ and also for conducting a review of WIPO technical assistance activities in the area of cooperation for development.¹⁵⁰

¹⁴⁰ WIPO, *Intellectual Property Handbook*, p. 7.

¹⁴¹ See Peter Drahos, "Developing Countries and international Intellectual Property Standard-Setting", *The Journal of World Intellectual Property*, vol. 5, No. 5 (1 November 2005), pp. 765-789 at p. 777, available at <https://doi.org/10.1111/j.1747-1796.2002.tb00181.x> (explaining that WIPO technical assistance to developing countries was inclined to provide laws and advice that would avoid any danger of that country becoming involved in dispute resolution, which could be guaranteed by adopting TRIPS plus models).

¹⁴² Ibid., pp. 777 and 789.

¹⁴³ The 45 Adopted Recommendations under the WIPO Development Agenda, Recommendations 1 and 13.

Available from <http://www.wipo.int/ip-development/en/agenda/recommendations.html#a>.

¹⁴⁴ Ibid., Recommendation 12.

¹⁴⁵ Ibid., Recommendation 3.

¹⁴⁶ Ibid., Recommendation 10.

¹⁴⁷ Ibid., Recommendation 33.

¹⁴⁸ Ibid., Recommendation 38.

¹⁴⁹ Ibid., Recommendation 40.

¹⁵⁰ Ibid., Recommendation 41.

IV.4 Mandate on Technology Transfer

Another important feature of the Development Agenda is that it included technology transfer as an issue that ought to be addressed by WIPO in relation to its activities on IP and development. This is significant since there is no mention about promotion of technology transfer in the WIPO Convention or in the Paris Convention. The Development Agenda sought to build upon the requirement under the UN-WIPO Agreement for WIPO to address transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development, in its capacity as a UN Specialized Agency. It specifically called upon WIPO to explore IP-related policies and initiatives necessary to promote the transfer and dissemination of technology that would be to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from flexibilities under international agreements.¹⁵¹ It also encouraged WIPO Member States, especially developed countries, to urge their research and scientific institutions to enhance cooperation with research and development institutions in developing countries, especially LDCs.¹⁵² To that end, it called for exploring supportive IP-related policies and measures that WIPO Member States, especially developed countries, could adopt for promoting transfer and dissemination of technology to developing countries.¹⁵³ The Development Agenda also called upon Member States to request WIPO to facilitate better access to publicly available patent information,¹⁵⁴ and that the WIPO secretariat should cooperate with other IGOs to provide advice to developing countries and LDCs on how to gain access to and make use of IP-related information on technology, particularly on areas of special interest to the requesting parties.¹⁵⁵ It also called for discussion on technology transfer issues in an appropriate WIPO body¹⁵⁶ and for the exchange of national and regional experiences and information on the links between IP and competition policy.¹⁵⁷

There is a need to understand the context in which developing countries sought to ensure that technology transfer is addressed in WIPO. The unsuccessful diplomatic conference for the revision of the Paris Convention had recognised the need to revise the Paris Convention to facilitate the use of industrial property for the acquisition of foreign technology and the export of domestic technologies and products. This was a reflection of the initiatives pursued by developing countries in the UN system for ensuring international regulation of transfer of technology, which led to the negotiations within UNCTAD of a Draft Code of Conduct on Transfer of Technology.¹⁵⁸ Though the negotiations for the Code of Conduct

¹⁵¹ Ibid., Recommendation 25.

¹⁵² Ibid., Recommendation 26.

¹⁵³ Ibid., Recommendation 28.

¹⁵⁴ Ibid., Recommendation 31.

¹⁵⁵ Ibid., Recommendation 30.

¹⁵⁶ Ibid., Recommendation 29.

¹⁵⁷ Ibid., Recommendation 28.

¹⁵⁸ See Ton J.M. Zuidwijk, "The UNCTAD Code of Conduct on the Transfer of Technology", *McGill Law Journal*, vol. 24 (1978), pp. 562-587. The UNCTAD Draft Code on Transfer of Technology had identified a number of restrictive practices in technology transfer transactions with firms in developing countries. These were - 1) grant back provisions, 2) challenges to the validity of the technology supplier's patents, 3) restrictions on sale or representation arrangements relating to competing technologies, 4) restrictions on research and development by the technology recipient, 5) restrictions relating to pricing by the recipient, 6) restrictions on adaptations or innovations by the recipient to meet local conditions, 7) grant of exclusive sales or representation rights to the supplying party, 8) tying arrangements requiring the recipient to accept further technologies or restricting sources of supply, 9) restrictions on the use of adequately trained local personnel, 10) restrictions on exports by the technology recipient, 11) patent pool or cross-licensing arrangements among technology suppliers

could not be concluded, the spirit of many of its provisions can be read into the Development Agenda recommendations. Inclusion of technology transfer within the Development Agenda clearly underscores its importance as a development issue in which the discussions around transfer of technology continue to be relevant.¹⁵⁹

that limit access to new technological developments or could result in abusive domination of an industry or market, 12) restrictions on publicity by the acquiring party, 13) payment and other obligations arising after the expiry of IP rights, 14) restrictions after the expiration of the technology transfer arrangements. Also see Pedro Roffe, "Transfer of Technology: UNCTAD's Draft International Code of Conduct", *The International Lawyer*, vol. 19, No. 2 (1985), pp. 689-707, at p. 699. Available from <http://www.jstor.org/stable/40705630>.

¹⁵⁹ See Padmashree Gehl-Sampath and Pedro Roffe, "Unpacking the international Technology Transfer Debate: Fifty Years and Beyond", Working Paper, (Geneva, International Centre for Trade and Sustainable Development, June 2012), p. 46. Available from <https://www.ictsd.org/sites/default/files/downloads/2012/07/unpacking-the-international-technology-transfer-debate-fifty-years-and-beyond.pdf> (observing that the general understanding of technology transfer has gradually expanded to include tacit knowledge as a critical component, reflecting the definition in the Draft Code of Conduct on Transfer of Technology).

V. THE POST-DEVELOPMENT AGENDA RECOMMENDATIONS DISCOURSE

V.1 The Role of the Committee on Development and Intellectual Property

The 2008 WIPO General Assembly established a new permanent body, the Committee on Development and Intellectual Property (CDIP),¹⁶⁰ with a mandate to 1) develop a work plan for implementing the adopted Development Agenda recommendations; 2) monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose coordinate with relevant WIPO bodies; and 3) discuss IP and development-related issues as agreed by the Committee, as well as those decided by the General Assembly.¹⁶¹

The first task of CDIP was to agree on a work plan to implement the 45 recommendations. It was agreed that the WIPO secretariat would report regularly to CDIP and the General Assembly about the implementation of 19 recommendations from the Development Agenda that were identified for immediate implementation throughout the work of WIPO. The first and second sessions of CDIP also discussed proposals regarding activities under some of the 26 remaining DA recommendations. These discussions led to some activities being proposed for implementing certain recommendations subject to an assessment by the WIPO Secretariat of the human and financial resource requirements for those activities. Based on the revised Program and Budget 2008/09 that was approved by the WIPO General Assembly in 2008,¹⁶² the WIPO Secretariat started implementing activities under some of these Development Agenda recommendations under a project-based methodology.¹⁶³ The third session of CDIP agreed to address related Development Agenda recommendations together through thematic-projects,¹⁶⁴ with the understanding that implementation of the projects did not imply that the Development Agenda recommendations concerned had been completely implemented.¹⁶⁵

Since its establishment, CDIP has approved 36 specific projects for implementing various recommendations of the Development Agenda. Twenty-nine of these projects have been completed and evaluated.¹⁶⁶ Most of the projects adopted by CDIP focus on acquisition and management of IP rights by innovators and creators in developing countries. However, there is a lack of focus on the use of IP flexibilities for access to IP protected technologies and works or prevention of misappropriation of traditional knowledge, genetic resources and traditional cultural expressions.

¹⁶⁰ Available from <http://www.wipo.int/policy/en/cdip/>.

¹⁶¹ See WIPO, document CDIP/18/7, Annex 1, p. 49. Available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_18/cdip_18_7-annex1.pdf.

¹⁶² WIPO, document WO/GA/39/7. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_39/wo_ga_39_7.doc.

¹⁶³ WIPO, document CDIP/3/INF/1. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_inf_1.pdf.

¹⁶⁴ Ibid.

¹⁶⁵ WIPO, document CDIP/3/9. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_9.pdf.

¹⁶⁶ Available from <http://www.wipo.int/ip-development/en/agenda/projects.html>.

The second pillar of the mandate of CDIP is to monitor, assess, discuss and report on the implementation of all recommendations adopted,¹⁶⁷ and for that purpose coordinate with relevant WIPO bodies. The 2010 WIPO General Assembly had adopted a decision on establishing a coordination mechanism to implement this element of the mandate of CDIP.¹⁶⁸ This mechanism requires “relevant” WIPO bodies to include in their reports to the Assemblies a description of their contribution to the implementation of the respective Development Agenda recommendations.¹⁶⁹ However, there has been a difference of views between developed and developing countries on whether all WIPO bodies are relevant for the purposes of reporting on implementation of the Development Agenda recommendations to the Assemblies. Developed countries regard the coordination mechanism as being restricted to a few relevant WIPO bodies and particularly view the Program and Budget Committee and the Committee on WIPO Standards as bodies that are not relevant for the purposes of the coordination mechanism. Discussions on this issue have been closed since the nineteenth session of CDIP in 2017. The 2017 WIPO General Assembly adopted a decision¹⁷⁰ which closed the discussion, but did not resolve the issue as to which WIPO bodies should report to the General Assembly on their contribution to the implementation of the Development Agenda.¹⁷¹ In 2018, only IGC reported to the General Assembly on its contribution to the implementation of the Development Agenda recommendations.

Even in respect of the WIPO bodies that are required to report to the General Assembly on the implementation of the Development Agenda recommendations, developed countries have objected to any discussion on the contribution by these bodies to the implementation of the Development Agenda's recommendations as a standing agenda item. The reports by these bodies to the General Assembly have been a general description of the comments by Member States on the implementation of the Development Agenda's recommendations, which do not enable a qualitative review of whether and how specific recommendations have been implemented through activities agreed to in those bodies. Significantly, though some committees like SCP or IGC have failed to achieve any substantive progress in their work in recent years, their reports to the General Assembly do not explore how this lack of progress adversely impacts on implementing the Development Agenda recommendations.

The opposition of the developed countries to include any discussion on development in any substantive WIPO committee (apart from CDIP and IGC) is a clear indication of their unwillingness to acknowledge the intrinsic linkage between IP and development. Developed countries have tried to use CDIP as a forum to “isolate” and “contain” the development discourse to one specially-designated WIPO committee rather than allow mainstreaming of development considerations. In this sense, the developed countries have ensured that WIPO continues to discharge a narrow mandate focused on global promotion of IP protection, even after becoming a specialized agency of the UN.

¹⁶⁷ Alexandra Bhattacharya, WIPO: Deadlock continues on development and IP integration, *TWN Info Service on Intellectual Property Issues* (May 14/09), 22 May 2014. Available from http://www.twi.my/title2/intellectual_property/info.service/2014/ip140509.htm.

¹⁶⁸ Available from http://www.wipo.int/ip-development/en/agenda/coordination_mechanisms.html.

¹⁶⁹ Ibid.

¹⁷⁰ The WIPO General Assembly decision merely reaffirmed the right of every Member State to express their views in all WIPO committees. See WIPO, document WO/GA/49/21. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_49/wo_ga_49_21.pdf.

¹⁷¹ See Nirmalya Syam, “Outcomes of the Nineteenth Session of the WIPO Committee on Development and Intellectual Property: A Critical Reflection”, Policy Brief No.40 (Geneva, South Centre, June 2017), p. 6. Available from https://www.southcentre.int/wp-content/uploads/2017/06/PB40_Outcomes-of-the-Nineteenth-Session-of-the-WIPO-Committee-on-Development-and-Intellectual-Property_EN.pdf.

The nineteenth session of CDIP in 2017 agreed to the introduction of a new standing agenda item on IP and Development for implementation of the third pillar of the mandate of the CDIP to discuss IP and development-related issues. However, it has been very difficult to reach agreement on this in CDIP after protracted discussions for nearly seven years. At the sixth session of CDIP in 2010 the Development Agenda Group had submitted a proposal to introduce a standing agenda item in CDIP on IP and development.¹⁷² However, developed countries had argued that there is no need for a standing agenda item on IP and development in CDIP as the entire work of the CDIP is about IP and development.¹⁷³ Indeed, in the view of developed countries the pursuit of stronger protection and enforcement of IP necessarily promotes development. However, though developing countries do not share this view, they have not been able to counter this view. Thus, the continuation of an IP centric discourse on how IP protection and promotion contributes to achieving development is still possible under this agenda item, while marginalising any critical reflection on the relationship of IP and development. Apart from Brazil and Mexico, no developing country Member of WIPO submitted proposals to CDIP in the content of discussion under this agenda item, while Group B submitted a proposal that focused on the positive impact of IP on innovation and particularly the role of women in IP.¹⁷⁴

There has also been considerable delay in finalising the details of activities agreed to be carried out. For instance, though CDIP had agreed in 2012 to organise a conference on IP and development, there was disagreement among Member States on the list of speakers which could only be finalised in early 2015. A proposal by the African Group for organising an international conference on IP and development on a biennial basis has been under discussion since May 2017.¹⁷⁵ Similarly, there was considerable disagreement on the terms of reference

¹⁷²WIPO, document CDIP/6/12 Rev. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_6/cdip_6_12_rev.pdf.

¹⁷³ See, for example, WIPO, document WO/GA/46/12, pp.12-3. Available from

http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_46/wo_ga_46_12.pdf (statement of the Group B at the 2014 WIPO General Assembly on the proposal for a new standing agenda item on IP and development in the CDIP).

¹⁷⁴ All the proposals except the proposal by Brazil had a narrow focus on the positive role of IP to promote development through innovation. The Russian Federation had submitted a proposal calling for exchange of experiences on the application of digital technologies in the IP field. The US, Canada and Mexico also submitted a joint proposal on the role of women in IP. See WIPO, document CDIP/21/12 Rev. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_21/cdip_21_12_rev.pdf; WIPO, document CDIP/21/8 Rev.

Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_21/cdip_21_8_rev.pdf. The twenty-first session of the CDIP in 2018 had agreed to undertake discussions on the Sustainable Development Goals in the CDIP under the agenda item on intellectual property and development. It had also agreed that the twenty-second and twenty-third sessions of the CDIP will undertake discussions on the topics of “Women and Intellectual Property” and “Intellectual Property and Development in the Digital Environment”, respectively. See WIPO, Summary by the Chair, Committee on Development and Intellectual Property (CDIP), Twenty-First Session, Geneva, 18 May 2018. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_21/cdip_21_summary.pdf.

¹⁷⁵ See WIPO, document CDIP/20/8. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_20/cdip_20_8.pdf. Agreement was finally reached at the twenty-second session of the CDIP to hold three consecutive one day international conferences on IP and development on the first day of the following three sessions of the CDIP. The topic of the first conference will be held at the twenty-third session of the CDIP in May 2019 with the agreed theme being “How to Benefit from the IP System”. The next two conferences, however, are subject to agreement between Member States on the topics for those conferences. See Summary by the Chair of the 22nd session of the CDIP. Available from https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_22/cdip_22_summary.pdf.

and composition of the team for a review of the implementation of the WIPO Development Agenda.¹⁷⁶

The report of the independent review of implementation of the Development Agenda recommendation that was submitted in 2014 had found that the general view of some countries and stakeholders is that CDIP has been playing a central role in implementing and monitoring the Development Agenda recommendations with the support of the WIPO secretariat. However, it also noted that CDIP did not devote adequate attention to the sustainability of the projects that had been completed and ostensibly mainstreamed.¹⁷⁷ It recommended that a higher level debate should be undertaken in CDIP to address emerging issues related to IP and the work of WIPO on those issues, and facilitate an exchange of strategies and best practices from Member States on addressing IP and development concerns. It also recommended that CDIP discussions need to benefit from the expertise of other UN development agencies, that Member States should ensure a higher level of participation of national experts in CDIP discussions, that CDIP should discuss modalities on reporting on activities undertaken at the national level to implement the Development Agenda recommendations, and establish a reporting mechanism on lessons learnt and best practices from successfully implemented projects in terms of their sustainability and impact.¹⁷⁸

In view of these recommendations, it is critical that developing countries ensure the participation of national experts from diverse development sectors such as public health, agriculture, industrial development and not restrict the discussion within the CDIP to an IP centric approach to development. CDIP could also undertake a higher level of debate by inviting United Nations (UN) agencies and expert bodies such as the UN Secretary-General's High Level Panel on Access to Medicines, UN Special Rapporteurs on the Right to Health, Right to Science and Right to Food to present their reports to the CDIP with a focus on the activities that the WIPO Secretariat and the Member States should undertake to address development issues raised by such experts.

V.2 Engagement of Developing Countries

While some of the recommendations of the independent review have been accepted, it is really in the hands of developing countries to ensure that these are implemented adequately. So far there has been no proposal from Member States on how to address these recommendations related to CDIP.¹⁷⁹ As one expert has observed, very few delegations

¹⁷⁶ The 2010 WIPO General Assembly had decided that the independent review should commence at the end of the 2012/2013 biennium. Developing countries had submitted a joint proposal by the African Group and the DAG on the terms of reference for the independent review at the eleventh session of the CDIP in May 2013, however the developed countries led by Group B tried to limit the scope of the independent review. See WIPO, document CDIP/11/8. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_11/cdip_11_8.pdf. The Terms of Reference for the independent review of the implementation of the Development Agenda recommendations was agreed upon at the fourteenth session of the CDIP in 2014 after nearly two years of discussions. See WIPO, Annex to the Summary by the Chair, Committee on Development and Intellectual Property (CDIP), Fourteenth Session, 14 November 2014. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_summary.pdf. The actual review could only commence from May 2015.

¹⁷⁷ See WIPO, document CDIP/18/7, pp. 28-30. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_18/cdip_18_7-main1.pdf.

¹⁷⁸ Ibid., pp. 42-43.

¹⁷⁹ See WIPO, document CDIP/19/3. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_19/cdip_19_3.pdf.

among WIPO Member States have the ability to follow the highly technical reviews of projects carried out in the context of CDIP,¹⁸⁰ which leads to disengagement of delegates. Thus, there is need for reviewing the role of CDIP in in this context.¹⁸¹ Indeed, the level of participation of developing countries in CDIP has reduced significantly in comparison to the initial years following the adoption of the Development Agenda.¹⁸²

The deep engagement of developing countries in the course of the negotiation for the WIPO Development Agenda as well as their engagement on IP and development issues in CDIP and other WIPO bodies after the adoption of the Development Agenda was immensely strengthened by cross-regional coordination among developing countries in the form of the Group of Friends of Development, and later in the form of the Development Agenda Group (DAG). DAG was formed in 2010 with eighteen members – Algeria, Brazil, Cuba, Djibouti, Ecuador, Egypt, Guatemala, India, Indonesia, Iran, Malaysia, Pakistan, the Philippines, South Africa, Sri Lanka, Sudan, Uruguay and Yemen – with the objective of actively contributing to mainstreaming the development dimension in all areas of WIPO work.¹⁸³ DAG stressed that the Development Agenda addresses WIPO work in all its dimensions and should not be limited to any specific body within WIPO.¹⁸⁴

In furtherance of this vision, DAG called upon all WIPO bodies as well as the WIPO Secretariat to integrate the development dimension into their work and advanced certain guiding principles for the same. These guiding principles emphasised on the need to ensure that the WIPO Secretariat's technical assistance activities provide balanced advice on appropriate national IP strategies based on available flexibilities, exceptions and limitations; the need to ensure that norm-setting activities are oriented towards preservation of national policy space to enable countries to implement IP rules in a manner that is supportive of economic development; the need to develop appropriate solutions, guidelines and/or instruments to facilitate transfer of technology to developing countries; the need for an effective mechanism for coordination, monitoring, assessment and reporting on the implementation of the Development Agenda by all WIPO bodies; the need for streamlining WIPO governance to ensure more effective oversight of WIPO Program and Budget, well-defined and clear rules of procedure for all WIPO bodies, equitable geographical representation of all nationalities in the WIPO Secretariat staff, and mainstreaming of civil society participation in WIPO deliberations; the need to ensure neutrality of the staff of WIPO secretariat; the need for effective and independent external oversight; and the need to address IP enforcement issues in the context of other public policy and development priorities.¹⁸⁵

Various proposals by DAG were instrumental behind several initiatives undertaken by CDIP such as the establishment of a coordination, monitoring, assessment and reporting mechanism on the implementation of the Development Agenda by relevant WIPO bodies, discussions on WIPO technical assistance in the area of cooperation for development in the context of the report of the external review of WIPO technical assistance, and the adoption of

¹⁸⁰ This is particularly important for developing countries who have limited numbers of diplomats who are responsible for WIPO along with a number of other agencies in Geneva, in contrast in with developed countries who have greater human.

¹⁸¹ See Catherine Saez, WIPO Development Agenda Needs More Promotion, Country Involvement, Experts Say, *Intellectual Property Watch*, 5 October 2016. Available from <http://www.ip-watch.org/2016/10/05/wipo-development-agenda-needs-more-promotion-country-involvement-experts-say/>.

¹⁸² Syam, "Outcomes of the Nineteenth Session" (sect. V, footnote 171).

¹⁸³ WIPO, document CDIP/5/9 Rev.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, pp. 3-5.

a project on South-South cooperation on IP and development. These initiatives that were pursued in CDIP at the behest of the DAG were also deeply resisted by the developed countries, and over subsequent sessions of CDIP many of these initiatives have become dormant as the participation of developing countries in the CDIP diminished. Thus, it is imperative that developing countries revive cross-regional coordination among them and replicate the approach adopted by the Group of Friends of Development and DAG. The DAG guiding principles and several of the proposals that have been advanced by DAG in CDIP and other WIPO bodies continue to be relevant today and should be pursued with renewed vigour. The DAG was also instrumental in mainstreaming development issues in the most technical of WIPO Committees – the Committee on Standards (CWS), the beginning of text based negotiations in the IGC, the adoption of the Marrakesh Treaty, as well as appointment of a developing country (India) as WIPO External Auditor for the first time in its history.

The independent review of implementation of the Development Agenda has recommended to enhance coordination between Geneva-based missions and their IP Offices and other authorities in capital in order to have a coordinated approach in dealing with CDIP and raising awareness about the benefits of the Development Agenda and that a higher level participation of national based experts should be enhanced in the work of the committee. In order to implement this recommendation, it must be ensured that all activities proposed by the WIPO Secretariat at the country level and all communication from the WIPO Secretariat to the country level, are transmitted through the Geneva-based Missions. Missions could also ensure that WIPO technical assistance activities involve other relevant intergovernmental organizations that also offer technical assistance activities on IP, so as to benefit from diverse perspectives.

V.3 Evaluation of the Project Methodology

Implementation of the Development Agenda recommendations through a project based approach has had limited impact in terms of mainstreaming development orientation in deliberations concerning IP. The total budget for CDIP projects represents less than 10 per cent of the total WIPO budget for all development cooperation activities.¹⁸⁶ Thus, CDIP approved projects comprise a small fragment of other development cooperation activities of WIPO, and hence, they do not reflect a complete mainstreaming of the Development Agenda. Moreover, though CDIP discusses the alignment of WIPO development cooperation activities and approves specific projects, it is not involved in the planning or assessment of WIPO overall development cooperation activities.¹⁸⁷

The evaluation reports of the completed CDIP projects have not assessed the impact of the projects on achieving the objectives of the Development Agenda. Rather, these were project management evaluations limited to the efficiency of design and management of the projects. Though the WIPO Secretariat seeks to mainstream the project activities within its regular programme activities, there is no mechanism to enable Member States to effectively

¹⁸⁶ Carolyn Deere Birkbeck and Santiago Roca, “An External Review of WIPO Technical Assistance in the Area of Cooperation for Development”, Final Report submitted to the WIPO, Geneva, 31 August 2011, p. iii. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_dev_ge_11/wipo_ip_dev_ge_11_ref_2_deere.pdf.

¹⁸⁷ Ibid., p. ix.

review how some of the completed Development Agenda projects are being mainstreamed.¹⁸⁸ The inadequate evaluation of the development impact of these projects is also a matter of concern because of the risk that certain project activities which could be detrimental to development interests could also be mainstreamed in the name of development.

The independent review of implementation of the Development Agenda recommendations found that in comparison with the initial activity based approach adopted by CDIP which involved agreeing to activities related to a specific recommendation, the thematic project-based approach has been useful in translating the recommendations into actionable activities and to ensure faster implementation and eliminate duplication of resources.¹⁸⁹ It also found that for some members the project-based approach is adequate while for other members it has been insufficient, and observes that the approach was a good modality to kick start implementation of the Development Agenda recommendations in absence of other options. Significantly, the review observed that after the approval of the project, “Member States rarely conduct follow up to the discussions undertaken in CDIP.”¹⁹⁰ It also pointed to a lack of a systematic and coordinated approach due to the absence of a better understanding of the links between IP and development. The review also pointed to the need to avoid mechanically linking any activity or project to a Development Agenda recommendation without assessing whether the same could have been initiated as a regular WIPO activity.¹⁹¹ Limited absorption capacity and local expertise in some beneficiary countries also impacted the sustainability of the projects in some cases. The review thus recommended the establishment of a mechanism to share experience and best practices from successfully implemented projects, including review of their sustainability, and also to consider the absorption capacity and local expertise of beneficiaries while designing the project.¹⁹² While these recommendations have been adopted by CDIP, there is still no specific proposal aimed at implementing these recommendations.¹⁹³

To advance on these recommendations of the independent review, future project proposals in the CDIP could be required to justify the need and added value of undertaking an activity as a Development Agenda project rather than a regular WIPO programme activity. Every project proposal should include an assessment by the WIPO Secretariat of the absorption capacity and level of expertise of project beneficiaries and how the project is adapted to the same. This should also include a statement on the UN agencies and other entities with a related interest on the issue present at the national level and the potential for cooperation with them. Progress reports on project implementation should demonstrate the knowledge and expertise of experts recruited to undertake activities under the project, about the socio-economic conditions of the recipient countries. Relevant departments besides the IP offices must be consulted in the design and implementation of projects.

¹⁸⁸ WIPO, document A/54/4. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_54/a_54_4.pdf (It was pointed out in the report of the external auditor to the 2013 Assemblies of the Member States of WIPO that though resources were re-allocated from the regional bureaus to the substantive programmes with the objective of mainstreaming development activities, the lack of a precise definition or methodology of determining the share of development expenditure obfuscated how the resources were re-allocated to the substantive programmes for development activities.)

¹⁸⁹ WIPO, document CDIP/18/7, pp. 25-26. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_18/cdip_18_7-main1.pdf.

¹⁹⁰ Ibid., p. 35.

¹⁹¹ Ibid., pp. 35-36.

¹⁹² Ibid., p. 43.

¹⁹³ WIPO, document CDIP/21/11 (inputs from Member States on modalities and implementation strategies of the adopted recommendations of the independent review).

Once a project has been completed, the substantive learning from the project is expected to be mainstreamed. However, currently there is no mechanism of following up on how activities undertaken under the projects will be subsumed within regular programme activities. Therefore, following the completion of a project, the objectives of the project should be translated into expected results with accompanying outcome indicators in the Program and Budget, for each of the programmes involved in implementation of the project.

V.4 Promotion of IP Flexibilities

One of the most prominent examples of development dimension relating to IP is how to balance IP protection and enforcement with access to the protected inventions and creations. While the Development Agenda recommendations stress on the importance of retaining and using flexibilities,¹⁹⁴ it does not define what is meant by flexibilities. Flexibilities in IP agreements provide governments some policy space to ensure that the scope of IP protection is calibrated with adequate safeguards so that IP rights do not impede the pursuit of public interest objectives such as public health, food security, access to education and reading material, etc.

However, the WIPO website states that: “... flexibilities can operate either downward or upward, i.e. *they may permit measures that reduce or limit the rights conferred; or measures that raise the level of protection above the minimum standards established by the TRIPS Agreement.*”¹⁹⁵ This perspective on flexibilities is completely contrary to the objective of ensuring that policy space is not undermined or eroded through raising the standards of IP protection, e.g., through harmonisation. Thus, it will be very important for Member States of WIPO to clarify the understanding of flexibilities from a development perspective and provide guidance on how the WIPO Secretariat should undertake legislative and technical assistance activities on them.¹⁹⁶

In this context, a critical issue is whether the promotion and use of flexibilities in the IP system to achieve development objectives have been adequately and effectively integrated in WIPO technical assistance and norm-setting activities. The independent review of implementation of the Development Agenda recommendations found that a number of initiatives on flexibilities have been undertaken pursuant to the Development Agenda recommendations.¹⁹⁷ However, the review did not comment on the substantive content of those initiatives. An overview of discussions in CDIP and initiatives undertaken by the WIPO

¹⁹⁴ Flexibilities are recognized in a number of Development Agenda Recommendations. Recommendation 14 states that WIPO shall make available advice to developing countries and LDCs on the implementation and operation of the rights and obligations and the understanding and use of the TRIPS flexibilities.

Recommendation 17 of the Development Agenda states that in its activities, including norm-setting, WIPO should take into account the flexibilities in international IP agreements, especially those which are of interest to developing countries and LDCs. These two recommendations were marked for immediate implementation. Recommendation 22 of the DA states that WIPO working documents for norm-setting activities should address potential flexibilities, exceptions and limitations for Member States. Recommendation 25 calls upon WIPO to explore IP-related policies and initiatives necessary to promote the transfer and dissemination of technology and to take appropriate measures to enable developing countries to fully understand and benefit from provisions pertaining to flexibilities in IP agreements.

¹⁹⁵ Available from, http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html.

¹⁹⁶ See South Centre, “South Centre statement at WIPO Assemblies 2018”, South News, No.229, 4 October 2018. Available from <https://us5.campaign-archive.com/?u=fa9cf38799136b5660f367ba6&id=cfe22ca5d7>.

¹⁹⁷ WIPO, document CDIP/18/7, pp. 28, 35. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_18/cdip_18_7-main1.pdf.

Secretariat on flexibilities suggests that there is lack of a sustainable, long-term work programme and technical assistance tools on flexibilities that could deepen the understanding of their role in advancing development objectives through their effective utilisation.¹⁹⁸

Various reports from the WIPO Secretariat merely state that it has been working on flexibilities through its legislative, technical assistance and capacity building activities, without much detail. However, this does not seem to be any different from WIPO activities before the adoption of the Development Agenda. No material has been presented by the WIPO Secretariat to suggest effective integration of the use of flexibilities in WIPO technical assistance, legislative assistance and capacity building activities. Rather, the warped understanding of flexibilities as policy space for raising standards of IP protection raises the concern whether unfettered expansion of IP protection in developing countries, without appropriate assessment of their development implications, are being promoted in the name of flexibilities.

Currently, the WIPO Secretariat addresses flexibilities as a response to requests or decisions of Member States only, and there is little initiative on the part of the WIPO Secretariat to promote flexibilities. For example, one of the WIPO Secretariat's primary public relations outreach tools, the WIPO magazine¹⁹⁹, does not contain any article or case study on flexibilities. More than a decade after the adoption of the Development Agenda, there is no WIPO publication that specifically focuses on the role of IP flexibilities in addressing various development objectives.²⁰⁰

This is also the case with various studies on specific flexibilities that have been discussed in CDIP.²⁰¹ The Committee on Development and Intellectual Property has been unable to agree on an ambitious and effective work programme on flexibilities due to the opposition of developed countries to the same. Significant proposals that were made at the

¹⁹⁸ Available from http://www.wipo.int/ip-development/en/agenda/flexibilities/flex_dev_agenda.html (A work program on flexibilities in the IP system had been under discussion in the CDIP since the fifth session of the CDIP. At its eighth session the CDIP considered a report by the Secretariat (CDIP/8/5) providing information to the Member States on WIPO work in this area. This report listed in an annex the activities carried out in various countries and their impact under the broad heading "Summary of Activities undertaken by WIPO related to Flexibilities in the Intellectual Property System." However, the activities described were very general in the nature of comments on various forms of IP regimes in different regions as inputs that are used by national authorities in the revision or implementation of their legal framework, development of draft laws on different forms of IP, specific country missions for formal consultations to discuss legal and policy options available in the context of country needs and priorities, and seminars and workshops to raise awareness about the flexibilities available within the multilateral framework. The activities described in the report merely asserted that WIPO has been undertaking work on flexibilities, but there was no information that would enable an assessment of the extent to which the flexibilities are being promoted and the modalities of the same.)

¹⁹⁹ Available from https://www.wipo.int/wipo_magazine/en/.

²⁰⁰ A database on flexibilities has been established on the WIPO website that provides a verbatim reproduction of flexibilities as they are implemented in various national legislations. This is insufficient, as the database would be more useful if it contained information on the experiences of countries in implementing the flexibilities in practice. A number of developed and developing countries have made use of various flexibilities to address public interest considerations that were critical to them. See WIPO, Database on Flexibilities in the Intellectual Property System. Available from <http://www.wipo.int/ip-development/en/agenda/flexibilities/database.html> (accessed 20 October 2018).

²⁰¹ The WIPO secretariat has submitted a number of studies on patent related flexibilities in the CDIP. These are – WIPO, document CDIP/5/4. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_4-main1.pdf; WIPO, document CDIP/7/3. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_3-main1.pdf; WIPO, document CDIP/13/10. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_13/cdip_13_10.pdf; WIPO, document CDIP/15/6. Available from http://www.wipo.int/edocs/mdocs/en/cdip_15_6-main1.pdf.

eighth session of CDIP by developing countries were opposed.²⁰² Though CDIP agreed on a compromise to arrive at a work programme on flexibilities that was limited to studies on how specific patent related flexibilities have been implemented in national laws,²⁰³ these studies have not addressed the practical use of those flexibilities as experienced by various countries. Member States should take the initiative and ask the WIPO Secretariat to work on practical implementation of flexibilities. In this context, under the newly established agenda item on IP and development in the CDIP, a session with representatives of Member States to the WTO TRIPS Council could be very useful. WIPO has remained insulated from the real world of IP issues that are discussed in the WTO and this artificial insulation should be removed by bringing in more interaction with TRIPS Council in WTO and institutional involvement and exchanges between the two entities. Developing countries should especially make efforts to ensure that their WTO and WIPO delegates attend both meetings and coordinate closely. Otherwise, the Development Agenda will remain an academic exercise in WIPO that is divorced from the real world.

While there has been disagreement on advancing the work on flexibilities in the CDIP in the face of objection by developed countries, this should not be a hindrance to the promotion of flexibilities and of their effective utilization by the WIPO Secretariat. Indeed, various WIPO initiatives and presentation by WIPO staff and consultants on promotion of IP protection have been undertaken without the need for specific approval from Member States. Conversely, Member States have unanimously provided guidance and empowered the WIPO secretariat through the Development Agenda recommendations to integrate the development dimension by effectively addressing the use of flexibilities by developing countries and LDCs.

V.5 Technical Assistance and Capacity Building Activities

During the negotiations on the Development Agenda, the Group of Friends of Development had proposed the following principles on technical assistance:

- a) the provision of technical assistance should be development oriented;
- b) the technical assistance programmes and activities should be mutually supportive and coherent with relevant international instruments and national development policies;
- c) technical assistance programmes and activities should adopt an integrated approach, expanding its coverage to include matters related to competition policy and related regulatory regimes;
- d) the provision of technical assistance should be neutral, of advisory nature and non-discriminatory among recipients or issues to be addressed;
- e) the technical assistance programmes and activities should ensure that IP laws and regulations are tailored-made and demand-driven;
- f) WIPO technical assistance staff and consultants should be fully independent;
- g) WIPO technical assistance programmes and activities should be continually evaluated independently and internally to ensure its effectiveness;
- h) transparency in all aspects of technical assistance should be ensured.²⁰⁴

²⁰² WIPO, document CDIP/8/9, pp. 80-87. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_5.pdf.

²⁰³ WIPO documents, CDIP/8/5 and CDIP/9/11.

²⁰⁴ WIPO, document PCDA/2/2 (sect. III, footnote 123).

Based on these principles, developing countries proposed that guidelines and disciplines on various aspects of technical assistance should be developed. These should include the following guidelines and disciplines:

- All information about design, delivery, cost, financing and implementation of technical assistance programmes should be made publicly available.
- Technical capacity of developing countries should be developed to fully use in-built flexibilities existing in the international IP system to advance national pro-development policies.
- The relationship between IP and competition law should be fully explored to ensure an integrated approach.
- There should be minimum social costs for IP protection and enforcement in developing countries.
- Implementation of international IP obligations should not overburden scarce national resources.
- Technical assistance providers must be independent.
- There should be continuous evaluation of the effectiveness of technical assistance programmes.
- There should be agreement on how to implement the relevant provisions on anti-competitive practices, and flexibilities and limitations of the TRIPS and WIPO agreements.
- Financial mechanisms should be set up for promoting development-friendly technical assistance to developing and least developed countries (LDCs), particularly in Africa.
- Separation of WIPO technical assistance and norm-setting functions.
- Benchmarks and indicators must be established for evaluation of technical assistance and capacity building activities of WIPO.²⁰⁵

The cluster of recommendations on technical assistance and capacity in the Development Agenda captures some of the principles that the proponents sought to introduce.

In order to achieve the objectives of the Development Agenda recommendations, developing countries should be provided assistance, upon request, to build their capacity in the following aspects:

- Develop national IP policies, laws and regulations to be in line with development objectives and public policies of relevance in areas such as health, agriculture, environment, science and technology, and education, and carefully balance the economic and social cost of IP protection and enforcement against the benefits.
- Incorporate flexibilities permissible under existing international agreements that a country may be party to into national IP policies, laws and regulations.
- Establish and/or strengthen robust IP institutions and systems to implement development oriented IP policies, laws and regulations, and IP flexibilities. This includes, the ability to:
 - apply rigorous criteria for the granting of patent rights;
 - conduct thorough search and examination when assessing the validity of a claim in an IP application;
 - make effective use IP related flexibilities;

²⁰⁵ WIPO, document IIM/1/4. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf.

- assist local industries to engage with the IP system, particularly SMEs and start-ups;
- use competition law to prevent and address the abuse of IP rights;
- enable the judiciary to make balanced judgments in disputes concerning IP, taking into account the interests of all the parties involved and of the public.

V.5.1 Technical Assistance on Developing National IP Policies

The WIPO Secretariat has been providing technical assistance to developing countries and LDCs to produce national IP strategies, policies or plans even before the adoption of the Development Agenda. Following the adoption of the Development Agenda, Member States have clarified in CDIP that WIPO technical assistance in the development of national IP strategies, policies and plans should be consistent with national development plans and any other sector specific national plan. In 2009 CDIP had approved a project to develop a standard methodology and tools for the development of national IP strategies that are aligned with national development goals.²⁰⁶ National IP strategies were developed so far under this project in six countries – Algeria, Dominican Republic, Mali, Moldova, Mongolia and Tanzania. Various WIPO programmes have also provided technical assistance to many developing countries in respect of development of national IP strategies, policies and plans. The WIPO Secretariat has also developed toolkits on the methodology for the development of national IP strategies.²⁰⁷

The external review of WIPO technical assistance in the area of cooperation for development pointed out several shortcomings in the way the WIPO Secretariat provides support for IP policies or strategies. First, there is confusion within the WIPO Secretariat and among Member States about what constitutes an IP strategy, policy or plan and their purpose. Second, there is inconsistency in terms of the methodology followed by different Regional Bureaus of WIPO with regard to designing national IP policy and there is lack of clarity regarding the WIPO Secretariat's role in the formulation of different strategies. There is no way to assess the extent to which the WIPO Secretariat's methodologies and tools for designing IP policies are actually used in the development of national IP strategies. Third, WIPO often conflates IP strategy with innovation strategy. Compilation of most of the IP strategies and plans available with the WIPO Secretariat do not sufficiently clarify their development orientation. Fourth, the IP strategies developed by the WIPO Secretariat often focus on the strategy of an IP Office rather than involving other institutions. Fifth, the WIPO Secretariat has not attempted to collaborate with other intergovernmental organisations that have also addressed IP policy in relation to specific sectors.²⁰⁸

According to the WIPO Secretariat, a national IP strategy consists of a set of measures that encourage and facilitate the effective creation, development, management and protection of IP at the national level, in order to strengthen a country's ability to generate economically viable IP assets.²⁰⁹ This understanding of national IP strategy clearly pursues creation of IP as an end in itself and tends to focus predominantly on raising the standards of IP protection and

²⁰⁶ See WIPO, document CDIP/3/INF/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_inf_2.pdf.

²⁰⁷ Available from <http://www.wipo.int/ipstrategies/en/>.

²⁰⁸ Deere Birkbeck and Roca, "An External Review of WIPO Technical Assistance", pp. 78-79 (sect. IV, footnote 186).

²⁰⁹ Available from <http://www.wipo.int/ipstrategies/en/>.

enforcement.²¹⁰ Indeed, as observed in the external review of WIPO technical assistance in the area of cooperation for development, certain WIPO tools on national IP strategy placed over emphasis on IP enforcement with questions that would lead beneficiary countries to think that provisions on IP enforcement under the national laws was inadequate.²¹¹

The project relating to national IP strategies resulted in the development of a standard methodology for designing national IP strategies²¹² by using a series of tools such as: a questionnaire aimed at a) assessing the current status of a country's IP system, b) defining strategic IP targets and priority areas and c) their relevance to national economic development objectives and plans;²¹³ guidelines for national consultants and international experts entrusted with designing national IP strategies; and a roadmap to assist national consultants in drafting the national IP strategy.²¹⁴ These tools have now been mainstreamed and are being used in technical assistance provided by the WIPO Secretariat to developing countries to design national IP strategies.²¹⁵

²¹⁰ The most important issue in the formulation of domestic IP policy is the integration of the IP policy into different aspects of the national development policies such as industrial and agricultural policies, health policy and environmental policy. The basic purpose of an IP policy should be to ensure that IPRs promote activities that improve the prospects of social and economic development. The focus should not be on pursuing the protection and promotion of IPRs as an objective per se, but rather on the interface between IP and other national policies. See Carlos Correa (2010), *Designing Intellectual Property Policies in Developing Countries* (Penang, Malaysia, Third World Network, 2010).

²¹¹ Letter to WIPO from 45 Civil Society Groups : IP Enforcement, 29 November 2011. Available from <http://infojustice.org/archives/6285>.

²¹² According to the methodology developed under this project, development of a national IP strategy would involve the following steps: an assessment mission by the WIPO Secretariat to meet institutions responsible for development of the national IP strategy in the country concerned as well as other key stakeholders. The assessment team would also help to identify and train the national team of experts who will be responsible for drafting the strategy. The project team selected with the help of the WIPO Secretariat's assessment team would carry out an IP audit and develop a strategy document and an action plan. The project team would carry out a desk review of existing policy documents to assess the national development objectives and policies and identify how to align the IP strategy with the national development priorities. The project team would also undertake a survey of the IP situation in the country using a questionnaire tool developed by WIPO. National consultations will be carried out with stakeholders to validate the findings of the IP audit. Based on the recommendations or suggestions from the national consultations the project team will formulate the national IP strategy and action plan. A second round of stakeholder consultations will be undertaken to validate the draft IP strategy. See WIPO, "Methodology for the Development of National Intellectual Property Strategies : Tool 1 : The Process" (Geneva, 2014). Available from http://www.wipo.int/edocs/pubdocs/en/intproperty/958/wipo_pub_958_1.pdf.

²¹³ The baseline survey questionnaire for conducting IP audit by the national experts focuses on seven clusters – IP administration and management, generation of IP by different national entities, commercialization of IP and technology transfer by such entities, copyright and copyright industries, plant variety protection, IP enforcement, and IP and public policy. On IP administration and management, the questionnaire focuses on issues such as the legal status, functions, autonomy, staffing, automation and modernization, number of IP applications, number of IP professionals registered, communications technologies used, the existence of an IP tribunal, compliance with TRIPS, use of TRIPS flexibilities and compliance with other international agreements, treaties and protocols. The questionnaire also asks about any problems in the existing IP laws and regulations and whether the national IP office has sufficient resources to address these problems, the priorities of the IP office in terms of developing the IP system, and the organizations and institutions that should be consulted in the process of formulating the IP strategy.

²¹⁴ WIPO, document CDIP/8/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_2.pdf.

²¹⁵ WIPO, document A/51/5, p. 5. Available from http://www.wipo.int/edocs/mdocs/govbody/en/a_51/a_51_5.pdf.

Though the project has been officially completed, the project evaluation report²¹⁶ observed that there was no systematic collection of qualitative evaluation data and information under the project. The evaluation report also observed that there was no clarity regarding follow up activities after the project activity was completed. For example, in Tanzania even after the development of the methodology for designing the national IP strategy with assistance from the WIPO Secretariat, national stakeholders were waiting for the WIPO Secretariat to develop the national IP strategy.²¹⁷ Thus, it is unclear whether the methodologies and tools developed under the project for designing national IP strategy have had any substantial impact in terms of actual development and adoption of national IP strategies led by the countries themselves and responsive to their particular conditions and needs in various sectors. In this context, Member States should consider undertaking in the CDIP an assessment of the effectiveness of the national IP policies established pursuant to WIPO technical assistance on developing national IP policies.

It is also important to assess whether the methodologies and tools developed under the project for assisting developing countries to design national IP strategies are appropriately development-oriented. As the external review of WIPO technical assistance in the area of cooperation for development observed, the WIPO Secretariat's technical assistance activities have been more focused on integrating developing countries into the IP system by attempting to derive benefits rather than to assist to lower the costs developing countries and their stakeholders may face in using the IP system. The WIPO Secretariat's technical assistance activities have been strongly oriented towards improvements in IP administration, public awareness of the IP system, adoption of IP laws and promoting accession to WIPO treaties.²¹⁸ An overview of the benchmarking indicators developed by the WIPO Secretariat as one of the tools for designing national IP strategies reflects that the standard methodology developed by the Secretariat for designing national IP strategies continues to have this orientation.²¹⁹ A development-oriented approach should rather aim at integrating IP into various national policies in a manner that is consistent with and instrumental to the achievement of their development objectives. Historical examples amply demonstrate how the developed countries have adapted IP rules to their changing needs and the gradual improvement of their industrial and technological capacities. For example, until the end of the nineteenth century, copyright protection in the US was denied to foreigners owing to the pursuit of policy objectives of ensuring affordable access to books for expanding literacy and to give competitive advantage to the US publishing industry. The Netherlands had abolished patent protection in 1869 to enable Philips to start production of light bulbs without infringing Edison's patents. The pharmaceutical industry in Switzerland flourished in the absence of patent protection until 1977. Similarly, the pharmaceutical industry was developed in India after product patent protection for pharmaceutical products were abolished in 1970.²²⁰ Though the policy space to

²¹⁶ There were significant limitations in the evaluation process itself. The project evaluation was based predominantly on desk research and interviews with WIPO project managers and other relevant officials. Field visits were undertaken in only two countries where national IP strategies were designed (Moldova and Tanzania) and there was a very low level of response to surveys conducted for the purpose of evaluation from national stakeholders or Geneva based missions.

²¹⁷ WIPO, document CDIP/10/7. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_10/cdip_10_7.pdf.

²¹⁸ Sangeeta Shashikant, "WIPO : Technical assistance criticized for shortcomings", *TWN Info Service on Intellectual Property Issues*, 14 November 2011. Available from

http://www.twn.my/title2/intellectual_property/info.service/2011/ipr.info.111105.htm.

²¹⁹ See WIPO, "Methodology for the Development of National Intellectual Property Strategies : Tool 3 : Benchmarking indicators" (Geneva, 2014). Available from

http://www.wipo.int/edocs/pubdocs/en/intproperty/958/wipo_pub_958_3.pdf.

²²⁰ Correa, *Designing Intellectual Property Policies*, p. 2.

adapt IP rules to national circumstances have been significantly limited by the WTO TRIPS Agreement, there is scope for exploring how the available policy space can be fully utilized by developing countries. It will be critical for national IP policies to be responsive to this need.

V.5.2 Development of National IP Institutions and Systems

The Development Agenda mandates that the WIPO Secretariat should undertake activities to build the capacity of national IP institutions, including IP Offices in developing countries and LDCs, with the objective of ensuring that they conduct their activities efficiently while ensuring that IP contributes to and does not impede the realisation of the public interest.²²¹ In the context of the need for developing countries to build robust IP Offices, these recommendations in the Development Agenda imply that capacity building in developing countries' IP Offices should not only focus on enhancing their efficiency in faster disposal of applications and reduction of backlogs; it should also focus on enhancing the ability of such IP Offices to conduct thorough search and examination to decide whether an application for the grant or registration of an IP right meets the relevant criteria under the applicable law and prevent the unwarranted grant of IP rights.

However, the focus of the WIPO Secretariat's activities in the area of capacity building has been predominantly on enhancing the efficiency of IP Offices in developing countries and LDCs for expeditious disposal of IPR applications through digitisation and automation tools provided to IP Offices by the WIPO secretariat.²²²

Furthermore, WIPO has provided the initial seed investment to establish “start-up” national IP academies in six developing countries under a project for implementing Recommendation 10 of the Development Agenda.²²³ However, there is no evaluation of whether the regular IP training programmes offered by the start-up academies actually achieved the objective of Recommendation 10 of the Development Agenda of building the understanding of the trainers about how IP impacts the ability of countries to realise public interest objectives in areas such as public health, food security, etc., and how IP can be harnessed while safeguarding the public interest from being adversely impacted by IP. Another Development Agenda project involved deployment of customised ICT infrastructure and e-communications systems for OAPI and ARIPO and two Member States of each of these regional IP offices in Africa, deployment of customised automation solutions for IP institutions in three LDCs, and regional workshops on office automation.²²⁴ Moreover, under the project on improvement of national, sub-regional and regional IP institutional and user capacity, there was a component on facilitating effective management of search and examination of IP applications through work sharing or pooling of resources in regional

²²¹ Recommendation 10 of the Development Agenda calls upon WIPO to assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. Recommendation 11 (for immediate implementation) further calls upon WIPO to assist Member States in strengthening national capacity for protection of domestic creations, innovations and inventions.

²²² Available from https://www.wipo.int/global_ip/en/activities/ip_office_business_solutions/.

²²³ WIPO, document CDIP/9/10 Rev.1.

²²⁴ WIPO, document CDIP/3/INF/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_inf_2.pdf.

systems of IP protection.²²⁵ This is in spite of the fact that in both the PCT Working Group and the Standing Committee on the Law of Patents (SCP), developing countries have raised concerns about the possibility of search and examination of patent applications by national patent offices being adversely influenced by work sharing with other Offices.²²⁶ In fact, the focus on promotion on work sharing between IP Offices was an integral element of the WIPO Patent Agenda, which was sought to be limited through the Development Agenda. Officials in some developing countries have expressed the concern that technical assistance to modernise IP offices tends to predominantly benefit foreigners who are the greatest users of the IP system and seek to acquire and maintain their IP rights in a given country.²²⁷

In contrast to this emphasis on IP Office automation, little has been done in terms of enhancing the capacity of developing countries to establish robust patent examination systems to conduct thorough search and examination of applications for the grant of IP rights in accordance with national legal standards and policies. It has been well-established that IP rights are often secured to strategically restrain the entry of competitors²²⁸ and therefore it is necessary to ensure through thorough search and examination that national offices do not grant frivolous IP rights which do not make any genuine contribution to innovation but can be used strategically to restrain competition. Indeed, many countries have adopted guidelines and developed institutional mechanisms to strengthen search and examination of applications for grant of IP rights.²²⁹ However, the WIPO Secretariat has not taken any initiative to raise awareness about such guidelines or mechanisms and has restricted its focus on facilitating faster disposal of applications through promotion of work sharing and accelerated examination.

In addition, the WIPO Secretariat has been supporting developing regional IP offices with the objective of expanding IP rights, strengthening enforcement, harmonising regional laws and facilitating the grant of IP rights by one central office that will take effect in all Member States. It has been reliably reported that WIPO has provided support to an initiative to establish a Pan African Intellectual Property Organization (PAIPO) in Africa.²³⁰ More than a decade after the adoption the Development Agenda, most countries in Africa do not have the capacity to conduct thorough search and examination of applications for the grant of IP

²²⁵ WIPO, document CDIP/3/INF/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_inf_2.pdf.

²²⁶ See K.M. Gopakumar, "WIPO: Developing Countries Oppose Proposals on Work-sharing in Patents Committee", 30 January 2014. Available from <http://infojustice.org/archives/32069>.

²²⁷ Deere Birkbeck and Roca, "An External Review of WIPO Technical Assistance", p. 114 (sect. IV, footnote 186).

²²⁸ See European Commission, "Pharmaceutical Sector Inquiry: Preliminary Report", DG Competition Staff Working Paper (28 November 2008). Available from http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf.

²²⁹ For example, in Brazil the national health surveillance agency – ANVISA – used to mandatorily intervene in the assessment of pharmaceutical patent applications to assess public health implications of grant of a patent on the relevant application ; see Carlos Correa (2011), "Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing", Research Papers 41 (Geneva, South Centre, 2011), p. 7. Available from http://www.southcentre.int/wp-content/uploads/2013/05/RP41_Pharmaceutical-Innovation_EN.pdf; Argentina has adopted new guidelines in May 2012 for examining pharmaceutical patent applications which specify a number of frivolous changes to drugs which will not be acceptable for the grant of patents, see Don't Trade our Lives Away, "Argentina adopts guidelines to examine patent applications for pharmaceuticals", 31 May 2012. Available from <https://donttradeourlivesaway.wordpress.com/2012/05/31/argentina-adopts-guidelines-to-examine-patent-applications-for-pharmaceuticals/>; The Patents Act in India (sect. 3.d) prohibits patenting of new forms of known pharmaceutical substances unless enhanced therapeutic efficacy can be proved.

²³⁰ See "WIPO Report on Support to NEPAD – July 2008 to June 2009", p. 4. Available from <https://carolinebncube.files.wordpress.com/2013/03/wipo-report-support-to-nepad.pdf>.

rights and are heavily reliant on regional offices such as ARIPO and OAPI for the administration of IP rights that would take effect in their territories.²³¹ Moreover, even these regional offices often have very limited capacity to conduct thorough search and examination and tend to rely on outcomes of IP applications in IP Offices in developed countries such as EPO, USPTO or JPO.²³² This has led to the grant of IP rights of questionable validity by regional offices.

Moreover, WIPO technical assistance has also not focused on the role that IP offices can play in making effective use of IP flexibilities. The review of WIPO technical assistance in the area of cooperation for development found that the primary focus of IP Offices in many developing countries is on technical, operational and administrative matters and that IP Offices are not always well-informed about broader policy issues concerning IP and development.²³³

V.5.3 Access to Patent Information in Developing Countries

Access to information about the patent status of particular inventions is necessary in order to ascertain whether a needed technology is under patent protection in the country and whether there is freedom to operate without infringing a patent. Based on this information developing countries can determine if the technology has to be procured through licensing, or if it can be reverse engineered by local firms. For example, lack of access to patent information can make drug procurement agencies in developing countries hesitant in procuring affordable generic medicines due to the fear of patent infringement.²³⁴ However, many developing countries do not have access to searchable patent databases and also lack capacity to make use of the information from such patent databases. There are many instances where unjustifiable patent claims have dissuaded local firms from entering the market in developing countries as they did not have access to the patent information to ascertain whether the patent claim would be upheld if legally challenged.²³⁵

In response to the Development Agenda recommendations,²³⁶ the WIPO Secretariat has implemented a project on developing tools for access to patent information. This project sought to provide developing countries and LDCs with services to facilitate the use of patent information on specific technologies for facilitating their indigenous innovation and R&D. Fourteen Patent Landscape Reports (PLRs) have been prepared in the areas of public health, food and agriculture, energy and the environment, and disabilities. The WIPO Secretariat has also established a dedicated web page containing links to 51 PLRs prepared by various IP Offices, private corporations, inter-governmental and non-governmental organizations.²³⁷ The

²³¹ See Shashikant, “The African Regional Intellectual Property Organization” (sect. II, footnote 94).

²³² Ibid.

²³³ Deere Birkbeck and Roca, “An External Review of WIPO Technical Assistance”, (sect. IV, footnote 186).

²³⁴ United Nations Development Programme, *Patent Information and Transparency: A Methodology for Patent Searches on Essential Medicines in Developing Countries* (New York, July 2012), p. 5. Available from <http://apps.who.int/medicinedocs/documents/s19575en/s19575en.pdf>.

²³⁵ See Anthony D. So and Rachel Sachs, “Making Intellectual Property Work for Global Health”, *Harvard International Law Journal Online*, vol. 53 (2012), p. 120. Available from http://www.harvardilj.org/wp-content/uploads/2012/02/HILJ-Online_53_SoSachs.pdf.

²³⁶ Recommendation 30 of the Development Agenda states that the WIPO Secretariat should cooperate with other intergovernmental organizations to provide developing countries and LDCs advice on how to gain access to and make use of IP related information. Recommendation 31 requires Member States of WIPO to agree and the Secretariat to undertake accordingly initiatives such as facilitating better access to publicly available patent information.

²³⁷ Available from http://www.wipo.int/patentscope/en/programs/patent_landscapes/published_reports.html.

secretariat has developed methodology guidelines for the preparation of PLRs, and it has also organized regional and national workshops on patent analytics.

The WIPO Secretariat has also created several databases pertaining to patent information. These are – the PATENTSCOPE database,²³⁸ Access to Research for Development and Innovation (ARDI),²³⁹ Access to Specialized Patent Information (ASPI) programme,²⁴⁰ the WIPO International Cooperation on the Examination of Patents (ICE) service,²⁴¹ the Technology and Innovation Support Center (TISC) programme,²⁴² the WIPO Digital Access Service System (DAS),²⁴³ WIPO Centralized Access to Search and Examination (CASE).²⁴⁴ The Secretariat has also published some booklets on how to access the PATENTSCOPE²⁴⁵ database²⁴⁶ and various forms of accessing technology.²⁴⁷

Though a number of patent information services have been established by the WIPO Secretariat, there is need for detailed assessment of the comparative advantages and cost-effectiveness of these services. The rate of utilization of some of the patent information services for developing countries such as ARDI and ASPI has been relatively low, and there is concern about the long-term sustainability of these services as they rely on voluntary, low-cost or free licensing from companies owning the patent information content.²⁴⁸ The PATENTSCOPE database does not comprehensively cover all national patent collections, and the full texts of the applications are not available for all countries. For developing countries, participation in PATENTSCOPE involves considerable investment and also carries the risk of providing competitive intelligence to developed country industries. It has been observed that some commercial patent search facilities provide more detailed options than PATENTSCOPE.²⁴⁹

V.5.4 Establishing or Strengthening Competition Authorities

During the negotiations on the Development Agenda, developing countries had proposed that in mainstreaming the development dimension WIPO should also focus on assisting developing countries to utilise competition policies to prevent abuse of IP rights and counter IP-related anti-competitive behaviour.²⁵⁰ Notably, developing countries proposed the development of an international framework to deal with issues of substantive law relating to anti-competitive licensing practices, and the development of appropriate enforcement mechanisms that can effectively restrain anti-competitive behaviour including mechanisms under which developed countries' authorities can undertake enforcement actions against firms headquartered or located in their jurisdictions for anti-competitive behaviour in developing countries.²⁵¹ Developing countries had also proposed that WIPO should consider model

²³⁸ Available from <http://www.wipo.int/patentscope/en/>.

²³⁹ Available from <http://www.wipo.int/ardi/en/>.

²⁴⁰ Available from <http://www.wipo.int/aspi/en/>.

²⁴¹ Available from http://www.wipo.int/patentscope/en/data/developing_countries.html.

²⁴² Available from <http://www.wipo.int/tisc/en/>.

²⁴³ Available from <http://www.wipo.int/das/en/>.

²⁴⁴ Available from <http://www.wipo.int/case/en/>.

²⁴⁵ Available from http://www.wipo.int/edocs/pubdocs/en/patents/434/wipo_pub_1434_07.pdf.

²⁴⁶ Available from http://www.wipo.int/edocs/pubdocs/en/patents/434/wipo_pub_1434_03.pdf.

²⁴⁷ Available from http://www.wipo.int/edocs/pubdocs/en/patents/434/wipo_pub_1434_02.pdf.

²⁴⁸ Deere Birkbeck and Roca, "An External Review of WIPO Technical Assistance", p. xxxi (sect. IV, footnote 186).

²⁴⁹ Ibid, p. 112.

²⁵⁰ Khor and Shashikant (eds.), *Negotiating a 'Development Agenda'*, p. 57 (sect. III, footnote 124).

²⁵¹ Ibid.

approaches on how to implement the relevant provisions of TRIPS relating to anti-competitive practices,²⁵² that provisions to deal with anti-competitive behaviour or abuse of exclusive rights should be included in new IP treaties, and the developing countries should be given technical assistance to better understand the interface between IP and competition policies.²⁵³

However, the Development Agenda recommendations that were finally adopted only made explicit references to some of the softer proposals that were made in relation to IP and competition policies.²⁵⁴ These are: technical cooperation to enhance the understanding of the interface between IP and competition policies, addressing links between IP and competition in working documents prepared by the Secretariat for norm-setting activities, providing a forum for exchange of national and regional experiences on IP and competition policies, and considering how to better promote pro-competitive IP licensing practices. Essentially, the Development Agenda recommendations relating to competition policies were limited to preparation of studies and exchange of experiences and did not address the development of specific mechanisms to deal with the problem of anti-competitive behaviour by IP right holders, except how to better promote pro-competitive IP licensing practices. This clearly suggests that there is a need for developing countries to take the discourse on IP and competition beyond the ambit of studies and sharing of experiences, and to explore mechanisms and substantive norms to prevent anti-competitive practices rights and develop effective enforcement mechanisms.

Very few developing countries have actually implemented or have the capacity to use competition law to achieve public policy objectives such as promotion of public health, and examples of the use of flexibilities in IP rules to address IP related anti-competitive practices are very limited. Competition law can be applied to address situations where existing safeguards under IP laws may not be sufficient to prevent an adverse impact of IP rights on consumers when there is an abusive exercise of IP rights. There is an important body of national administrative and judicial precedents, doctrinal work and guidelines, particularly in developed countries, which delineate principles and conditions for the application of competition law in relation to IP. Significantly, there are no binding international rules limiting the policy space to design national disciplines on competition law. Hence, countries are free to design the competition laws in accordance with their domestic interests and needs, taking their level of development into account, subject only to the limitations arising from the territorial applicability of such laws.²⁵⁵ However, with regard to implementation of the adopted Development Agenda recommendations on IP and competition policy, the WIPO Secretariat has demonstrated that it perceives IP as inherently pro-competitive.²⁵⁶ For example, the Secretariat published a study in 2007 which sought to establish IP and

²⁵² Arts. 8.2, 31 (k) and 40, Agreement on Trade Related Aspects of Intellectual Property Rights, 15 April 1994. Available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf>.

²⁵³ WIPO, document WO/GA/31/11.

²⁵⁴ See recommendations 7, 22, 23 and 32 of the WIPO Development Agenda.

²⁵⁵ See Carlos M. Correa, "Intellectual property and competition – room to legislate under international law", in Frederick M. Abbot (ed.), *Using Competition Law to Promote Access to Health Technologies: A Guidebook for Low and Middle-Income Countries* (United Nations Development Program, 2014), p. 35. Available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439416.

²⁵⁶ For example, the WIPO web page on IP and Competition Policy stresses only on how IP can benefit competition while describing the interface between IP and competition policy. Thus, it states, "Intellectual property (IP) allows consumers to make choices between competing entrepreneurs, and the goods and services they sell. Therefore, **IP is inherently pro-competitive** as it ensures the protection of differentiated, intangible business assets." (Emphasis added). Available from <http://www.wipo.int/ip-competition/en/>.

competition as complementary policies.²⁵⁷ This perspective on IP and competition essentially downplays the concerns that were raised by developing countries during the negotiations of the Development Agenda in relation to anti-competitive abuse of IP rights.

After the adoption of the Development Agenda, CDIP had approved a project proposed by the WIPO Secretariat on “IP and Competition Policy”.²⁵⁸ The project introduced IP and competition issues in WIPO training programmes on technology licensing, produced three studies on IP and competition in selected countries and regions, organised regional meetings on IP and competition and series of Geneva-based symposia, developed a guide on franchising, and undertook a survey on the use of compulsory licensing to curb anti-competitive practices. However, the studies produced under this project have not generated new knowledge to address the challenges faced by developing countries in relation to IP and competition policy. Rather, these studies have only pointed to the need for further studies. The studies also demonstrated a bias towards viewing IP as inherently pro-competitive. For example, a literature review concluded that the literature did not explicitly refer to IP as a barrier to market entry and recommended specific research to explore rights and practices as barriers to entry.²⁵⁹ Another study produced under that project on the interface between exhaustion of IP rights and competition law pointed to a lack of practical experience of using exhaustion regimes to address IP abuses in developing countries.²⁶⁰ Another study on abuse of IP rights to pursue sham litigation recommended deepening the international debate for identifying criteria of anticompetitive use of IP to enable courts to dismiss a significant number of cases.²⁶¹ Overall, these studies merely reconfirmed the existence of anti-competitive abuse of IP rights and the lack of practical experiences in developing countries to address the same, which the developing countries proposing the Development Agenda were aware of. They have not substantially generated new knowledge that can be of practical utility to developing countries in addressing concerns relating to anti-competitive abuse of IP rights.²⁶² Developing countries should advance specific proposals for a study in CDIP on how competition law can be used in the context of IP to advance their public policy objectives, drawing from the experiences of countries that have used competition law and also address the practical challenges that developing countries face in this regard.

Even the surveys conducted under the Development Agenda project had very limited impact. The survey on the use of compulsory licenses for anti-competitive uses of IP rights received responses from only 34 Member States of which 16 were developed countries.²⁶³

²⁵⁷ Gesner Oliveira and Thomas Fujiwara, “Intellectual Property and Competition as Complementary Policies : A Test Using an Ordered Probit Model” (2007). Available from http://www.wipo.int/export/sites/www/ip-competition/en/studies/study_ip_competition_oliveira.pdf.

²⁵⁸ WIPO, document CDIP/4/4 Rev. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_ref_cdip_4_4_rev.pdf.

²⁵⁹ WIPO, document CDIP/4/4 Rev./Study/INF/3. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_3.pdf.

²⁶⁰ WIPO, document CDIP/4/4 Rev./Study/INF/2. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf.

²⁶¹ WIPO, document CDIP/9/INF/6. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_6.pdf.

²⁶² However, the project evaluation concluded that the project has been instrumental in enhancing the understanding of policy-makers of the interface between IP and competition which is demonstrated by the signing of MoUs between IP and competition authorities in a number of countries, and there has been a discernable rise in the level of debate on IP and competition in WIPO. See WIPO, document CDIP/9/8. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_8.pdf.

²⁶³ WIPO, document CDIP/4/4 Rev./Study/INF/5. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_5.pdf.

The survey on measures to address the interface between antitrust and franchising agreements received only 29 responses from various countries, the majority of which were developed countries.²⁶⁴ The project evaluation has also pointed out that the impact of the project on industry licensing practices could not be measured. The evaluation report also concluded that it did not find it appropriate to make any recommendation on the direction or scope of future work in this area.²⁶⁵ The Committee on Development and Intellectual Property also did not provide any guidance in this regard.

In addition to the studies under the Development Agenda project, the WIPO Secretariat has also conducted sector specific or thematic studies on the interface of IP and competition policy. Some of these clearly reflect the WIPO Secretariat's perspective that IP is inherently pro-competitive. For instance, a study on the issue of refusal to license IP rights, which is a critical concern that was raised by developing countries during the negotiations on the Development Agenda, states in its conclusion that refusal to license is at the core of IP rights and that situations in which refusal to license can be anti-competitive are rare and exceptional.²⁶⁶ Thus, it can be said that the orientation of WIPO on IP and competition has not been substantially transformed by the Development Agenda.

V.5.5 Communications and Awareness Raising

The Development Agenda calls upon WIPO to promote a development-oriented IP culture with an emphasis on introducing IP at different academic levels and generating greater public awareness on IP.²⁶⁷ However, in practice very little attention has been given by WIPO on the development dimension in relation to IP in its public outreach programmes. The focus has been almost exclusively on promotion of IP per se.

The WIPO Secretariat provides technical assistance to support training and outreach activities at the national level with the objective of helping governments and right holders build awareness about the IP system, rights of IP holders and enforcement of IP. In this regard, WIPO uses a range of outreach and communications tools such as information brochures, documentaries, comic strips,²⁶⁸ animations and cartoons,²⁶⁹ etc. targeted to a diverse audience from policy makers to consumers and students.

The WIPO Secretariat's IP outreach campaigns focus exclusively on enhancing the understanding of IP through toolkits to assist entrepreneurs, award schemes for promotion of IP, and anti-piracy or anti-counterfeiting commercials.²⁷⁰ For example, WIPO videos on YouTube focus on counterfeit medicines and their health and safety risks,²⁷¹ though the WHO

²⁶⁴ WIPO, document CDIP/4/4 Rev./Study/INF/4. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_4.pdf.

²⁶⁵ WIPO, document CDIP/9/8. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_8.pdf.

²⁶⁶ WIPO, "Refusals to License IP Rights – A Comparative Note on Possible Approaches", Prepared by the Secretariat, August 2013, p. 18. Available from http://www.wipo.int/export/sites/www/ip-competition/en/studies/refusals_license_IPRs.pdf.

²⁶⁷ WIPO Development Agenda, Recommendation 3.

²⁶⁸ WIPO had organized a competition in 2010 inviting Japanese manga artists to create original works highlighting the health and safety risks of purchasing counterfeit products. Available from <http://www.wipo.int/about-wipo/en/offices/japan/outreach/manga/>.

²⁶⁹ Available from <https://www.youtube.com/playlist?list=PLE959E9FF7D8E0CF2>.

²⁷⁰ Available from <http://www.wipo.int/ip-outreach/en/tools/>.

²⁷¹ Available from <https://www.youtube.com/watch?v=geemYyOrFto>.

itself has recognised the need to separate IP considerations from quality considerations in relation to medicines.²⁷²

The WIPO Secretariat has instituted a number of awards with the objective of generating publicity to promote wider understanding of how, from its perspective, the IP system works to serve creativity and innovation. These awards are targeted at primary and secondary school children, business enterprises making imaginative use of IP, users of WIPO IP services, makers of creative works, and inventors making use of IP protection.²⁷³ Promotion of awareness about the benefits of IP is the sole objective of these awards, which makes the utilisation of the IP system by the innovator or creator a basic condition for the grant of the award. It is glaring to note, for example, that in spite of the Development Agenda recommendations calling for WIPO to promote alternative incentive mechanisms such as open source models, and also enrich the public domain, no award schemes are in place for developing inventions or creations through open source models or for taking measures to enhance the public domain.

It is interesting to note that the WIPO communications campaign database²⁷⁴ that has been developed to enable users to search WIPO outreach tools only mentions three search categories – IP creation, IP crime and IP use and awareness. The omission of the interface of IP with various development challenges from these search categories is noteworthy. Similar search categories are used for the databases on IP outreach research-surveys.²⁷⁵ Promotion of IP has also been the sole focus of various events organised by WIPO to celebrate the World IP Day.

The WIPO Secretariat's training programmes are comprised of various general and specialised courses that are organised each year in a number of developed and developing countries, periodical seminars, workshops and other meetings at the national, sub-regional and regional levels. These trainings are provided by the WIPO Academy. Target beneficiaries of the WIPO Academy include students and teachers, inventors and creators, business managers and IP professionals, policy makers, officials from IP institutions and diplomats.²⁷⁶ The WIPO Academy offers a Professional Development Program for government officials from developing countries and countries with economies in transition in specialised IP areas,²⁷⁷ joint post graduate degree programmes on IP with a partner academic institution from seven countries,²⁷⁸ and also an annual two-week colloquium for teachers of IP from developing countries and countries with economies in transition in collaboration with the WTO. The WIPO Academy has been offering distance learning courses since 1998 and also organises summer schools in various countries.

An overview of the joint degree programmes offered by the WIPO Academy shows that though IP flexibilities and development considerations are addressed in certain modules in the curricula, whether these issues are addressed adequately cannot be assessed without evaluating the course materials. An assessment of the course materials of the distance learning

²⁷² See World Health Organization, document A70/23, pp. 34-36. Available from http://www.who.int/medicines/regulation/ssffc/A70_23-en1.pdf?ua=1.

²⁷³ Available from <http://www.wipo.int/ip-outreach/en/awards/awards.html#schoolchildren>.

²⁷⁴ Available from <http://www.wipo.int/ip-outreach/en/tools/practice/>.

²⁷⁵ WIPO, IP Outreach Research – Surveys Database. Available from <http://www.wipo.int/ip-outreach/en/tools/research/> (accessed 25 October 2018).

²⁷⁶ Available from <http://www.wipo.int/academy/en/>.

²⁷⁷ Available from http://www.wipo.int/academy/en/courses/professional_training/.

²⁷⁸ Available from http://www.wipo.int/academy/en/courses/academic_institutions/.

programmes and the summer schools is necessary for evaluating whether the content of these courses are development oriented or merely promote the use of IP. Overall, the various courses and programmes offered by the WIPO Academy have sought to address the interface between IP and development issues in varied ways. In 2012 an independent review of the WIPO Academy was conducted but the WIPO Secretariat has refused to share the findings of this review with Member States in spite of the request of the Development Agenda Group and several other developing countries to the Secretariat to make the results of the review available to the Member States.²⁷⁹

The independent review of implementation of the Development Agenda also recommends that Member States and the WIPO Secretariat should consider ways and means to better disseminate information about the Development Agenda and its implementation. In this regard, Member States should call upon the WIPO Secretariat to deploy its outreach and communication tools including newsletters, the WIPO Magazine, social media, award schemes, WIPO Academy courses, etc. to promote awareness about the Development Agenda recommendations and its implementation. IP related development challenges in the field of public health, access to knowledge, protection of traditional knowledge, prevention of biopiracy, etc., should be made themes for greater awareness about the interface of IP with these issues, in WIPO outreach and dissemination tools.

V.6 Norm-Setting, Public policy and the Public Domain

Creating new multilateral norms on intellectual property has profound implications on national IP policy, laws and regulations. They may constrain, or support, the ability of countries to pursue their public policy goals. Thus, active participation of developing countries and LDCs in setting international norm-setting standards on IP is crucial in seeking to build an international IP system that recognises the various development stages and needs among countries. Moreover, in seeking to establish a multilateral IP system that balances IP protection with need for access and follow on innovation, norm-setting exercises should also take into account the diversity of interests among potential IP right holders, e.g. big industry, medium firms, small firms, and among other stakeholders, e.g. public health groups, consumer groups, educational institutions.

The proposal by the Group of Friends of Development for the establishment of a Development Agenda in WIPO had raised specific concerns regarding WIPO norm-setting processes. It had observed that norm setting should be more responsive to public interest concerns and specific development needs of developing countries. It also noted that alternative approaches such as the potential of open access models for promotion of innovation and creativity should be explored.²⁸⁰

²⁷⁹ Sangeeta Shashikant, "WIPO: Academy to be revamped, independent review remains secret", *TWN Info Service on WTO and Trade Issues*, 18 July 2013. Available from <http://www.twn.my/title2/wto.info/2013/twninfo130704.htm>.

²⁸⁰ See WIPO, document WO/GA/31/11. The Group of Friends of Development raised concerns about the negotiations on the Substantive Patent Law Treaty in the SCP and discussions on new forms of IP protection in the digital environment. It stated that adding new layers of IP protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new efforts for promoting innovation and creativity through initiatives such as the "Creative Commons". Norm-setting relating to IP protection in the digital environment must be balanced and take on board interests of consumers and the public at large, and safeguard existing exceptions and limitations in the domestic laws of Member States.

At the first meeting of the IIM, the Group of Friends of Development proposed the following specific guidelines on norm-setting:

- The WIPO Secretariat should not play a substantive negotiating role by endorsing or supporting particular proposals for the implementation or development of IP rules or standards.
- Only Member States should propose initiatives and priorities for the work plan of WIPO and its different bodies, and provide a clear indication of the actual need for, as well as the costs and benefits of the proposed norms.
- The necessity and desirability of new normative proposals should be assessed vis-à-vis other non-IP type or non-exclusionary options, in view of implementation burdens and potential loss of policy space that the proposed norms could entail.
- Differences in levels of technological, economic and social development should be reflected in operative and substantial special and differential treatment (S&DT) provisions for developing countries and LDCs. Such S&DT provisions should
 - recognize overarching objectives and principles of IP protection from a development perspective;
 - provide longer compliance periods (transitional arrangements);
 - safeguard national implementation of IP rules;
 - suppress anti-competitive practices.
- The pursuit of sustainable development should be the fundamental objective of any normative initiative on IP and development considerations should not be limited to a few specific exceptional provisions.
- Effective and active participation of a broad range of stakeholders, not limited to IP right holders, should be promoted in norm-setting processes in WIPO and their rights and interests should be given due consideration.²⁸¹
- WIPO norm-setting processes and outcomes should be fully compatible and actively support other international instruments that reflect and advance sustainable development objectives.²⁸²
- Under no circumstance can human rights be subordinated to IP protection.
- WIPO norm-setting initiatives should adequately support basic rights and public policy objectives enshrined by the international community in instruments such as the Millennium Development Goals (MDG), Plan of Implementation of the World Summit on Sustainable Development, and the Convention on Biological Diversity.²⁸³

In addition, the African Group proposal submitted at the third session of the IIM urged WIPO and its Member States to take pragmatic and constructive posture to satisfactorily advance negotiations in the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore. In addition, the African Group also supported norm-setting activities for elaborating a mechanism for facilitating access to knowledge and technology for developing countries and LDCs, and also supported a development impact assessment of new

²⁸¹ The Group of Friends of Development proposed holding public hearings prior to initiating any discussion on norm-setting in WIPO with broad participation of different stakeholders such as intergovernmental organizations, academia, consumer groups and other civil society organizations.

²⁸² The Group of Friends of Development also called for a development impact assessment (DIA) of each norm-setting initiative for core sustainable development indicators such as innovation, access by the public to knowledge and products, job creation, poverty alleviation, equity, respect for cultural diversity, protection of biodiversity, health and education.

²⁸³ WIPO, document IIM/1/4.

treaties and enhanced participation of civil society and other stakeholders in WIPO activities.²⁸⁴

At the first session of the PCDA, the Group of Friends of Development proposed that discussions should focus on what procedural and substantive approaches should be followed to norm-setting in WIPO to address the following elements, by drawing from the discussions in the IIMs and the General Assembly:

1. Norm-setting priorities should reflect the interests of both developed and developing countries.
2. Objectives or issues to be addressed in each proposed treaty or norms should be based on the views of all stakeholders, with special emphasis on participation by public health groups.
3. Potential impacts, especially development impacts, of norm-setting activities should be undertaken before commencing such activities, and the potential costs for developing countries should be evaluated through strengthened member-driven evaluations, studies and research.
4. WIPO treaties and norms should reflect the profound economic and social differences among WIPO Members.
5. There should be a system, overseen by Member States, for continuous objective evaluation of the actual impact and costs of treaties adopted, especially for developing countries.
6. There is need for exploring what measures are needed within WIPO to facilitate access to knowledge, specifically in developing countries through norm-setting initiatives such as a Treaty on Access to Knowledge, and also for maintaining and building a robust public domain in all WIPO Member States and other countries.²⁸⁵

All of the proposals by developing countries on norm-setting were captured in 28 proposals on norm-setting contained in the list of 111 proposals that were finally considered in the third session of the PCDA. Ultimately, the Development Agenda only contained 8 recommendations in cluster B. Although these recommendations can be read broadly to include many of the critical proposals that were raised by developing countries during the negotiation of the Development Agenda, in practice these recommendations have been interpreted narrowly. This has significantly limited the impact of the Development Agenda recommendations on norm-setting.

Most of the Development Agenda recommendations on norm-setting are in the nature of principles for immediate implementation.²⁸⁶ Only three recommendations focus on specific actions – promotion of norm-setting activities related to IP that support a robust public domain (Recommendation 20); ensuring that WIPO norm-setting initiatives support the UN development goals including the MDGs (Recommendation 22); ensuring that working documents for norm-setting activities prepared by the WIPO Secretariat should address issues such as safeguarding national implementation of IP rules, links between IP and competition, IP-related transfer of technology, potential flexibilities, exceptions and limitations, and possibility for additional special provisions for developing countries and LDCs (Recommendation 22); and to consider how to better promote pro-competitive IP licensing

²⁸⁴ WIPO, document IIM/3/2 Rev. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/iim_3/iim_3_2_rev.pdf.

²⁸⁵ WIPO, document PCDA/1/5, pp. 4-6 (sect. III, footnote 120).

²⁸⁶ WIPO Development Agenda Recommendations 15, 16, 17, 18, 19 and 21.

practices (Recommendation 23). Since most of the recommendations are in the nature of principles for immediate implementation through regular WIPO norm-setting activities, these can be nominally implemented by ensuring greater transparency and participation of Member States in all norm-setting processes. More substantive aspects of these principles, such as undertaking cost-benefit analyses of new normative proposals, are difficult to evaluate. For instance, the negotiations for the draft Design Law Treaty was initiated in WIPO on the basis of a draft text prepared by the WIPO Secretariat without any specific request for the development of such a text by Member States, and without any prior analysis costs and benefits of the draft treaty for countries with different levels of development.²⁸⁷

With regard to recommendation 20, CDIP agreed to a proposal by the WIPO Secretariat to adopt a project-based approach²⁸⁸ and the Secretariat implemented a project on “Intellectual Property and the Public Domain” which involved undertaking a series of studies, surveys, and pilot and feasibility tests.²⁸⁹ Similarly, a project-based approach was also adopted for recommendation 23. However, these projects were designed as an initial first step to generate knowledge for guiding further action in the areas of strengthening the public domain and promoting pro-competitive IP licensing. In practice, though these projects have been completed, no further norm-setting action has been initiated on these areas, although the Development Agenda recommendations clearly call for normative actions on the same.²⁹⁰ Thus, there has been no discussion on pursuing normative initiatives in WIPO in relation to protection and strengthening of a rich and accessible public domain, or on developing norms for facilitating pro-competitive IP licensing.

In particular, the failure of WIPO and its Member States to agree on a normative agenda for strengthening the public domain as mandated by the Development Agenda recommendation 20 is very glaring because a scoping study on copyright and the public domain that was conducted as part of the project on IP and the public domain had made some very significant recommendations that could guide norm-setting in this area. For instance, the scoping study had identified the following pivotal principles for a robust public domain in the context of Recommendation 20 of the Development Agenda: need for legal certainty in identification of public domain material; a policy for the public domain should enhance its availability and sustainability; a legal principle of non-exclusivity and non-rivalry should be applied to the public domain. The study had made specific recommendations about normative

²⁸⁷ Exploratory discussions on formalities for registration of industrial design rights was pursued in the WIPO Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT) since 2005. In 2007 the SCT had requested the WIPO secretariat to compile a working document to identify possible areas of convergence on industrial design law and practice. This working document and its revised versions were discussed in the past sessions of the SCT and the Secretariat was requested to prepare a revised working document for consideration and future work in this area. However, in 2010, instead of presenting a revised working document, the WIPO secretariat had submitted draft provisions on industrial design law and practice. See WIPO, document SCT/23/6. Available from https://www.wipo.int/edocs/mdocs/sct/en/sct_23/sct_23_6.pdf; also see WIPO, document SCT/24/3. Available from https://www.wipo.int/edocs/mdocs/sct/en/sct_24/sct_24_3.pdf.

²⁸⁸ WIPO, document CDIP/3/3. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_3.pdf.

²⁸⁹ WIPO, document CDIP/3/4. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_4.pdf.

²⁹⁰ In fact, the project evaluation report of the project on copyright and the public domain observed that no new tools or guidelines could be developed under the project to be used to access subject matter has fallen into the public domain. Thus one of the key objectives of the project was not achieved to any degree. See WIPO, document CDIP/9/7. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_7.pdf.

issues that should be considered in relation to each of these four principles, including provisions in the Berne Convention and the 1996 WIPO Internet Treaties.²⁹¹

Moreover, working documents prepared by the WIPO Secretariat on various normative initiatives have not addressed how national implementation of treaty commitments can be adapted to developing countries' needs and conditions, nor considered special safeguard provisions for developing countries and LDCs as stated under Recommendation 22 of the Development Agenda. For instance, the WIPO Secretariat on its own initiative prepared the initial draft text for the Design Law Treaty (DLT) that is currently being negotiated in the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT). The draft text of the DLT was prepared without taking into consideration any of the elements mentioned in Recommendation 22 of the Development Agenda. The initiative by the WIPO Secretariat to present a draft treaty text for the DLT in the absence of any request from Member States in the SCT was in clear contravention of the principle of neutrality of the Secretariat enshrined in Recommendation 15 of the Development Agenda.²⁹²

A significant normative outcome in WIPO after the adoption of the Development Agenda has been the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled which is the only treaty in WIPO that makes explicit reference to the WIPO Development Agenda and the principles enshrined in international instruments such as the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.²⁹³ However, the Marrakesh Treaty only partially addresses the concerns raised by developing countries about the need for elaboration of the international legal regime on copyright exceptions and limitations to facilitate access to copyright protected works, including by libraries and archives and educational and research institutions. In spite of the Marrakesh Treaty, progress on negotiations on these other elements of copyright exceptions and limitations have not achieved satisfactory progress.

Discussions in other norm-setting committees in WIPO have also reached a state of limbo. Though the SPLT is off the agenda of the Standing Committee on the Law of Patents (SCP), it has been unable to make progress towards agreeing on establishing a balanced work programme to address various development related concerns pertaining to the patent system. Though the Development Agenda specifically urged the acceleration of the IGC process for a normative outcome on genetic resources, traditional knowledge and traditional cultural expressions,²⁹⁴ there has been no agreement on setting a date for convening a Diplomatic Conference to conclude text based negotiations. Indeed, the United States had submitted a proposal at the 2015 WIPO General Assembly objecting to any renewal of the mandate of the IGC.

²⁹¹ WIPO, document CDIP/4/3 Rev./Study/INF/1. Available from

http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf.

²⁹² In 2007 at the request of the SCT the WIPO Secretariat had conducted a questionnaire survey on the formalities in industrial design law registration among WIPO Member States and prepared a working document compiling the responses, in order to identify possible areas of convergence. Subsequent sessions of the SCT continued to request the Secretariat to update the working document, but in 2010 the Secretariat submitted a draft treaty text instead of a working document based on the responses to the survey, without any request from the SCT for a draft treaty text.

²⁹³ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 27 June 2013. Available from

http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019.

²⁹⁴ WIPO Development Agenda, Recommendation 18.

V.7 WIPO and the Sustainable Development Goals

In accordance with the agreement between WIPO and UN, WIPO has the obligation to contribute to the achievement of the development goals of the UN. In the context of the adoption of the Sustainable Development Goals (SDGs), as a UN specialized agency, WIPO should assist in implementing the SDGs by addressing IP issues relevant to the SDGs, and provide an annual report to UN on its SDG related activities.

The contribution of WIPO to SDGs to date is sporadic and mostly tangential. The WIPO Secretariat has been preparing annual reports of WIPO contributions to the SDGs in the form of a report by the Director-General. The WIPO Secretariat had submitted the first annual report of the activities undertaken by WIPO to implement the SDGs in 2018.²⁹⁵ The report mostly described the engagement of WIPO with the UN agencies in the framing of certain SDG goals, targets and indicators related to innovation, its involvement in the Inter-Agency Task Team (IATT) under the Technology Facilitation Mechanism (TFM) and annexed a presentation by the Director-General that was made to the permanent representatives in Geneva on this issue. The report largely focused on most of WIPO activities that can be linked to goal 9 and some activities that can be related to goals 3 and 4. The report also noted the relevance of innovation as a direct contributor to realising some other SDGs and the importance of other SDGs to the setting of innovation policy frameworks.

In 2017, the WIPO Secretariat submitted a mapping of its activities related to SDGs implementation.²⁹⁶ The mapping had indicated that most activities reported by the Secretariat were directly linked to SDG 9 and some activities were also directly linked to goal 17. Most of the mapped activities were also indirectly linked to goal 8, and only a few activities were linked to goals 3, 4 and 5.

Member States had also made written submissions in 2017 with arguments as to which SDGs should be addressed by WIPO.²⁹⁷ Submissions were made by Brazil, China, Uganda and GRULAC. All of these submissions pointed out the relevance of most of the SDG goals and specific targets thereunder to WIPO work, and particularly the need to broaden WIPO activities to address SDGs beyond goals 9 and 17. However, specific activities to address these SDGs have not been discussed. Developing countries stressed on the need for discussion within WIPO on how to address all the SDGs, including a proposal for establishing a standing agenda item in the CDIP for these discussions. The CDIP has agreed to undertake discussions on SDGs under the new standing agenda item of IP and development.²⁹⁸

The Inter-Agency Task Team has produced a mapping report of the landscape of science, technology and innovation initiatives for the SDGs within the UN system, based on submissions from UN agencies.²⁹⁹ This report presents an overview of the nature of initiatives

²⁹⁵ WIPO, document CDIP/19/6. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_19/cdip_19_6.pdf.

²⁹⁶ WIPO, document CDIP/17/8. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_17/cdip_17_8.pdf.

²⁹⁷ WIPO, document CDIP/18/4. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_18/cdip_18_4.pdf.

²⁹⁸ WIPO, document CDIP/21/SUMMARY. Available from https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_21/cdip_21_summary.pdf.

²⁹⁹ United Nations, Sustainable Development Goals Technology Facilitation Mechanism, "Landscape of Science, Technology and Innovation Initiatives for the SDGs", Inter-Agency Task Team for Science, Technology and Innovation for SDG (IATT-STI), May 2017. Available from

undertaken by WIPO. These are in the domain of industry-scale technologies, scale-agnostic technology mechanisms (e.g., WIPO dispute resolution mechanism), support to R&D activities, and innovation policy issues which include IP regimes. WIPO international engagement is reported in the area of statistical and data provision services, national engagement on provision of technical assistance, sharing of experience, and local engagement in the nature of training programmes, matchmaking, transfer and installation programmes.³⁰⁰ Significantly, the IATT report demonstrates an absence of WIPO in terms of international engagement on norm-setting and policy guidelines, though this should be a major area of WIPO engagement in addressing SDGs, guided by the WIPO Development Agenda recommendations. IATT mapping does not address the extent of WIPO engagement on IP policy and normative issues, which are critical to the SDGs. There is no in depth discussion of IP issues in the report.

Some activities undertaken by WIPO in relation to specific SDGs are described in the global registry of voluntary commitments and multi-stakeholder partnerships for implementation of SDGs.³⁰¹

The mapping document, the annual report from the Secretariat, the information on the global registry and the IATT mapping demonstrate that the WIPO Secretariat's activities related to the SDGs have been extremely limited and largely focused on goals 9 and 17. This clearly suggests that there is need for Member States to provide specific guidance to the WIPO Secretariat on SDG goals and targets that should be addressed by WIPO and develop a work programme for the same.

V.8 WIPO Governance

A number of proposals were made for improvements to WIPO Governance by the proponents of the Development Agenda. These included clarifying the mandate of WIPO as part of the UN system, upholding WIPO as a member-driven organization, examining WIPO governance and oversight structures for making recommendations on how to improve them, separating the norm-setting functions of the WIPO Secretariat from those of technical assistance, establishing an Independent Evaluation and Research Office, improving oversight systems by Member States, e.g. more effective oversight of WIPO budget and programmes, improving the rules of procedure for all WIPO bodies, increasing the equity and balance in the different nationalities comprising WIPO staff to reflect the representative and international character of WIPO as a UN Specialized Agency, and fostering civil society (public interest groups as opposed to right holder organizations) participation in the deliberations of WIPO.³⁰²

The role of the WIPO Secretariat in both servicing and administering global IP services such as PCT, Madrid and the Hague systems and assisting Member States in norm-setting and providing technical assistance, makes it vulnerable to being caught between an approach of servicing “clients” that allow the organisation to maintain healthy accounts, and its role in providing support to Member States through technical assistance in designing national IP laws and policies. More importantly, the aim must be to ensure that any norm-setting, technical assistance or other activity by the WIPO Secretariat is not unduly influenced or affected by its

https://sustainabledevelopment.un.org/content/documents/147462017.05.05_IATT-STI-Mapping.pdf.

³⁰⁰ Ibid, p. 6.

³⁰¹ Available from <https://sustainabledevelopment.un.org/partnerships/>.

³⁰² WIPO, document IIM/1/4.

role in norm-setting or administering global protection systems (PCT, Madrid, Hague and Lisbon Systems). In this respect the Group of Friends of Development had noted that:

... payment by rightholders for WIPO services should in no way provide a basis for anyone to claim that the users of those protection systems have the right to determine the agenda or priorities of the Organization, or even the manner in which the incomes of the Organization are to be allocated under its Programme and Budget. WIPO must remain a Member-driven Organization, where the role of the Secretariat is focused on facilitating the work of the Members and implementing decisions and instructions received from Member States.³⁰³

One of the fundamental issues that the WIPO Development Agenda proponents brought forward was the **role of WIPO as a member of the United Nations system**. In this sense, it was proposed to streamline the mandate of WIPO under the WIPO Convention with its agreement of 1974 with UN. The proposal noted that the WIPO Convention should be amended “in order to ensure that development concerns are fully brought into WIPO activities ... the Member States may consider the possibility of amending the Convention. The amendment would explicitly incorporate the development dimension into the objectives and functions of WIPO. 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**.”³⁰⁴

This proposal however did not find its way into the final 45 agreed Development Agenda recommendations. Only recommendation 44 refers to **the member driven nature of WIPO as a United Nations specialized agency**. Thus, it is up to Member States to interpret the mandate of WIPO, either narrowly limited to the Convention or more broadly to include its agreement with the UN.

In 2010 the Development Agenda Group proposed further improvements to WIPO governance to ensure the following:

1. more effective oversight of WIPO Budget and Programs;
2. well-defined and clear rules of procedure for all WIPO bodies that ensure predictability, transparency and consensus building;
3. well-defined rules of procedure and code of conduct for the committees, chairs, the bureau, and Secretariat, including rotation of chairmanships among the various regions to provide for a member-driven process of deliberation;
4. equity and balance in composition among different nationalities comprising WIPO staff to reflect the representative and international character of WIPO as a UN specialised agency; and
5. mainstreaming of civil society participation in the deliberations of the organisation.³⁰⁵

³⁰³ WIPO, document IIM/1/4.

³⁰⁴ WIPO, document WO/GA/31/11/Add. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11_add.pdf.

³⁰⁵ WIPO, document CDIP/5/9 Rev.

Thus, governance is an area that requires more work towards implementation of the Development Agenda. A deeper overhaul of WIPO governance could focus on separation of WIPO norm-setting processes from other organisational functions such as treaty administration, improving Member State oversight by creating additional structures, and insulating the management of WIPO capacity building activities from undue influence on the part of any Member State, the Secretariat, rightholders or advocacy groups.³⁰⁶

The subject of WIPO governance has also been discussed in the Program and Budget Committee (PBC). In 2009 the WIPO Audit Committee (WO/GA/38/2) recommended that Member States should consider the establishment of a new functional governing body to meet more frequently than the PBC. In 2011 the 16th session of the PBC requested the secretariat to invite inputs from Member States about their views on WIPO governance. The 18th session of the PBC requested the Independent Advisory Oversight Committee (IAOC) to review the issue of WIPO governance in view of the inputs from Member States. IAOC recommended that a more detailed study on governance be undertaken. Following consultations by the Chair of the General Assembly with regional coordinators in 2012, it was agreed that the performance, efficiency and coordination of the existing WIPO governing structures needed to be enhanced. The PBC was requested to explore how to do this and report back. In 2014, the UN Joint Inspection Unit (JIU) report on management of WIPO had also recommended that the WIPO General Assembly should review the WIPO governance framework as well as current practices with a view to strengthen the capacity of the governing bodies to guide and monitor the work of the organization.³⁰⁷ Discussions continued in subsequent sessions of the PBC over the next few years with many proposals being made by Member States.³⁰⁸ These include proposals by the African Group to limit the PBC discussions to only the programme and budget; to establish a new executive body to discuss and approve WIPO calendar of meetings, following recommendations of oversight bodies, discussing non-financial personnel matters; ensuring official participation by national experts in WIPO meetings only on the nomination by Member States; requiring WIPO communications to officials or departments of respective governments to be transmitted through their respective diplomatic missions in Geneva; and drafting agendas of WIPO committee meetings in consultation with Member States.³⁰⁹ The Development Agenda Group also proposed the establishment of a new

³⁰⁶ See Carolyn Deere, "Reforming Governance to Advance the WIPO Development Agenda", in Jeremy de Beer (ed.), *Implementing the World Intellectual Property Organization's Development Agenda* (Ottawa, Wilfrid Laurier Un. Press and IDRC, 2009), pp. 43-56.

³⁰⁷ The Joint Inspection Unit report found that the PBC had become the de facto decision making body on substantive, administrative, financial and personnel matters and has taken over much of the functions that are formally assigned to the Coordination Committee under the WIPO Convention. The JIU report also suggested that the reporting line of the PBC be shifted from the General Assembly to the Coordination Committee and appropriate adjustments be made to the mandate of the PBC. The report also points out the dominant influence of the WIPO Secretariat in giving direction to the discussions in Member States bodies and the reliance of Member States on the secretariat as matter that needs to be addressed. It also suggests the need for developing indicators to track the implementation of the Development Agenda recommendations. See United Nations, Joint Inspection Unit, *Review of Management and Administration in the World Intellectual Property Organization (WIPO)* (Geneva, 2014), document JIU/REP/2014/2. Available from https://www.unjiu.org/sites/www.unjiu.org/files/jiu_document_files/products/en/reports-notes/JIU%20Products/JIU_REP_2014_2_%20English.pdf.

³⁰⁸ See WIPO, document WO/PBC/18/20. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_18/wo_pbc_18_20.pdf; also see WIPO, Proposals by the Delegations of Belgium, Mexico and Spain: Increasing Efficiency in WIPO Meetings, Program and Budget Committee, Twenty Second Session, WO/PBC/22/26, 24 July 2014, available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_22/wo_pbc_22_26.pdf.

³⁰⁹ WIPO, document WO/PBC/21/20. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_22/wo_pbc_22_ref_wo_pbc_21_20.pdf.

executive body, to undertake a review of recruitment processes for staff and consultants in WIPO, to improve Member State interaction with the Staff Council, and to establish minimum cooling off period before considering former Member State delegates for hiring by WIPO. These proposals, not adopted yet, should be pursued further.

The issue of governance has not been given sufficient time in the PBC to allow for substantial discussion with priority being given to discussions over other items on the agenda. Since 2016 the discussion on governance reforms has been limited to a review of the ratifications of the 1999 and 2003 amendments to the WIPO Convention. Developing countries should ratify the 2003 amendment of the WIPO Convention which abolishes the WIPO Conference and makes the WIPO General Assembly the representative body of all WIPO Member States, and also replaces separate budgets for the Unions and the WIPO Conference with a single budget. Developing countries should seek regular updates at every General Assembly session on the status of the ratification of the 2003 amendment to the WIPO Convention and urge all WIPO Member States to expedite the ratification process. Similarly, developing countries should also pursue ratification of the 1999 amendment of the WIPO Convention which limited the term of the Director General to 12 years. In recent years, the Secretariat has been updating the PBC about the status of ratification of these amendments. So far only 53 out of the required 129 ratifications have been submitted for the 1999 amendment and only 19 out of the required 135 ratifications have been submitted for the 2003 amendments.³¹⁰

Developing countries should also pursue reforms of the WIPO Program and Budget Committee and the Coordination Committee. Though the participation of Member States has been limited in the PBC, there is no specific rule that governs the composition of the PBC. The Asian and Pacific Group have submitted a proposal in the WIPO General Assembly for expansion of the membership of the PBC and adequate representation of all regional groups in WIPO in the Coordination Committee. It will be critical for developing countries to support this proposal to ensure adequate and effective representation of developing countries in all WIPO decision making bodies. Developing countries should also revive discussions on reforms of WIPO governance that had been undertaken in the PBC and the General Assembly since 2011 but has become dormant since 2017 with the focus on governance related discussions being limited to the status of the 1999 and 2003 amendments to the WIPO Convention.

Apart from reforming the governance structures, it will also be critical to ensure realization of equitable geographical representation and enhanced effective representation of staff from developing countries in the WIPO Secretariat, particularly in the middle to senior management levels. It will also be critical to establish minimum cooling-off periods before a delegate representing a Member State in WIPO can be hired by the organisation. Member States should also establish rules on avoiding individual and institutional conflicts of interest in the process of hiring or secondment of personnel in the WIPO Secretariat. For the first time in WIPO history, a developing country (India) was elected as the External Auditor for 9 years. However, this should be seen as the first step towards giving developing countries a role in WIPO governance structures and more such efforts need to be made by developing countries.

In addition to reviving discussions on the proposals that have been made in the PBC on governance reforms, developing countries should pursue constitutional reforms to amend

³¹⁰ WIPO, document WO/PBC/28/12. Available from http://www.wipo.int/edocs/mdocs/govbody/en/wo_pbc_28/wo_pbc_28_12.pdf.

Article 3 of the WIPO Convention to ensure that the mandate of WIPO of globally promoting the protection of IPRs is undertaken in deference to the development needs and challenges faced by its Member States, and in support of the development goals of the UN, including the Sustainable Development Goals.

Besides pursuing proposals relating to issues on IP and development within WIPO, developing countries should also pursue those issues in parallel in WIPO. The history of the IP and development discourse in WIPO unequivocally demonstrates that discussions on IP and development issues in the UN have created the necessary momentum for some parallel initiative in WIPO. The very establishment of WIPO was a response to the demand for addressing IP and development issues in the UN.

Developing countries may also consider the possibility of undertaking a review of the relationship agreement between UN and WIPO at the UN Economic and Social Council (ECOSOC). The status of WIPO as a UN specialized agency is based on an agreement negotiated by the ECOSOC with WIPO in terms of Article 63 of the UN Charter. Article 19 of the relationship agreement recognises the possibility of amendment or revision of the agreement if both organisations agree and if the same are ratified by the UN General Assembly and the WIPO General Assembly.³¹¹

Article 59 of the UN Charter also empowers the UN to initiate negotiations among its Member States for the creation of any new specialized agency for the accomplishment of the economic and social cooperation goals enshrined in Article 55 of the Charter. This suggests that the status of Specialized Agency under Article 57 of the UN Charter, based on a relationship agreement negotiated by the UN, does not give exclusive competence to the concerned specialized agency over a specific technical theme that it may be addressing.

The relationship agreement between UN and WIPO also recognises the competence of both UN and WIPO for undertaking technical assistance activities for development in the field of intellectual creation.³¹² To that end, it requires WIPO and UN to cooperate and coordinate their technical assistance activities. In this regard, developing countries could also initiate discussions both in CDIP as well as in ECOSOC on cooperation and coordination of technical assistance activities of WIPO and UN. ECOSOC could make recommendations on the same by virtue of its powers under the UN Charter and WIPO is required under the terms of the relationship agreement with UN to place those recommendations before the governing bodies of WIPO. Similarly, developing countries could initiate discussions on activities undertaken by WIPO with regard to transfer of IP protected technologies to developing countries, in collaboration with UNCTAD, UNIDO and UNDP, as mandated by the relationship agreement.³¹³

³¹¹ Agreement between UN and WIPO, Art. 19 (sect. I, footnote 5).

³¹² *Ibid.*, Article 9.

³¹³ *Ibid.*, Article 10.

VI. CONCLUSIONS

The establishment of WIPO and its quest for being recognised as a United Nations specialized agency, was a response to the demand for addressing development concerns relating to the IP system that was raised within the UN. However, the establishment of WIPO did not result in addressing such concerns, as demonstrated by the failure of the attempt to revise the Paris Convention and the parallel ratcheting up of norms on standards of IP protection. While WIPO gained legitimacy as an intergovernmental organisation of Member States and a UN specialized agency, developed countries continued to wield dominant influence in its governance structures. The service orientation of WIPO has made the organisation financially independent from its Member States, and beholden to the IP rights holders whom it serves. Thus, promotion of development concerns continued to be at odds with the interest of right holders in seeking further expansion of IP protection through initiatives such as the WIPO Patent Agenda.

The adoption of the Development Agenda should be seen in this context as a significant step for ensuring the preservation of policy space for addressing development considerations in designing IP laws and policies and in developing international norms. The Development Agenda was not proposed by developing countries as a limited set of recommendations, but as a multi-pronged reform agenda for transforming the orientation of WIPO to development challenges in relation to the IP system. The Development Agenda recommendations that were finally adopted through compromise did not advance a specific understanding of the development dimension. This has largely neutralised the Development Agenda's effectiveness as an alternative to the IP maximalist agenda in a package of development. Thus, even under the new agenda item on "IP and development" in CDIP, the agreed topics for discussion so far have been framed in terms of how IP protection can promote development.³¹⁴ Most of the adopted projects for implementation of the Development Agenda also fundamentally aim to bring innovators and creators in developing countries within the fold of the IP system and facilitate the acquisition and management of IP rights by them. Conversely, the use of IP flexibilities for access to patented technologies and copyright protected works for patients, the disabled, educational and research institutions, etc., as well as prevention of misappropriation of traditional knowledge and genetic resources, have received relatively limited attention under the projects adopted by CDIP. Thus, in spite of the adoption of the Development Agenda, legitimate concerns of developing countries have been consistently undermined.

VI.1 Some Considerations for Developing Countries

The level of engagement of developing countries in CDIP has significantly reduced in comparison to the initial years after the establishment of CDIP.³¹⁵ In this context, it is noteworthy that the Independent Review of the Implementation of the Development Agenda Recommendations has recommended that a higher level of debate should be introduced in CDIP, and WIPO Member States should ensure a higher level of participation of national based experts in the work of CDIP.³¹⁶ For a higher level of discussion in CDIP, it is critical

³¹⁴ See WIPO, document CDIP21/8 Rev. Available from http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_21/cdip_21_8_rev.pdf.

³¹⁵ Syam, "Outcomes of the Nineteenth Session" (sect. V, footnote 171).

³¹⁶ WIPO, document CDIP/18/7, pp. 3-4.

that developing countries ensure the participation of national experts from diverse development sectors such as public health, agriculture, industrial development and not restrict the discussion within CDIP to an IP centric approach to development. CDIP should also invite United Nations agencies, UN Special Rapporteurs on the Right to Health, Right to Science and Right to Food to present their reports to CDIP with a focus on the activities that the WIPO Secretariat and the Member States should undertake to address development issues raised by such experts. It should also be noted with concern that in spite of the coordination mechanism under which relevant WIPO bodies are required to report to the General Assembly on their contribution to the implementation of the Development Agenda recommendations, some committees such as PBC have never reported on this aspect to the General Assembly and also some of the substantive committees that used to regularly submit such reports to the General Assembly have not done so in the recent past. For example, only the IGC reported on its contribution to the implementation of the Development Agenda recommendation to the General Assembly in 2018, in stark contrast to previous years where other standing committees had submitted similar reports.

Developing countries should reinvigorate cross regional collaboration and coordination mechanisms that were pursued in the past, such as the Group of Friends of Development and the Development Agenda Group, and pursue a coordinated work programme for addressing their development challenges and related IP issues in various WIPO bodies. In this regard, some of the proposals that have been made in the past by the Development Agenda Group can be revived and follow up proposals can be developed based on some of the outcomes of the CDIP approved projects that have been completed.

The impact of the CDIP approved projects in terms of mainstreaming development orientation has been limited. The evaluation reports of the completed CDIP projects have not assessed the impact of the projects on achieving the objectives of the Development Agenda. The independent review of the implementation of the WIPO Development Agenda recommendations points to a lack of a systematic and coordinated approach in the implementation of the projects approved by CDIP due to the absence of a better understanding of the links between IP and development. The review also emphasizes the need to avoid mechanically linking any activity or project to a Development Agenda recommendation without assessing whether the same could have been initiated as a regular WIPO activity. On the basis of this observation of the independent review, future project proposals in CDIP should be required to demonstrate the added value and the need for implementing a particular activity as a Development Agenda project instead of a regular WIPO program activity. Every project proposal should include an assessment by the WIPO Secretariat of the absorption capacity and level of expertise of project beneficiaries and how the project is adapted to the same. This should also include a statement on the UN agencies and other entities with a related interest on the issue present at the national level and the potential for cooperation with them. Progress reports on project implementation should demonstrate the knowledge and expertise of experts recruited to undertake activities under the project, about the socio-economic conditions of the recipient countries. Relevant departments besides the IP offices must be consulted in the design and implementation of projects.

Once a project has been completed, the substantive learning from the project is expected to be mainstreamed. However, currently there is no mechanism of following up on how activities undertaken under the projects will be subsumed within regular programme activities. Therefore, following the completion of a project, the objectives of the project

should be translated into expected results with accompanying outcome indicators in the Program and Budget, for each of the programmes involved in implementation of the project.

Developing countries should also clarify the understanding of flexibilities from a development perspective and provide guidance on how the WIPO Secretariat should undertake legislative and technical assistance activities on them, in the context of the WIPO Development Agenda recommendations that stress on the use of flexibilities. There is lack of a sustainable, long-term work programme and technical assistance tools on flexibilities that could deepen the understanding of their role in advancing development objectives through their effective utilisation. The issue of flexibilities has been generally neglected in the publications and outreach, communications and dissemination tools of the WIPO Secretariat. Member States should take the initiative and ask the WIPO Secretariat to work on practical implementation of flexibilities. In this context, under the newly established agenda item on IP and development in CDIP, a session with representatives of Member States to the WTO TRIPS Council could be very useful. WIPO has remained insulated from the real world of IP issues that are discussed in WTO and this artificial insulation should be removed by bringing in more interaction with the TRIPS Council in WTO and institutional involvement and exchanges between the two entities. Developing countries should especially make efforts to ensure that their WTO and WIPO delegates attend both meetings and coordinate closely. Otherwise, the Development Agenda will remain an academic exercise in WIPO that is divorced from the real world.

The technical assistance provided by the WIPO Secretariat to developing countries upon request should seek to build their capacity to develop national IP policies, laws and regulations to be in line with development objectives and public policies of relevance in areas such as health, agriculture, environment, science and technology, and education. The content of the technical assistance should carefully balance the economic and social cost of IP protection and enforcement against the benefits; incorporate flexibilities permissible under existing international agreements into national IP policies, laws and regulations; and establish and/or strengthen robust IP institutions and systems to implement the same. This should include the ability to apply rigorous criteria for the granting of patent rights; conduct thorough search and examination when assessing the validity of a claim in an IP application; make effective use IP related flexibilities; assist local industries to engage with the IP system, particularly SMEs and start-ups; use competition law to prevent and address the abuse of IP rights; and enable the judiciary to make balanced judgments in disputes concerning IP, taking into account the interests of all the parties involved and of the public. It will be important to assess whether the methodologies and tools developed by the WIPO Secretariat for assisting developing countries to design national IP strategies are appropriately development-oriented. As the external review of WIPO technical assistance in the area of cooperation for development observed, the WIPO Secretariat's technical assistance activities have been more focused on integrating developing countries into the IP system by attempting to derive benefits rather than to assist to lower the costs developing countries and their stakeholders may face in using the IP system. Member States should consider undertaking in CDIP an assessment of the effectiveness of the national IP policies established pursuant to WIPO technical assistance on developing national IP policies.

The focus of the WIPO Secretariat's activities in the area of capacity building has been predominantly on enhancing the efficiency of IP Offices in developing countries and LDCs for expeditious disposal of IPR applications through digitisation and IP Office automation tools provided by the WIPO Secretariat. Capacity building projects implemented by the

WIPO Secretariat have also promoted work sharing and collaboration between IP Offices in the process of search and examination of applications, which is an integral part of the harmonisation agenda envisaged under the WIPO Patent Agenda. Thus, developing countries should ensure that the WIPO Secretariat's capacity building activities for IP institutions in developing countries focus on enhancing the ability of IP Offices to conduct thorough search and examination to decide whether an application for the grant or registration of an IP right meets the relevant criteria under the applicable law and prevent the unwarranted grant of IP rights.

The WIPO Secretariat should also broaden its orientation on IP and competition issues and address how developing countries could tackle anti-competitive practices through the use of IP rights, rather than limiting itself to promoting complementarity between IP and competition policy. Developing countries should advance specific proposals for a study in CDIP on how competition law can be used in the context of IP to advance their public policy objectives, drawing from the experiences of countries that have used competition law and also addressing the practical challenges that developing countries face in this regard.

The outreach and communication tools and materials deployed by the WIPO Secretariat should also raise awareness about the benefits as well as costs of IP protection for development and the need for use of appropriate flexibilities to balance IP protection vis-a-vis the public interest. The independent review of implementation of the Development Agenda also recommends that Member States and the WIPO Secretariat should consider ways and means to better disseminate information about the Development Agenda and its implementation. In this regard, Member States should call upon the WIPO Secretariat to deploy its outreach and communication tools including newsletters, the WIPO Magazine, social media, award schemes, WIPO Academy courses, etc. to promote awareness about the Development Agenda recommendations and its implementation. IP related development challenges in the field of public health, access to knowledge, protection of traditional knowledge, prevention of biopiracy, etc., should be made themes for greater awareness about the interface of IP with these issues, in WIPO outreach and dissemination tools. The courses offered by the WIPO Academy should also be independently evaluated and assessed to measure the extent to which development related issues vis-a-vis IP are addressed.

With regard to the Development Agenda recommendations on norm-setting, developing countries should build upon the learning from the projects implemented on exploring norm-setting to support a robust public domain. Developing countries should also ensure that all future norm-setting initiatives should, at the outset, undertake an assessment of how the commitments made will be implemented in developing countries, as well as safeguard mechanisms that may be required for developing countries. Developing countries should also seek urgent conclusion of negotiations for copyright exceptions and limitations for educational and research institutions, libraries and archives. Developing countries should also seek concrete progress towards development of a work programme in the SCP to address various development related concerns pertaining to the patent system. It will also be critical to ensure that the IGC negotiations are expedited to convene a Diplomatic Conference for the adoption of appropriate international legal instruments to address IP related issues pertaining to traditional knowledge, traditional cultural expressions and genetic resources.

While Member States have called upon the WIPO Secretariat to address IP related issues pertaining to the Sustainable Development Goals, the WIPO Secretariat's activities related to the SDGs have been extremely limited and largely focused on goals 9 and 17. There

is need for Member States to provide specific guidance to the WIPO Secretariat on SDG goals and targets that should be addressed by WIPO and develop a work programme for the same.

A critical issue that must be addressed in order to ensure effective and adequate mainstreaming of the development discourse while safeguarding against its dilution is to pursue reforms on WIPO governance. Developing countries should ratify the 1999 and 2003 amendments to the WIPO Convention which limits the term of the Director-General to a maximum of 12 years (2 terms) and makes the WIPO General Assembly the representative body of all Member States. Developing countries should also seek expansion of the membership of the Program and Budget Committee and the Coordination Committee.

In addition to greater representation of developing countries in WIPO decision making bodies, developing countries should also seek enhanced geographical representation of developing country nationals in middle and senior management staff of the WIPO Secretariat, and also establish rules for avoiding individual and institutional conflicts of interest in the process of hiring of staff and consultants by the WIPO Secretariat.

Developing countries should also pursue constitutional reforms to amend Article 3 of the WIPO Convention to ensure that the mandate of WIPO of globally promoting the protection of IPRs is undertaken in deference to the development needs and challenges faced by its Member States, and in support of the development goals of the UN, including the Sustainable Development Goals. In addition to pursuing such reforms within WIPO, developing countries could also seek to pursue a review by the UN Economic and Social Council of the relationship between WIPO and UN, and explore options for appropriate amendments to the relationship agreement between WIPO and UN, in the light of the Development Agenda and the UN development goals.

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