

# **Intellectual Property and the ‘WIPO Development Agenda’**

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## **ABSTRACT**

The persistent attempts of the major industrial nations to press ahead with the newly initiated (Doha) round of international trade negotiations under the auspices of the World Trade Organisation (WTO) have met with resistance from the developing countries (DCs). The failure of the WTO Ministerial meeting in Cancun and the slow pace of trade negotiations both before and since then are potent proof of that resistance. Moreover, the anti-globalisation demonstrations that have kept popping up everywhere (Seattle and Prague, amongst others) have highlighted the problems of economic and social transformation in DCs. The worsening impacts of mass poverty and the spread of the Aids pandemic on DCs have fuelled their repeated calls for reform of the global trading system. By comparison, the role of intellectual property (IP) in the development of non-industrial nations has received very little attention from any quarter.

The DCs have persisted in their demands to have the new round of WTO trade negotiations revisit the role of TRIPs in their economies and cultures. Brazil and Argentina took the extra step of articulating a “development agenda” for the World Intellectual Property Organisation (WIPO) and formally submitting their proposal, on 26 August 2004, to the WIPO General Assembly. The US, UK and Mexico have submitted their responses and positions.

This paper examines the various proposals within the framework of the historical roles of IP and the social-economic conditions of DCs. It starts off by summarising, in Section 1, the negative experiences of DCs in their failed attempts to reform the IP system both on an international level and locally. Section 2 picks up the recent (post-TRIPs) exploits of the DCs in pushing for some form of revision of TRIPs as part of the new (Doha) round of international trade negotiations. Section 3 examines the proposal for a ‘WIPO Development Agenda’ put forward by Argentina and Brazil. Section 4 looks at the reception of the same proposal by the major industrial powers and assesses its chances of success. The article concludes by highlighting the fallacious propositions that permeate the ‘WIPO Development Agenda’, namely that the international IP system culminating in TRIPs can still facilitate the transformation of DCs and that it possesses sufficient flexibility amenable to the needs of such nations.

## **1. Introduction**

The persistent attempts of the major industrial nations to press ahead with the newly initiated (Doha) round of international trade negotiations under the auspices of the World Trade Organisation (WTO) have met with resistance from the developing countries (DCs). The failure of the WTO Ministerial meeting in Cancun and the slow pace of trade negotiations both before and since then are potent proof of that resistance. Moreover, the anti-globalisation demonstrations that have kept popping up everywhere (Seattle and Prague, amongst others) have highlighted the problems of economic and social transformation in DCs. The worsening impacts of mass poverty and the spread of the Aids pandemic on DCs have fuelled their repeated calls for reform of the global trading system. The pressure for change has become so overwhelming that even the major industrial powers have joined with other nations in various fora<sup>1</sup> to begin to address the problems of economic development and technology transfer that afflict DCs

By comparison, the role of intellectual property (IP) in the development of non-industrial nations has received very little attention from any quarter.<sup>2</sup> This is because, on the one hand, the value and impact of IP was considered a settled issue once virtually all nations had joined the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). On the other hand, the major industrial nations were reluctant to concede that the implications of IP might merit scrutiny at the international level. Every time DCs demanded that the WTO Ministerials re-examine the link between IP and development, reconsider the TRIPs and allow relevant adjustments in their favour, the major industrial nations always expressed the view that any outstanding issues should be left to the TRIPs Council and resolved in line with the provisions of the TRIPs Agreement.<sup>3</sup> This meant, in essence, that the industrial powers were unwilling to re-examine TRIPs because they suspected that such a step might result in ‘a lowering of standards’ or ‘weakening of IP’. Indeed, the TRIPs itself does not allow any reservations for nations that accede to it and firmly rejects the adoption by members of any form of IP that does not lead to further extensions of the scope of rights enshrined in it.<sup>4</sup>

The DCs have persisted in their demands to have the new round of WTO trade negotiations revisit the role of TRIPs in their economies and cultures. Still, apart from the pronouncement on access to drugs made at Doha,<sup>5</sup> the general expectations of the DCs that the new Doha round could resolve the problem of the impact of TRIPs on their economies and societies have failed to materialise. This has prompted DCs, whether singly<sup>6</sup> or in groups<sup>7</sup>, to express their disappointment and desperation for review of the situation even more loudly. Brazil and Argentina (on behalf of the “Group of Friends of Development” or FoD) took the extra step of articulating a “development agenda” (‘DA’) for the World Intellectual Property Organisation (WIPO) and formally submitting their proposal, on 26 August 2004, to the WIPO General Assembly. The General Assembly subsequently adopted a decision, on October 4, 2004, to consider their submission as well as additional proposals that other members might have on the same topic. Since then, the US, UK and Mexico have submitted their responses and positions.

This article examines the various proposals within the framework of the historical roles of IP and the social-economic conditions of DCs. It starts off by summarising, in Section 1, the negative experiences of DCs in their failed attempts to reform the IP system both

on an international level and locally. Section 2 picks up the recent (post-TRIPs) exploits of the DCs in pushing for some form of revision of TRIPs as part of the new (Doha) round of international trade negotiations. Section 3 examines the proposal for a 'WIPO Development Agenda' put forward by Argentina and Brazil (as part of the FoD). Section 4 looks at the reception of the same proposal by the major industrial powers as well as other DCs and assesses its chances of success. The article concludes by highlighting the fallacious propositions that permeate the 'WIPO Development Agenda', namely that the international IP system culminating in TRIPs can still facilitate the transformation of DCs and that it possesses sufficient flexibility amenable to the needs of such nations.

## **2. The Failure of Developing Countries to Reform the Intellectual Property System**

Starting from the 1960s, the developing countries (DCs) have sought to reshape their international relations; in particular, they set out to reform the international intellectual property (IP) system by removing certain aspects they believed to be barriers to their economic and technological development and transforming it into a vehicle that assisted their aspirations for change and growth. The proposals for reform of that system concentrated on the extensions of free or permitted use in copyright, the revocation of rights for lack of use, or, where abuse occurred, the imposition of compulsory licensing on all forms of IP where the proprietors of the respective rights failed to supply a reasonably-priced, adequate volume of products to satisfy local demand.<sup>8</sup>

The initial attempt of the DCs was to inject their proposals into the Paris and Berne conventions by way of amendments. Inevitably, the major industrial countries presented robust defence of the status quo and refused to entertain virtually all of the proposals for reform that the DCs wished. Although certain concessions were promised and seemed destined to be adopted by the members of the conventions,<sup>9</sup> they were all eventually sidelined and abandoned. Indeed, by the beginning of the Uruguay Round of GATT negotiations (1986), the reform movement had all but lost its momentum. The delay tactics deployed by the major industrial powers and the lack of fresh ideas that could recharge the movement put paid to any further advances in the cause of the DCs.

The failure of the DCs to reform the international IP system did not spring merely from their weakness in mustering sufficient bargaining power. Above all, the reform movement was fraught with conceptual fallacies and tactical blunders. The conceptual fallacies which continue to imbue the IP debate, put forward even, as we will see below, by the proponents of the latest call for reform, Brazil and Argentina, arise from the perception that IP should be a universal vehicle, that all nations need to adopt identical or undifferentiated forms of IP. The major IP writers and commentators in the US, UK and Germany have raised this fallacious proposition to the level of ideology and propagated it regularly through scholarly publications, government policy documents and the mass media. The DCs' formulation of the reform of the international IP system was consequently a by-product of that approach. In other words, having embraced the universality of IP (involuntarily during colonialism and uncritically afterwards) and knowing full well that the international IP system is the making of the major industrial powers, DCs were inevitably trapped into seeking only to reform that system as a whole

rather than piercing through the ideological façade and digging up novel solutions. In particular, DCs should have woken up to the fact that IP has evolved over the centuries, and should therefore always be formulated, by reference to the culture, social-economic and technological conditions of a society. The persisting ignorance of policy makers and so-called experts in DCs that the forms and scope of IP need to be congruent with the level and type of cultural, social-economic and technological substructure within a society has left them prey to transplants of laws and rules that meet the requirements of the most industrially developed nations.

Indeed, the governments of DCs were deluded into thinking that every form of IP copied from the industrial countries of Western Europe and North America would be relevant to their circumstances. In most instances, they sought to fill any perceived gaps in their laws by transplanting similar solutions already on the statute books of the developed industrial nations. The predominant view in international IP equated this to modernisation and considered it to be an inevitable part of the economic and technological transition that DCs desired to achieve. The United Nations was co-opted into fostering these misconceptions under the guise of helping DCs. The WIPO and the United Nations Conference on Trade and Development (UNCTAD) have become key organisations in charge of proselytising the ‘universalist’ notion of IP in DCs and in making sure that the DCs’ laws kept pace not with their domestic circumstances but with that of the developed industrial countries. As a consequence, virtually all DCs have retained the gamut of IP laws that were imposed on them from colonial times but buttressed from time to time by the WIPO from without and the national legislative authorities from within to bring them into line with the IP laws of the most industrially developed countries.

It is ironic that even at the height of their movement to reform the international IP system, the DCs could not grasp that their aspirations were in diametric opposition to the pressures and activities of the industrial nations to extend that system and even deepen it. While the DCs could not find alternative paths for their pursuits, the major industrial nations were critical not only of the DCs’ proposals for reform of the international IP system but also their domestic implementation of their obligations under the major conventions. No doubt, the DCs’ desire for reform sounded to the industrial powers like a clawing back of the frontiers of that system and weakening it to deprive their multinational corporations of adequate protection in the DCs. The reform movement was therefore doomed to fail.

The DCs could never succeed in reforming the international IP system principally because it was made by, and served the purposes of, the industrial powers. If the system did not work for the DCs it was because it was not meant to. The rationale and aims of international IP protection were precipitated by the growth of international trade in manufactured goods, and not of raw materials and agricultural products, among the industrial nations. The fact that DCs largely export primary, that is unprocessed or semi-processed, goods means that they were, and still are, in no state to influence the making or implementation of the international IP system.

Short of a total withdrawal of the DCs from the international IP treaties and charting their own paths from scratch, the only realistic chance that the DCs had of reforming anything depended on a grasp of the conceptual foundations of IP law, its purposes and relevance for DCs within the context of their international obligations. This would have implied that any notion of reform should be directed at their local IP laws. However, as their IP laws were in conformity with the thinking and practice that prevailed in the industrial nations, even reforms of the local IP laws would lead to collision with their obligations under the international treaties. Nonetheless, DCs never really came to realising the seriousness of the underlying issues, let alone reforming their own internal IP laws. Even the most vocal critics of the international IP system and proponents of reforms such as India,<sup>10</sup> Brazil<sup>11</sup> and Mexico<sup>12</sup> (individually or as part of the Group of 77) never discovered the need for internal or local reforms.

We now know that the DCs not only failed in reforming IP both in the domestic context and on an international level but also found themselves victims of a further surge in the demands of the major industrial powers, particularly the US, to expand the scope and enforcement of IP. The introduction of the TRIPs in the face of the DCs' fierce resistance killed off any lingering hopes of reforming the international IP system. This was done through the simple formula of dubbing IP law and enforcement as an aspect of international trade. The treatment of international IP protection as trade issues and introduction of minimum (universal) standards for all forms of IP, far beyond the requirements under the major conventions, put paid to any national (domestic) attempts to work out alternative paths. The momentary concessions that DCs had obtained in international forums in the 1960s and 1970s were virtually eliminated and the relentless pressure to further extend the IP system and its implementation was in full swing. The ultimate consequence to IP law making in DCs and for that matter in industrial nations may be summarised thus:

[More and more] the fundamental question that lies at the core of national IP law, namely conformity with the socio-economic conditions of the nations that introduce or adopt it, seemed irrelevant. It was, and had to be, conveniently ignored by the major industrial nations once they got away with TRIPs, under the leadership of the US. Any further progress in the scope and nature of IP protection would only be on their terms. Simply put...the dominant trading nations could seek further changes in the existing IP regime, at will, to suit their purposes. Thus, although TRIPs might be the minimum standard for all *trading* nations, that is members of WTO at the moment, the very fact that the major ICs [industrial countries] can wield their standings in WTO to push ever higher standards means that, henceforth, a general adoption of the highest common denominator is likely to become the way forward for international IP.<sup>13</sup>

There is abundant proof for the further extension of IP rights since TRIPs: the WIPO treaties relating to copyright, patent and trademark as well as the injection of higher standards of IP law and enforcement (dubbed 'TRIPs plus') through the device of free trade agreements deployed, chiefly, by the US.

### **3. New Quests of Developing Countries in Intellectual Property: Doha to Cancun**

During the preparations for a new round of WTO negotiations, the developing countries (DCs) once again expressed their hopes that the impact of TRIPs on their prospects for development would be reviewed. At any rate, they contended that such a review is called for under certain provisions of TRIPs<sup>14</sup> as well as pursuant to the “built-in agenda” in TRIPs.<sup>15</sup> The major industrial powers however bluntly rejected any calls for such a revision. They eschewed any proposals for the grant of certain concessions to the DCs that promote transfer of knowledge and technology to the mutual advantage of both DCs and the industrial powers.<sup>16</sup> On the other hand, the ongoing review by the TRIPs Council of the implementation of obligations of WTO member states,<sup>17</sup> its tasks of examining the unresolved issues in TRIPs (the ‘built-in agenda’<sup>18</sup>) as well as of submitting proposals for “modification or amendment” of TRIPs did not produce anything substantial, or of interest to DCs. The TRIPs Council remained ensnared in the web of proposals and counter proposals emanating from diametrically opposed groups of countries, the major industrial powers on the one hand and the DCs, on the other. In the event, it is no coincidence that it became more of a battlefield of ideas and less a forum for consensus and practical action.

The most important development, from the point of view of DCs, is the declaration on the nexus between IP and state intervention during national emergencies, particularly in the context of national health. Supported by the world-wide clamour for cheaper drugs to assist AIDS sufferers, the DCs snatched a major concession during the 2001 Doha Ministerial meeting in the shape of the declaration on the permissibility of state intervention in health emergencies to sidestep rights of IP owners.<sup>19</sup> Apart from the fact that such powers of the state were explicitly incorporated in the TRIPs and any additional assurance by the major industrial nations that they would not impose sanctions on DCs that exercise their rights were unnecessary. But the demands of DCs to receive such assurance indicated beyond any doubt their morbid fear of the latent power of retaliation that the big industrial nations possessed. The declaration is therefore a mere restatement of the existing rules in TRIPs and represented no compromise, leave alone erosion, of IP rights that the drugs manufacturers in the major industrial nations might have—despite the profuse references to the ‘breakthrough’ achieved or the victories scored by DCs and their supporters.

Furthermore, “the Declaration on the TRIPs Agreement and Public Health” was fraught with all kinds of restrictions and practical hurdles. For one thing, it restricts products made under compulsory licence to be destined “predominantly for the supply of the domestic market”. Secondly, the resort to compulsory licence would be allowed “only in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.”<sup>20</sup> Thirdly, the additional requirements of disclosure, registration and administration of licensed products make the exercise so burdensome that DCs have in effect elected to ignore its use in practice. To date, there are no records of any imports/exports of generic drugs by DCs in conformity with the declaration.

It is interesting that, apart from the declaration on health, the major industrial powers were forced to pronounce a Doha Development Agenda<sup>21</sup> iterating their promise to place the “needs and interests” of DCs “at the heart of the Work Programme adopted in this Declaration”.<sup>22</sup> Still, the Doha Ministerial did not produce any policy statements regarding the revision of TRIPs in the manner that the DCs had demanded. It merely gave instructions to the TRIPS Council to examine “the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1.”<sup>23</sup>

Subsequent to the Doha Ministerial, the TRIPs Council has been busy collating and distributing the views of the WTO members on the problem of protecting and exploiting indigenous or traditional knowledge as well as the extension of protection to geographical indications other than wines and spirits. DCs have submitted a diversity of views and engaged heavily in the negotiations.<sup>24</sup> Yet, the coalition of major industrial nations and a few DCs ranged against them in the negotiations does not bode well for any outcome before too long. Indeed, the DCs’ undying hopes for reconsideration of TRIPs appeared, despite the momentary concessions on generic drugs, more illusory than ever. The major industrial nations have expressly reiterated their rejection of any reconsideration of TRIPs and sought to interpret the ‘built-in agenda’ as a straightening out of any remaining *minor* issues.

One would have expected that the preparations of the DCs for the Cancun conference, September 10-14, 2003, could throw up fresh views on the state and directions of their desire to see a revision of TRIPs. In their 2003 meeting, leaders of the Non-Aligned Movement called for a “Review the TRIMs and TRIPS Agreements from a developmental dimension with a view to neutralise the negative aspects of these agreements on the development of the developing countries and stressed the importance of implementing, and interpreting the TRIPS Agreement in a manner supportive of public health and access to medicines for all”.<sup>25</sup> They expressed the need to work out a framework for special and differential treatment for DCs.

According to the stated views of their delegations at the opening of the ill-fated Cancun Conference, however, DCs had all but abandoned any notion of revision of TRIPs or its extension to cover additional geographic indications and traditional knowledge. They expressed their principal expectations at Cancun in terms of gaining market entry for their products through the removal of agricultural subsidies and other barriers in the markets of Western Europe and North America.<sup>26</sup> The only exception seemed to be Myanmar which argued:

harmful practices such as economic coercive measures, trade sanctions, linkage to trade preferences, development aids or debt relief initiatives are being used by some major developed countries are contrary to the multilateral trade rules that negatively affect the socio-economic lives of the people and also slow down the development process. We strongly

believe that developing countries have the right to choose the path of development in accordance with their national priorities and objectives.<sup>27</sup>

In the end, the failure of the Conference left even the trade issues on the back burner. It is only with the proposals to consider the relationship between IP and development — submitted by Brazil and Argentina to the WIPO— that global IP issues have found fresh impetus.

#### **4. The Proposed “WIPO Development Agenda”**

The initiative of Brazil and Argentina (as well as other 12 developing countries)<sup>28</sup> to place IP at the heart of the development discourse has come in the wake of the failures of all previous attempts by DCs to impress on the major industrial nations the necessity of ‘granting’ specific exceptions or exemptions from obligations imposed on them through the sprawling international IP regime. The proposal states, at the outset:

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.<sup>29</sup>

It may be pointed out that the broad generalisation on the supposed costs and benefits of the IP protection does not refer just to DCs but all countries. This is symptomatic of the ideologically-propped, widespread illusion that all nations require, and will be served by, the same set of IP laws. Hence, the proposal does not question whether some nations might not need any IP at all. Moreover, the proposal fails to indicate why, if, as it asserts, IP protection is a “policy instrument”, its formulation cannot be at issue? As we will see from the contents of the proposal, it does not seem that Brazil and Argentina grasp the basic, intractable problems of IP for DCs— that current forms do not reflect their internal requirements for economic and technological development but block it.

The proposal has four basic components. The proposal first picks up the role of WIPO and suggests that it needs to go beyond “the promotion of intellectual property protection”<sup>30</sup> and be “fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals.”<sup>31</sup> The proposal thus seeks WIPO to become an instrument for the implementation of UN policies and suggests for that purpose the amendment of the WIPO Convention to reflect the “development dimension” into its activities.

A second aspect of the proposal concerns new treaties, such as the draft Substantive Patent Law Treaty (SPLT), that are currently being drafted or negotiated. As regards the SPLT, it asserts that it “would considerably raise patent protection standards, creating new obligations that developing countries will hardly be able to implement.”<sup>32</sup> It thus suggests that the views of the DCs expressed through proposed amendments be

incorporated into the draft to make it “more responsive to public interest concerns and the specific development needs of developing countries.”<sup>33</sup> It exhorts members to “strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States.”<sup>34</sup> The proponents do not seem to realize that all previous advances in IP law making were done in the interest of the pace-setters and without regard to the special circumstances of the least developed. Even when the minimal standards of the major conventions were endorsed, in the 19<sup>th</sup> century, against the proposals for universal or extensive standards applicable to all, it was not out of sympathy for the lesser developed but as a consequence of the deep division among the pace-setters themselves.

As part of the same concern for ‘safeguarding public interest flexibilities’, the proposal then refers to “access to information and knowledge sharing” as “essential elements in fostering innovation and creativity in the information economy” to argue that extending IP protection “to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the ‘Creative Commons’.”<sup>35</sup> It therefore suggests that any treaties in relation to the digital environment need to address the “interests of consumers and the public at large” and “safeguard the exceptions and limitations existing in the domestic laws of Member States.”<sup>36</sup> It urges WIPO to consider the potential value of open access models such as the Human Genome Project and Open Source Software “for the promotion of innovation and creativity.”<sup>37</sup> These proposals seem to assume that all nations will be affected by the expansion of IP to the same degree and require identical solutions. Yet, not all nations, least of all DCs, have transited to the ‘information economy’. Thus, while the industrial nations might need to rethink their IP system in light of advances in information and communication technologies (ICT), the same cannot be said of DCs. The nature of the economic, technological problems DCs face are so different from that of the industrialized countries that, their engagement with the catch up game with the industrial nations will not be helped either by such rethinking or by a reversion to the utopian notion of ‘common heritage of mankind’. The DCs cannot be party to an attempt to foist forms of IP on other nations while they themselves continue to suffer from the same experience of ‘received’ or imported laws.

A third element of the proposal questions the efficacy of Articles 7 and 8 of TRIPs, namely that it would facilitate ‘transfer of technology’ to DCs. It contends that the DCs “lack the necessary infrastructure and institutional capacity to absorb such technology.”<sup>38</sup> It adds that “higher standards of intellectual property protection” have not led to transfer of technology even in those countries possessing “a degree of absorptive technological capacity”.<sup>39</sup> It concludes, “In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.”<sup>40</sup>

The proposal suggests the creation of a body under WIPO “to ensure an effective transfer of technology to developing countries, similarly to what has already been done in other fora such as the WTO and the UNCTAD.” It cites as an example the introduction of a “Treaty on Access to Knowledge and Technology” that promotes “access by the

developing countries to the results of publicly funded research in the developed countries.”<sup>41</sup> This aspect of the proposal resuscitates the debate in the 1970s and 1980s ending with the failed draft treaty agreement on transfer of technology (TOT) that DCs managed to push through UNCTAD relying on their majority (“Group of 77”) in that forum. Although the current proposal relates only to publicly funded research, leaving out privately-held proprietary knowledge that was included in the previous debate, the industrial nations that rejected it then will not necessarily be convinced that the fundamental arguments they put forward have lost their relevance today.

A fourth element of the proposal is enforcement of IP. It contends that IP enforcement should be approached “in the context of broader societal interests and development-related concerns, in accordance with Article 7 of TRIPS.” It also asserts “The rights of countries to implement their international obligations in accordance with their own legal systems and practice, as clearly foreseen by Article 1.1 of TRIPS, should be safeguarded.”<sup>42</sup> It comments that the Advisory Committee on Enforcement (ACE), established by WIPO in 2002 should not confine itself to the perspective of right holders or to infringement issues but also consider their obligations as well as “the need to ensure that enforcement procedures are fair and equitable and do not lend themselves to abusive practices by right holders that may unduly restrain legitimate competition.”<sup>43</sup> It refers to Articles 8 and 40 of TRIPS as respectively supporting measures “to curb practices that may adversely affect trade and the international transfer of technology” or to address “anti-competitive practices in contractual licenses.”<sup>44</sup>

Clearly, the proposal seeks to introduce standards of use of IP by rights holders under the guise of curbing abusive practices. One might recall that throughout the evolution of IP, particularly during the mercantilist era, the main concern of states was the lack of use or implementation of the object of rights. The obligation on patentees to work their inventions, prominent during the earliest phase (Venice, e.g.), was gradually eroded until it became a point of conflict between DCs and the major industrial powers in the 1960s and 1970s. Regardless of whether the proponents are aware of the historical impasse preceding TRIPs, the current proposal is hence an attempt to revive the debate. TRIPs sealed the fate of any such demands by rejecting any preconditions for the use of IP or rather the assertion of rights. No nation can deny registration of patents or trademarks by reference to lack of domestic use or in the traditional phrase, “working”.

The proposal to balance the rights of proprietors with their obligations seems therefore an attempt to open old wounds without providing fresh arguments as to how this might become plausible. As a matter of fact, it is rather odd that such a suggestion has been made while the conditions of DCs have deteriorated in every department: their national IP systems have fallen under the absolute domination of foreign rights holders; their share in the world economy has been in the precipitous decline. The reference to ‘abusive’ or ‘anti-competitive’ practices might suggest that the proponents did not differentiate the two sets of problems, namely lack of working versus use or the fall outs from use (working). While economists have constantly questioned the inherently anti-competitive nature of IP but always came to the conclusion that such an outcome was a necessary evil, IP law was ill-equipped to address the problems of ‘overuse’ or ‘abuse’

For, the deployment of IP rights extend beyond IP per se into contract law, competition law and human rights. Consequently, any attempt to contain the problem within IP will not lead to viable solutions. Still, 'overuse' or 'abuse' is hardly a problem prevalent in DCs.

A fifth element of the proposal concerns the provision of technical assistance and its availability both in breadth and in quality. It then goes off a tangent: "This is important to ensure that in all countries the costs of IP protection do not outweigh the benefits thereof. In this regard, national regimes set up to implement international obligations should be administratively sustainable and not overburden scarce national resources that may be more productively employed in other areas."<sup>45</sup> There seems to be a number of contradictory claims here. On the one hand, it is not clear why, if nations have set up a system to administer IP, those systems cannot be run in a "sustainable" way? If the state concerned does not seek to put up the finances for the established system, either the state was aware all along that such was for face-saving purposes, to create the impression that it was discharging its international obligations and the like. Alternatively, the state was reliant on foreign assistance. In both cases, the state would not seem to have been convinced of the utility of such a system to the national economy or that the nation might benefit from supporting it to the hilt. The truth however is further from these: the IP machinery erected in DCs serves international rights holders a lot more than domestic proprietors. In fact, the system would collapse forthwith were it not for the income received from foreign applications, the fear of the government officials that the absence of the trappings of the capitalist economy and industrialisation might adversely impact on foreign investment and aid. Thus the proposal should have owned up fully to the reality of IP administration in DCs and called on the major industrial countries to pay for the upkeep of a system they largely benefit from or would not want to see collapse. Indeed, the promise of technical assistance is not altruistic at all – it is a channel the industrial nations have adopted for disbursing funds in DCs for services to be rendered to their IP rights holders. If the WIPO Development Agenda now insists that more of this should be available, it does not in any way diminish the stake the major industrial powers have in the IP systems of DCs. Quite the contrary! The proposal is only a coded reminder to those powers that those systems have always served their rights holders and that it is up to them to maintain and extend it further.

The proposal also asserts "WIPO's legislative assistance should ensure that national laws on intellectual property are tailored to meet each country's level of development and are fully responsive to the specific needs and problems of individual societies. It also must be directed towards assisting developing countries to make full use of the flexibilities in existing intellectual property agreements, in particular to promote important public policy objectives." Whilst extending technical cooperation to meet the needs of nations might be within WIPO's remit, it is not clear how it should also engage in the formulation of IP laws appropriate to DCs? Would it not indeed be more appropriate for the respective DCs themselves to assume such a responsibility with or without the assistance of WIPO? Moreover, the assertion that DCs can still manage to formulate laws in keeping with "each country's level of development and are fully responsive to the specific needs and problems of individual societies" contrasts sharply with the current reality of IP rights as

being firmly fixed on global levels and therefore operating in a universal framework. Clearly, not only the logic of the proposal but also its very language is a relapse into the dead past.

A sixth element of the proposal concerns participation of civil society in the work of WIPO, “including in all norm-setting activity”. The proposal calls for a change in current practice of inviting only representatives of IP right holders and bringing in non-governmental organizations (NGOs) to represent “the public interest”. It argues for participation of such NGOs “to ensure that in IP norm-setting a proper balance is struck between the producers and users of technological knowledge, in manner that fully services the public interest.”<sup>46</sup>

All in all, the proposal is, in theoretical terms, a rehash of perspectives previously submitted but either totally lacking in a grasp of the reality of IP law in DCs as well as on an international level or rejected by the major industrial powers as attempts to dilute or weaken IP rights. It puts a gloss on the real problems that DCs have to face in formulating and executing an IP policy that reflects their domestic needs, as sovereign nations.

## **5. The Reception of the ‘WIPO Development Agenda’**

The proposal submitted to the WIPO General Assembly in September 2004 by Argentina and Brazil and co-sponsored by 12 other DCs (all of whom have adopted the group name of ‘the Friends of Development’) has not been embraced by all the other DCs. Notable absentees from the group are India and China, indeed the DCs of the entire Asian continent. It seems also that the G-20 group of nations<sup>47</sup> that crystallised during the Cancun WTO Ministerial Meeting has not endorsed the DA proposals as such. It is puzzling why the ‘Friends of Development’ (FoD) did not merge with the G-20, if not to avoid fragmentation in the level of support for change in international trade rules, at least to consolidate the efforts of the DCs and create a broad-based pressure on the developed industrial nations.

Two counter-proposals were submitted to the WIPO by the major industrial nations, US and UK. The rest of EU, Japan and Canada did not proclaim their views until after the first inter-sessional intergovernmental meeting of the WIPO devoted to the DA was held in April 11 to 13, 2005 and the second from June 20 to 22, 2005. Mexico stated its views, largely echoing those of the US and UK and in stark contrast to that country’s position on IP at the Uruguay Round. Interestingly, although India did not join the ranks of the FoD, it openly stated its opposition to the status quo in IP.<sup>48</sup>

Apart from the above, other nations have expressed their views in the course of the discussions during the Inter-Sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO. Some nations, Australia and Japan, among them, have expressed their agreement with the US view that implementation of a “development agenda” has always been an integral part of WIPO’s mission. Others have supported the stance of the FoD. Still others have sought to add to the DA, by way of further

elaboration. A case in point is Chile. The rest of DCs in Africa and the Middle East expressed their opinions (through Morocco<sup>49</sup> and Bahrain,<sup>50</sup> respectively) in support of the contrasting positions of the FoD and the US-UK. We will presently examine the set of views expressed in written submissions and are therefore more accessible to us.

### 5.1 United States

By far the strongest and earliest opposition to the DA came from the US,<sup>51</sup> As a matter of fact, the reactions of the US to the proposal could not have been unexpected. The US countered that WIPO had engaged in “a robust ‘development agenda’ in all of its work for a long time, delivering high-quality development activities to Member States on a demand-driven basis.”<sup>52</sup> It insisted that WIPO should continue with its defined role of promoting IP rather than attempting to take on additional development concerns that are within the ambit of other UN agencies. The US asserted further that IP alone “cannot bring about development and can contribute only part of the solution”; that it is “simply one part of the necessary infrastructure needed to stimulate development”.<sup>53</sup> The US proposed, instead, to strengthen WIPOs role through a “WIPO Partnership Program”—an Internet-based facility “to match specific needs with available resources” more effectively and in a transparent manner.<sup>54</sup>

Clearly, the US did not appear to have been impressed by the repeated calls for injection of a ‘development dimension’ into the operations of WIPO. Neither did it seem to appreciate the significance of the renewed demands for a rethink of the international IP regime, particularly its relevance in DCs. It merely reiterated the well-known views in industrial nations about the role and continuity of technical assistance programme as extended to DCs by the WIPO. Inevitably, the evident gap between the demands and expectations of the FoD and their supporters, on the one hand, and the dismissive approach apparent in the US (and some of its supporters), on the other, will lead to further disappointments among DCs and a desire to recast the international IP regime in a manner “more responsive to public interest concerns and the specific development needs of developing countries.”<sup>55</sup>

### 5.2 United Kingdom

The UK proposal<sup>56</sup> reiterated the US view that IP policy is only one aspect of the development process. It pointed to “the development of an indigenous scientific and technological capacity” as crucial for such a process and to the IP system as “an important element in developing that capacity.”<sup>57</sup> The UK then argued that assistance should be directed at building the DCs’ capacity in science and technology. It also showed a willingness to depart from the outright rejection of the DA by the US. On the one hand, the UK relied on the recommendations of the Commission on Intellectual Property Rights it had established in 2001 to concede that “IP regimes can and should be tailored to take into account individual country's circumstances within the framework of international agreements such as TRIPs”.<sup>58</sup> Not that such a position represents anything radically different from the status quo, anchored as it is on unqualified support for TRIPs—the very premise that the DA looks more and more to be pitting itself against.

Yet, the UK's eagerness to endorse concerns of 'development' as expressed in the DA — by calling for the need to give “explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits”<sup>59</sup> — demonstrated an inclination to appease the increasingly strident voices of the FoD.<sup>60</sup>

On the other hand, the UK argued that WIPO's activities should be guided by the need to integrate IP policies with the development objectives of countries —very much akin to one of the demands in the DA. The UK declared that “if WIPO is unable to do this within its existing mandate then that mandate should be changed... We are however not as yet persuaded that WIPO's existing mandate is such that it is prevented from effectively integrating development objectives into its activities.”<sup>61</sup> Unlike the US, therefore, the UK seemed ready to reconsider whether the WIPO has not lived up to the expectations placed on it and to agree to changes, if so convinced.

In the area of technical assistance, the UK expressed the view that such must be done to enhance “capacity to facilitate the development of balanced IP-related policies.”<sup>62</sup> It wondered whether WIPO has managed to draw up and execute the requisite action plans in the context of the broad objectives of development in countries or regions. It called for examination of WIPO's activities and past records in order to redefine its programmes on development. Ultimately, it sought to reinforce the existing provision of the technical assistance to DCs by all parties, including individual governments, through further rationalisation and coordination. It thus welcomed the proposal of the US for a new facility to coordinate and match needs with the available assistance.

As regards the issue of further harmonisation of patent laws, the UK maintained that common rules, even in restricted aspects such as on novelty and inventive step, will benefit all nations by reducing costs and time for processing applications in multiple jurisdictions. It conceded however, that in “countries where there is little or no domestic demand for patents, further harmonisation is unlikely to bring any direct benefit to offset the costs of further amending their patent laws. For such countries it may be appropriate to explicitly provide in any harmonisation proposal an extended transition period or even a clear opt out.”<sup>63</sup>

While the UK's largesse of allowing deferred obligations in future harmonisation activities may be commendable, one wonders why such an approach cannot be applied across the board to all DCs who have not directly benefited from TRIPs? — the very premise of the current demands for DA, though unarticulated and still vaguely kept in the background. Indeed, the UK's attempt to warm to the DA at the same time as keeping quiet about the intransigence of the US casts doubts on its motives. By pushing for a reinvigoration of WIPO's “Permanent Committee on Cooperation for Development” as the ultimate tool to rectify the perceived deficiencies of the IP system,<sup>64</sup> it shrinks from upholding the broad reform of the same system according to its analysis of tailoring a system in conformity with the specific circumstances of DCs. Both the US and its other industrial allies and the FoD must be wondering what the UK has actually offered as the way forward.

On the question of technology transfer, the UK referred to current activities under the WTO, following from the Doha Ministerial in 2001, as being a more proper forum for any discussions.

## 5.2 Mexico

In its proposal,<sup>65</sup> Mexico took the view that the most important consideration in the current debate should be rationalization of resources. It asserted, “resources are not in plentiful supply and must be used rationally even where they come from external sources.”<sup>66</sup> Mexico pointed to the absence of knowledge by the general population of the relevance and benefits of the IP system as “a cause of inefficiency as well as an obstacle to development”.<sup>67</sup> It contended that “The sanction of conduct which infringes intellectual property is of no use, if it is not complemented by appropriate dissemination and understanding of the system.”<sup>68</sup> Consequently, Mexico proposed that dissemination be integrated into WIPO’s activities in DCs.”<sup>69</sup>

Mexico did not stop at suggesting the creation of awareness among the general public in DCs. It endorsed the current international IP system and demonstrated its alliance with the developed industrial countries in no uncertain terms: “The viability and success of the national systems require an international standard-setting framework based on clear, predictable and non-discriminatory rules, as well as minimum protection standards not subject to modifications resulting from the political, economic, social and even cultural changes generated by the members of the international community.”<sup>70</sup> Now, this is a declaration not only in favour of the existing international IP regime but also a rejection of any attempts to “modify” national systems at all. Although Mexico is a member of the G-20 that is presently seeking to modify the current international trade regime and to implement the Doha Development Agenda, its rebuttal of the DA newly formulated by the FoD is bewildering. Considering its determined opposition to TRIPs at the Uruguay Round, one would have thought that, at the very least, Mexico could express some sort of support to the DA.

## 5.4 India

India’s response rested on its opposition to any further harmonisation by citing “all the damage that TRIPS has wrought on developing countries”.<sup>71</sup> It asserted that DCs need a flexible IP regime, a “national policy space”, just as much as “today’s developed countries had when they themselves were at a comparable stage of development.”<sup>72</sup> It argued further that “higher and higher levels of IP protection, inherent in any harmonization exercise that takes no account of the circumstances of each country, are extremely detrimental to developing countries.”<sup>73</sup> In India’s view, any further harmonization of IP will only “serve the interest of rent seekers, who are predominantly in developed countries, rather than that of the public in developing countries.”<sup>74</sup> Accordingly, India called on the industrialised powers to respect “the national policy space” of DCs when seeking to add to their international obligations.

With regards to the DA, India declared its full support but sought to define the direction of desirable changes somewhat differently by calling for the “need to take into account any possible negative impact on the users of IP, on consumers at large, or on public policy in general.”<sup>75</sup> It asserted that IP protection was “meant, first and foremost, to promote societal development by encouraging technological innovation” and hence a country should be able to calibrate the kind of incentive it wishes to create “in the light of its own circumstances, taking into account the overall costs and benefits of such protection.”<sup>76</sup> In a sense, then, India stands for a total halt to an IP harmonisation at an international level so long as that harmonisation leads to further obligations being placed on DCs. Although not explicitly, India also seems to desire the unravelling of the TRIPs. It would appear that the ambiguity and wishful thinking in the DA, on the one hand, and the absence of clear intentions in the DA about what needs to be done to TRIPs, on the other, may have put off India from co-sponsoring that proposal.

In the area of transfer of technology, India sought to make it an obligation of developed countries as a quid pro quo for IP protection that DCs provide to “western rights holders”. It asserted that without such an obligation being imposed on the developed industrial nations, consumers in DCs will hardly benefit from IP protection.<sup>77</sup> India must surely know that this strange proposal finds no support in logic or theory. Were rent outflows to be the basis of evaluating the benefits of the IP system, all countries save a handful would qualify for the bounty that India has suggested. But such a measure would be tantamount to abolition of the international IP system, precisely because it is the framework for transfer of incomes (‘rent’) from one country to another, not just only between DCs and industrial nations.

### 5.5. Bahrain

Bahrain produced a lengthy document,<sup>78</sup> on behalf of the Middle East countries,<sup>79</sup> iterating general views on the value of an IP system in the abstract, the benefits it received from WIPO’s help and its proposals to improve the technical assistance system. Thus, it did not seize upon any of the grounds for a critique of the past roles of WIPO expressed by the proponents of the DA. Indeed, Bahrain seemed determined to add its voice to the US and other countries which saw no need to establish a ‘development dimension’ to WIPO’s current role, only some improvements in the form of cooperation and coordination of the technical assistance.

### 5.6 Morocco

Morocco, representing the African group, reiterated the importance of IP as “one mechanism among many for bringing about development” but that it should not be “detrimental to individual national efforts at development.”<sup>80</sup> Morocco demanded that “the existing international IP architecture should be made more democratic and responsive to the needs and aspirations of developing and least developed countries, especially in matters that are vital to the needs and welfare of their citizenry.”<sup>81</sup>

In terms of the specific issues presented in the DA, Morocco declared that “knowledge has no bounds or confines, and has never had one single source”, ignoring the fact that IP mediates the boundaries of where publicly available and ‘private’ knowledge meet. This view paints Morocco’s approach of how WIPO should be reformed to serve the DA: to enable countries “to gain access to technology at reasonable cost;” and to facilitate “access to foreign patented information on technology and technical resources”.<sup>82</sup> It then added, “Relaxation of patent rules should therefore, be considered as a policy option for developing and least developed countries to facilitate their drive towards technological and scientific development.”<sup>83</sup> Clearly, Morocco does not seem to appreciate the nature of the international IP regime that stands guard over the subject-matter of its proposals or the fact that similar demands in the 1970s and 1980s have fallen on deaf ears. Instead of repeating the failed demands, therefore, Morocco should have stepped up to the challenge of formulating IP strategies conducive to technological and social development in DCs, regardless of whether the international regime allows it or the developed industrial nations welcome it.

That Morocco is oblivious to the current IP regime across the world is proved by its limited concerns in the area of norm-setting. Amidst all the argument for reforms of the status quo, Morocco could only put forward a proposal for a treaty “on the protection of genetic resources, traditional knowledge and folklore.”<sup>84</sup> Again, although it also called for an impact assessment study to be conducted into “technical assistance, technology transfer and impact of new treaties on developing and least developed countries,”<sup>85</sup> it did not countenance any need for reform in the domestic IP laws of DCs.

Finally, Morocco sought to involve the WIPO in conducting studies into the obstacles for IP protection in the context, particularly, of the informal sector in Africa as well as the “tangible costs and benefits” of such protection for the sector “especially with regards to generation of employment”.<sup>86</sup> Its proposals encompassed virtually all aspects of the development process: strengthening the roles of small and medium enterprises (SMEs); “bridging the digital divide”; reversing the brain drain; and creating better “access to essential medicines and food, and also to information and knowledge for education and research”.<sup>87</sup>

### 5.7 Chile

Chile submitted its proposals for an appraisal of the public domain; the creation of a complementary systems to IP; an assessment of what the appropriate levels of IP might be to each country by reference to its particular situation and the degree of development and institutional capacity in that country.<sup>88</sup> As regards the public domain, Chile urged WIPO to undertake a study to look into its implications and benefits and to “draw up proposals and models” for its protection and access.<sup>89</sup>

In relation to the second, Chile argued that “economic policy instruments” such as “competitions, tax benefits, direct contributions, work commissions and public procurement” stimulate creativity.<sup>90</sup> Chile thus proposed that WIPO set up “a permanent

area for analysis and discussion” of these incentives “in addition to the intellectual property system.”<sup>91</sup>

As regards the third, Chile suggested that a study of the development dimension be conducted not only “to demonstrate the benefits and impact of intellectual property systems” but also to identify the costs and appropriate levels of IP protection congruent to the particular circumstances of a country but within the framework of “the minimum standard” established by TRIPs.<sup>92</sup> For all the apparent desire to re-examine the three specified issues, Chile has not grappled with the crux of the current debate: whether or not to create or inject a shift in the international IP system to facilitate development as the demanded by DCs. It is not easy to understand why else Chile would propose an independent study of the relationship between IP and competition, the extent of exceptions and limitations to IP that DCs might need to facilitate innovation.<sup>93</sup>

## **6. Conclusion**

Commentators, policy makers and government officials in the industrial nations might be amused by the new attempt of the FoD to cast doubt on the benefits of the international IP regime to DCs. Exactly ten years after the adoption of a global standard of IP by all members of the WTO, it had never seemed that questions of appropriateness and relevance to the DCs would haunt it all over again. As it is, many had made a career out of promoting IP for DCs, to the extent of turning the adoption or rejection of IP in DCs as an ideological divide between those who stand for progress and those who oppose it. The WIPO had been busy, since its inception, in transplanting IP to all DCs and stuck to an unchanging template for that purpose. Any form of differentiation among national IP laws was a taboo subject even among academic circles.

However, with the rise in awareness of the economic and social decay that many DCs suffer under the weight of what are broadly perceived to be unfair world trade rules and the willingness of sections of the population in the industrial nations to come to the aid of the suffering majority, the tide has started to turn. Many seem to be ready to see that the critique of the current international IP system generally or in the DCs is neither about the abandonment of that system altogether, nor about promoting theft or piracy. The proposals of the FoD have ignited fresh debate into the role of IP in the development of DCs and generated sympathetic responses overall.

The success or failure of the current attempt to transform the WIPO into a tool of development in the interest of DCs will, nevertheless, depend on whether Brazil and Argentina (the FoD) can muster enough support among DCs and gather around themselves countries like China and India who have the experiences, resources and clout to win the argument in the face of intransigence from some of the industrial countries, in particular the US. For one thing, the forays of the US into pulling DCs into some form of free trade agreement (FTA), with uniform TRIPs-plus provisions, will deprive them of more and more countries that might opt for a fundamental reversal in the IP system – the relatively favourable stance of the EU, notwithstanding.

Secondly, the FoD have yet to refine the kind of changes they desire to bring about in the IP field. As they stand, their proposals are, in many ways, illusory or utopian; they seek to appeal to, and draw on, the increasing sympathy that some governments and the general public in the West express for the provision of massive relief to DCs. The proposals seek to take advantage of the constant portrayal, in the media, of mass poverty, rampant diseases, interminable conflicts and repression in DCs as well as the weakening of the administrative and infrastructural capabilities of the DCs to fortify arguments for a largely undefined 'development dimension'.

Clearly, they need to move away from battling the international system and concentrate on the formulae suitable to DCs. The rationale for this is simple. Just as the industrial nations strive to protect their IP anywhere in the world, DCs too should seek to promote innovation and build their economies through a suitable form of IP. To that extent, devising an appropriate form of IP is, first and foremost, an internal matter for both groups of nations although the industrial countries attempt to portray IP as something that needs to be treated as a common concern transcending national interests and boundaries. This is exemplified by the aggressive stance of the US in the last two decades.

Ultimately, if the FoD intend to make an impact, they should insist on the exercise of their sovereign rights to legislate and implement laws appropriate to their needs. Should any country desire protection for its IP beyond its borders that again depends on its consent as a sovereign nation. It is a matter of historical record that most of the present-day DCs were co-opted into the major conventions without their consent (because they were colonies or unable to stand up to the pressures put on them by the industrial powers). Lacking the fundamental attributes of sovereignty, namely acting on consent reflecting the expressed wishes of its population, no DC can be held to live up to the obligations enshrined in the major conventions. DCs should exercise such a right now and allow for their population to express their views on the long-standing shackles placed on their businesses, creative communities and the wider society. If democracy is the byword for the 21<sup>st</sup> century, surely such a course should be welcome by the major powers and other industrial countries.

Finally, the FoD needs to transcend the false sermon that the door is still open for DCs to tinker with TRIPs and modify its deleterious impacts. An example is Reichman who advises DCs that Articles 7, 8, 31 and 40) TRIPs "arm developing and least-developed countries with legal grounds for maintaining a considerable degree of domestic control over intellectual property policies in a post-TRIPs environment, including the imposition of compulsory licenses."<sup>94</sup> However, the apparent concessions to DCs are conditional on adherence to substantive rules of TRIPs and hence any deviation ostensibly allowed is merely theoretical. The paralysis of many DCs to act in favour of their population facing the AIDS pandemic because of the fear of retaliation from the major industrial powers attests to the reality of TRIPs. In short, the lack of legislative space for DCs that TRIPs brought about is indisputable. The rush of DCs to inject the standards of TRIPs into their domestic legislation is testimony to that phenomenon. Even when DCs seek to take advantage of the specified provisions (such as compulsory licence in relation to drugs),

there is no lack of writers and interest groups who seek to show this as an attempt to weaken the IP system or free ride on others' IP.<sup>95</sup>

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<sup>1</sup> Among them are the following: the Millennium Development Goals adopted by the United Nations, the Johannesburg Declaration on Sustainable Development which was issued by the World Summit on Sustainable Development, the Sao Paulo Consensus adopted at UNCTAD XI.

<sup>2</sup> The UK government's Commission on Intellectual Property attempted to look at the problem but its recommendations fell short of calling for a through revision of the IP system for the benefit of DCs. See Commission on Intellectual Property Rights, *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy*, London, September 2002. It is interesting that even the Commission's suggestions for a few concessions to the DCs were rejected outright prompting the government to distance itself from the Commission's recommendations and putting an end to its existence.

<sup>3</sup> The Council is in charge of examining the unresolved issues in TRIPs, the so-called 'built-in agenda', as well as making proposals for "modification or amendment" of TRIPs.

<sup>4</sup> Article 72, TRIPs.

<sup>5</sup> WTO, "The Declaration on the TRIPs agreement and public health", 20 November 2001, WT/MIN(01)/DEC/2.

<sup>6</sup> The Philippines, for instance, presented a proposal for re-examination of the impact of WTO-linked obligations on DCs. See, WTO, General Council, Preparations for the 1999 Ministerial Conference, "Proposal for a Declaration on Developing Countries, Communication from the Philippines", WT/GC/W/393, 25 November 1999.

<sup>7</sup> The Africa Group, certain countries from South America as well as Asia asserted, among other things, "the rights of members (pursuant to Article 8.2) "to take measures to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". See, WTO, TRIPs Council, "Submission by the African Group, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela", IP/C/W/296, 29 June 2001.

<sup>8</sup> See, A. Endeshaw, *Intellectual Property Policy for Non-Industrial Countries*, Dartmouth, 1996, at 105-108.

<sup>9</sup> An example is the Stockholm Protocol to the Berne Convention.

<sup>10</sup> See Terence P. Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Volume II: Commentary, Kluwer Law and Taxation Publishers, 1993, at 2271 (regarding India's contention that countries should be free to formulate laws appropriate to themselves and they should be granted more favorable treatment in the international IP system).

<sup>11</sup> See Stewart, *ibid.*, on Brazil's proposal for compulsory licence over patents.

<sup>12</sup> Mexico contended that overprotection of IP prevents DCs from securing access to modern technology. *Ibid.*, at 2267.

<sup>13</sup> A. Endeshaw, "The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for non-Industrial Nations; Piracy as an Offshoot", 10 *Cardozo Journal of International and Comparative Law*, Vol. X, No.1, pp. 47-77, Spring 2002, at ¶.

<sup>14</sup> See, Article 27 (3), TRIPs, on the protection of plant varieties;

<sup>15</sup> See, Articles 23(4) and 24 (1) on geographical indications; Article 64 (2) and (3) on discontinuation of the "non-violation" provision of WTO as a form of dispute resolution.

<sup>16</sup> See Frederick M. Abbott, "TRIPs in Seattle: The Not-So-Surprising Failure and the Future of the TRIPs Agenda" 14 *Berkley Journal of International Law* 165, 2000.

<sup>17</sup> Article 68, TRIPs.

<sup>18</sup> These are Art. 24.1, on entering into negotiations for increasing the protection of individual geographical indications; Art. 24.2, on reviewing the application of the TRIPs provisions for geographical indications; Art. 23.4, on undertaking negotiations for establishing a multilateral system of notification and registration of geographical indications for wines; Art. 27.3(b), on reviewing after four years from entry into force of TRIPs, of members' measures to protect plant varieties and any exclusion from patentability they might make; Art. 64.3, on establishing modalities for non-IP complaints five years from entry into force of the WTO Agreement; Art. 71.1, on reviewing the implementation of TRIPs by developing nations, post-2000.

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<sup>19</sup> Paragraph 6 of the Doha Ministerial Declaration 2001 partly reads: “We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.” See note 5, *ibid*.

<sup>20</sup> Decision of the WTO General Council of 30 August 2003, “Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health”, WT/L/540, 1 September 2003, paragraph 1.

<sup>21</sup> WTO, The Doha WTO Ministerial Declaration 2001, 20 November 2001, WT/MIN(01)/DEC/1.

<sup>22</sup> Paragraph 2, *ibid*.

<sup>23</sup> Paragraph 19, *ibid*.

<sup>24</sup> For example, see, WTO, Council for TRIPs, “The Relationship Between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge”, (communication from Brazil, on behalf of China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Peru, Thailand, Venezuela, Zambia and Zimbabwe), IP/C/W/356, 24 June 2002

<sup>25</sup> Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur, 24 - 25 February 2003

<sup>26</sup> Thus the Philippines demanded special and differential treatment for DCs to be able to pursue “rural development and food security.” See, Ministerial Conference, Fifth Session, Cancún, 10 - 14 September 2003, Statement by the Honourable Manuel Roxas, Secretary of Trade and Industry, WORLD TRADE ORGANIZATION, WT/MIN(03)/ST/63, 10 September 2003.

<sup>27</sup> Ministerial Conference, Fifth Session, Cancún, 10 - 14 September 2003, Statement by H.E. Brigadier General Pyi Sone, Minister for Commerce of Myanmar, WORLD TRADE ORGANIZATION, WT/MIN(03)/ST/105, 12 September 2003

<sup>28</sup> WIPO, “Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO”, Geneva, August 27, 2004; WO/GA/31/11. The proposal was later elaborated through a further document; see, WIPO, “Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11”, Geneva, April 6, 2005; IIM/1/4.

<sup>29</sup> Proposal by Argentina and Brazil, note 28, *Ibid*.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid*

<sup>41</sup> *Ibid*

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid*

<sup>46</sup> *Ibid*

<sup>47</sup> Notwithstanding the fluctuation in membership (currently at 21), the group comprises of Argentina, Bolivia, Brazil, Chile, China, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Guatemala, India, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand and Venezuela. See, <http://www.g-20.mre.gov.br>.

<sup>48</sup> Statement by Debabrata SAHA, Deputy Permanent Representative of India, October 1, 2004; available at [www.cptech.org/ip/wipo/india10012004.html](http://www.cptech.org/ip/wipo/india10012004.html); accessed on January 31, 2006.

<sup>49</sup> WIPO, The African Proposal for the Establishment of a Development Agenda for the World Intellectual Property Organization (WIPO), Geneva, July 18, 2005, IIM/3/2.

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- <sup>50</sup> WIPO, “Proposal by the Kingdom of Bahrain on the Importance of Intellectual Property in Social and Economic Development and National Development Programs for the Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO”, Geneva, June 14, 2005, IIM/2/2.
- <sup>51</sup> WIPO, “Proposal by the United States of America for the Establishment of a Partnership Program in WIPO”, Geneva, March 18, 2005, IIM/1/2
- <sup>52</sup> *Ibid.*
- <sup>53</sup> *Ibid.*
- <sup>54</sup> *Ibid.*
- <sup>55</sup> Proposal by Argentina and Brazil, note 28, *Ibid.*
- <sup>56</sup> WIPO, “Proposal by the United Kingdom”, Geneva, April 7, 2005, IIM/1/5
- <sup>57</sup> *Ibid.*
- <sup>58</sup> *Ibid.*
- <sup>59</sup> *Ibid.*
- <sup>60</sup> WIPO, “Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11”, Geneva, April 6, 2005, IIM/1/4.
- <sup>61</sup> See note 56, *ibid.*
- <sup>62</sup> *Ibid.*
- <sup>63</sup> *Ibid.*
- <sup>64</sup> WIPO, Proposal by the United Kingdom, Geneva, June 14, 2005, IIM/2/3.
- <sup>65</sup> WIPO, “Proposal by Mexico on Intellectual Property and Development”, Geneva, April 1, 2005, IIM/1/3
- <sup>66</sup> *Ibid.*
- <sup>67</sup> *Ibid.*
- <sup>68</sup> *Ibid.*
- <sup>69</sup> *Ibid.*
- <sup>70</sup> *Ibid.*
- <sup>71</sup> See, note 48, *ibid.*
- <sup>72</sup> *Ibid.*
- <sup>73</sup> *Ibid.*
- <sup>74</sup> *Ibid.*
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *Ibid.*
- <sup>77</sup> *Ibid.*
- <sup>78</sup> WIPO, “Proposal by the Kingdom of Bahrain on the Importance of Intellectual Property in Social and Economic Development and National Development Programs for the Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO”, Geneva, June 14, 2005, IIM/2/2.
- <sup>79</sup> These are: Jordan, Lebanon, United Arab Emirates, Qatar, Yemen, Oman, Saudi Arabia, Kuwait, Syria, and Libyan Arab Jamahiriya.
- <sup>80</sup> WIPO, Proposal by Mexico on Intellectual Property and Development, Geneva, April 1, 2005, IIM/1/3.
- <sup>81</sup> *Ibid.*
- <sup>82</sup> *Ibid.*
- <sup>83</sup> *Ibid.*
- <sup>84</sup> *Ibid.*
- <sup>85</sup> *Ibid.*
- <sup>86</sup> *Ibid.*
- <sup>87</sup> *Ibid.*
- <sup>88</sup> WIPO, Proposal by Chile, Geneva, January 12, 2006, PCDA/1/2.
- <sup>89</sup> *Ibid.*
- <sup>90</sup> *Ibid.*
- <sup>91</sup> *Ibid.*
- <sup>92</sup> *Ibid.*
- <sup>93</sup> *Ibid.*
- <sup>94</sup> See, J.H. Reichman, “Universal minimum standards of intellectual property protection under the **TRIPS** component of the WTO agreement” 29 *International Lawyer*; 345-388 (1995), at 357-8.

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<sup>95</sup> Thus Leaffer asserts rather sharply that “In Third World countries, the piracy of intellectual property is justified by an ideology of development. Ready access to intellectual property is viewed as important to development, whereas the enforcement of intellectual property law is considered a burden on development.” See Leaffer, .... at 282.