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Research Report

Analysis of the role of South-South cooperation to promote governance on intellectual property rights and development

Research Paper, No. 14

Provided in Cooperation with:

South Centre, Geneva

Suggested Citation: Tekeste Biadgleng, Ermias (2007) : Analysis of the role of South-South cooperation to promote governance on intellectual property rights and development, Research Paper, No. 14, South Centre, Geneva

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RESEARCH PAPERS

14

ANALYSIS OF THE ROLE OF SOUTH-SOUTH COOPERATION TO PROMOTE GOVERNANCE ON INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT

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SOUTH CENTRE

DECEMBER 2007

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ACKNOWLEDGEMENT

I gratefully acknowledge the valuable comment from Peter Drahos, a Professor in Law and the Director of the Centre for the Governance of Knowledge and Development in the Regulatory Institutions Network (RegNet) at the Australian National University, Canberra, and Syed Asif Hasnain, United Nations Industrial Development Organization (UNIDO), Programme Coordination and Field Operations Division/Special Programmes Group. The views expressed in the study are, however, those of the author.

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LIST OF ACRONYMS

ARIPO	African Regional Intellectual Property Organization
FAO	United Nations Food and Agriculture Organization
FTAs	Free Trade Agreements
G-77	The Group of Seventy Seven
GSTP	Global System of Trade Preferences
IGWG	Intergovernmental Working Group on Public Health, Innovation and Intellectual Property of WHO
IP	Intellectual Property
OAPI	Organization Africaine de la Propriété Intellectuelle
OECD	Organization for Economic Cooperation and Development
R&D	Research and Development
SPLT	WIPO Substantive Patent Law Treaty
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
TLT	WIPO Trademark Law Treaty
UPOV	International Convention for the Protection of New Varieties of Plants
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WSIS	United Nations World Summit on the Information Society
WTO	World Trade Organization

EXECUTIVE SUMMARY

The international regime on IP rights is currently made up of a patchwork of laws and institutions at the bilateral, regional, and multilateral levels with a growing number of players. The TRIPS Agreement of the WTO forms the core instrument with critical influence on the role of international actors and the scope of national policy making. TRIPS aim at reducing the North-South tension on IP rights protection through a multilateral system as one of its objectives. The WTO rules on dispute settlement also call for strengthening the multilateral system and ensuring the use of the Dispute Settlement Body to address disputes among WTO members. However, TRIPS becomes the basis for developed countries to demand higher protection of IP rights outside the multilateral system. Such use of TRIPS fundamentally undermines the objective of reducing tension and the contribution of the multilateral system in managing the political-economy of IP rights norm setting. The dispute settlement rules also do not prevent the developed countries from using unilateral trade review mechanism to require the protection of IP rights in developing countries based on standards other than those under TRIPS. Moreover, TRIPS has weak review mechanism to evaluate and address the socio-economic impact of the implementation of its provisions. The inability of the multilateral system to manage the political economy of IP rights norm-setting implies that the developed countries can pursue their interests on IP rights protection irrespective of the objectives and principles of TRIPS and the consequences for the multilateral system.

The United Nations system has helped to advance the interests of the developing countries in certain areas of the protection of IP rights and technological development. However, policy coherence within the UN system itself remains critical. Recently the role of the UN on IP rights turned into a North-South debate, resulting in the disassociation of some of the developed countries from final decisions and treaties after important concessions have been made by developing countries.

WIPO advances further the standards of protection of IP rights. Currently WIPO is unable to make progress with respect to the conclusion of treaties for further strengthening of IP protection supported by the developed countries. It also failed to make progress on initiatives to address the concerns of developing countries on the protection of traditional knowledge and folklore. Norm-setting, technical assistance and other activities of the WIPO would be influenced by the implementation of the WIPO Development Agenda. Increasingly WIPO would be forced to consider complex policy issues on the relationship between IP rights and development, the balance of competing interests, and an assessment of the impact of its activities.

Almost all important treaties on the protection of IP rights are initiated by the developed countries. Developing countries have some success in influencing the direction of the global IP rights regime. They have secured important concessions that provided flexibilities in the implementation of international treaties. In addition, the developing countries, civil society organizations and the academia continue to push for fundamental rethinking of the present IP rights system in light of development challenges. Their efforts include the WIPO Development Agenda, the WHO global framework and plan of action on R&D for diseases disproportionately affecting developing countries, protection of biological resources and traditional knowledge, and access to knowledge treaty. These efforts have to contend with the sharp contrast in the interests of developed and developing countries and governance issues that include;

- fragmentation of policy making and conflicting role of different actors at the multilateral level, namely, the WTO, WIPO and the UN system;
- the relatively limited developments of policies and norms that are supported by developing countries in multilateral and bilateral negotiations; and

- weak coordination among developing countries, despite similarity of interests, and lack of binding norms among developing countries.

The fragmentation of policy making at multilateral level is accompanied by strong cooperation among developed countries. For example, while the developed countries are preparing to move forward on patent law harmonization outside the WIPO, developing countries have not initiated any complementary process to work on their priorities. The developed countries continue to coordinate efforts to push for their interest on IP rights protection through trans-Atlantic and other cooperation mechanisms, the latest concerning the enforcement of IP rights. The effectiveness of coordination among developed countries indicates the strong likelihood that IP rights protection would continue to evolve reflecting the interests of the industries in the North, unless developing countries create stronger and effective mechanisms for cooperation. In this regard, it is recommended to develop and strengthen South-South cooperation as a strong complementary process for addressing the governance problems and the concerns of developing countries.

The Research Paper recommends substantive and institutional framework and core principles for South-South Cooperation. A South wide mechanism, possibly with the political leadership of the G-77, with a specialised norm-setting mandate on IP rights and development, would provide effective mechanism for cooperation. The 'South' consists of technological learners at different levels of capacity and cooperation become imperative to achieve technological development and innovation. The development of IP rights norms as ideologically favoured by big corporations and governments of the developed countries, isolated from other socio-economic objectives, and sheltered from competition, could not be the basis for cooperation among technological learners. Instead, it is submitted that the substantive framework for South-South cooperation should primarily target the governance of IP rights, norm-setting and the establishment of a holistic and integrative approach on IP rights, innovation, access to knowledge and socio-economic development. The case for South-South cooperation does not rest on a loose assumption that mechanisms that exclude the North from participation are the most optimal tools to achieve the interests of developing countries. Rather, it can function as a strong complementary process to incorporate the interest of the developing countries in the multilateral policy making.

I. INTRODUCTION

The economic, political, and social dimensions of IP rights demonstrate the sharp contrast in the interests of the technological advanced North and the developing South. Since the adoption of the TRIPS Agreement, the North continues to push for higher IP rights protection and enforcement. The South has reflected some level of political unity at the international level on IP norm-setting processes driven by the need for innovation, technological development and to address critical socio-economic problems. However, the South has had limited success in advancing a common agenda, and individual efforts are often disjointed or challenged by pressure from the North. The Research paper discusses the role of South-South cooperation for promotion of governance on IP rights and technological development. It has identified the problems on IP rights norm setting and technological development that consist of:

- 1) the conflicting role of different actors at the multilateral level, namely, the WTO, WIPO and the UN, that result in fragmentation of policy making on development, technology and IP;
- 2) the impact of TRIPS on governance, on IP rights norm setting and, the weak legal structure it has adopted to handle the North-South tension on IP rights protection in a balanced manner;
- 3) the relatively limited developments of policies and norms that are supported by developing countries in multilateral and bilateral negotiations, as a result of the above-mentioned factors and, the exercise of political and economic leverage by the developed countries against their weak partners;
- 4) the sharp contrast of interest between the North and the South on the expansion of the protection of IP, on the one hand, and promotion of local innovation and access to technology for development, on the other hand;
- 5) weak coordination, partnership and leadership among developing countries, despite similarity of interests, and lack of binding norms among developing countries; and,
- 6) the technical and analytical nature of organizations working on South-South Cooperation.

The key questions the Research Paper will address are: 1) what lessons can be learned from the experience of developing countries on IP and technology related multilateral negotiations and 2) how and in what areas can South-South cooperation function as a tool to compliment the efforts of developing countries. It is submitted that South-South Cooperation, based on agreed principles and objectives, can play a strong complementary role to multilateral, regional and bilateral norm-setting on IP rights. The Research paper has been prepared on the basis of analysing the international legal instruments, reviewing the literature, and, the debates in international organizations.

The Research Paper is divided into four sections. Section II discusses the landscape of the international norms and institutions that influence technological development of the South, cooperation among developed countries and the various actors at the multilateral level. Section III discusses the role of South-South cooperation as a strong complementary process to supplement the efforts at the multilateral level. It examines the substantive and institutional framework for cooperation among developing countries. Section IV summarizes and concludes the findings.

The research experienced limitations, partly because of the nature of the research problem. There are no well developed initiatives, institutional framework and legal mechanism for South wide cooperation on IP rights and technological development. As a result, the research has to stipulate how South-South Cooperation should look like in order to be meaningful and effective.

II. THE INTERNATIONAL REGIME ON INTELLECTUAL PROPERTY RIGHTS AND THE CHALLENGES OF GOVERNANCE ON INTELLECTUAL PROPERTY NORM-SETTING

The international regime on IP rights is currently made up of a patchwork of laws and institutions at the bilateral, regional, and multilateral levels with a growing number of players. The WTO, WIPO and several UN agencies play a critical role in IP rights standards. Private, commercial and corporate practices on licensing, industry standards and research and development add up to the complexity of the international regime. The international regime on IP rights is part of the broader debate often related to, among others, the global knowledge society. Important policy research underlines the challenges as:

Challenges [that] include: the principle of minimum intellectual property standards backed by trade retaliation; the loss of balance in intellectual property policy and rules; the incumbency problem; lack of economic analysis: fighting rather than embracing new technologies such as the internet; undemocratic and ideological international norm-setting processes; inconsistency and lack of coordination within and among developing countries; and glossing over historical evidence and lessons.¹

These challenges are primarily questions of how to manage the fragmentation of bilateral, regional and multilateral processes and institutional players that have influence on the global knowledge society. The challenges have become an integral feature of global governance on IP rights.² However, the substantive question is beyond coordination of institutional and norm setting processes. Under each process and within each institutional player, there has been what can be called ‘the fundamental disparity’ between the protection of IP rights as demanded by technologically advanced countries and right holders and the interest of developing countries and users of technology.³ In this regard, it is critical to examine how TRIPS approaches the balancing of competing interests in IP rights, the nature of cooperation among developed countries, the relationship between WTO and WIPO and the role of UN.

II.1 The Birth Defects of the TRIPS Agreement in Strengthening the Multilateral System on IP Rights Norm-Setting

The adoption of the TRIPS Agreement under the WTO was a radical transformation of multilateral norm-setting in IP rights. It transformed the multilateral trading system to play a role in the realm of private rights and property.⁴ It also transformed the international IP rights norm by subjecting IP issues to the in-built trade dispute settlement mechanisms and permitted trade retaliation. It was adopted on assumed trade-offs between the North and the South that gave improved access to agricultural products of the South in exchange for a trading system that safeguarded the technological competitiveness of the North.⁵ However, there were important compromises made among developed countries that made the agreement possible. In this regard, the protection of geographic indications under TRIPS upon the demand of the European countries is a good example.

¹ Musungu (2005), p. 2.

² Abdel-Latif (2005), p. 3

³ Abbott (2007), p. 9. Abbott described the problem as ‘historical’ that should be evaluated in the present context where some developing countries registered remarkable progress.

⁴ Ostry, Sylvia (2002), p.203

⁵ *Id.*, p. 195.

TRIPS covers broad areas of IP rights and international minimum standards below which no country's domestic law is expected to fall, unless specifically permitted. The IP rights standards cover copyright and related rights, trademarks, geographic indications, industrial designs, patents, layout-designs, and protection of undisclosed information.⁶ The international minimum standard governs the availability, scope and the use of IP rights and the in-built flexibility safeguarding the diversity in domestic laws in pertinent areas of IP policy. The standards on enforcement of IP rights, as part of the minimum standards, require fair and equitable procedures, the availability of civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and, criminal proceedings.⁷ The critical aspect of TRIPS relates to its procedures for transparency and trade dispute settlement mechanisms.⁸

The WTO established a Council for TRIPS that operates under the guidance of the General Council and the Ministerial Conference of the WTO. The Council for TRIPS monitors the operation of the agreement, its objectives and principles and implementation of notification requirements. Article 68 of TRIPS makes particular reference to the monitoring of WTO members' compliance with their obligations. Where requested by the member states, the Council for the TRIPS provides any assistance in the context of dispute settlement procedures.

One of the critical objectives of TRIPS was to reduce the tension on IP rights protection through a multilateral system. The preamble emphasizes '... the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.' However, TRIPS is being used by the developed countries as the *de-facto* and strategic base to require higher standards of IP rights protection through unilateral trade measures. Although TRIPS established minimum standards and allows certain flexibility for national implementation, it fails to provide substantive norms on how it shall become the basis for handling tensions on IP at the multilateral level, for various reasons, including that:

- 1) The TRIPS does not provide for strong in-built system to analyse the socio-economic impact of its provisions, and the achievement of its objectives (Art. 7) and principles (Art. 8). Under Art. 71.1, TRIPS provides for review and amendment of the agreement other than for adjustment to a higher level of protection of IP rights under multilateral agreements accepted by all WTO members. The Doha work programme provides, under paragraph 19, for the continuation of the work of the Council for TRIPS under Article 71.1 taking into account the development dimension of the issues. However, no specific work has taken place in the Council for TRIPS to review the agreement except for general discussion of the issues. In addition, the review stipulated under Article 71.1 is not yet supported by a clear method of assessment and benchmarks.
- 2) Art. 1 of TRIPS permits the provision of more extensive protection of IP rights than required, provided that such protection does not contravene the provision of TRIPS. There are two limitations of this provision. First, the delineation of when 'more extensive protection than required' would contravene TRIPS can be made only in limited circumstances. The availability of copyright protection for 'methods of operation' *per se* would contravene Article 9 (2) of TRIPS. Other standards of protection higher than required by TRIPS may function as a trade barrier. TRIPS under its preamble and Art. 2, 8 and 41 establishes principles that measures and procedures to enforce IP rights do not themselves become barriers to legitimate trade. However, there is no linkage created with respect to the trade implications of 'more extensive protection than required.' Secondly, the provision does not permit the re-evaluation and adjustment of the balance of interests as required under Art. 7 of TRIPS following the provision of more extensive protection than required. According to Art. 7 IP rights protections should contribute to the mutual advantages of producers and users of technology. However, countries providing, or third countries that are affected by more extensive protection granted

⁶ WTO (1994a), "The Agreement on Trade-Related Aspects of Intellectual Property Rights, Part II & IV.

⁷ Id. Part III.

⁸ Id. Part. V.

to the producers of technology, are not allowed to adopt balancing measures to the advantage of users better than those provided by TRIPS.⁹ TRIPS supports the provision of protection more extensively than required under its provisions, but not the expanded use of limitations and exceptions to the rights conferred.¹⁰

- 3) Art. 1 also requires countries to give effect to the provisions of the agreement. The effect of such a requirement has been inadequate to support the utilisation of the flexibilities that require the cooperation of other member countries. It does not also give rise to the legal right to ascertain claims by a country that is affected by the practices and laws of member states that undermine, or do not give effect to the provisions of the agreement providing for flexibilities and the requirement for cooperation.¹¹
- 4) Art. 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes is perhaps the main provision dealing with the management of the tension on IP rights through the multilateral system. The provision requires Members not to make a determination of violation, impairment or nullification of benefits or impediment of the attainment of any objective of the WTO agreements, except through its rules and procedures and, prohibits any suspension of concessions or other measures taken seeking to redress a WTO violation prior to the relevant authorization by the Dispute Settlement Body (DSB) of the WTO. The United States maintains a mechanism for ensuring protection of United States IP rights under a unilateral trade barriers review mechanism (called Section 301 Trade Act). The very discretion to make determinations covered under Art. 23(2) (a) of the Understanding prima facie precludes the United States from abiding by its obligations. The mechanism was the subject of dispute under the Understanding. The utility of the provision is undermined by the Panel's finding in *US - Section 301 Trade Act* when it relied on the undertakings of the United States administration that the United States would base its determinations on whether there has been a violation or denial of United States rights on the findings of the panel or Appellate Body.¹² Accordingly, the Panel concluded that the discretionary power for taking action under the trade review mechanism cannot be presumed to be used in violation of the United States obligations under the WTO Agreements.¹³

The inability of the multilateral system to manage the political economy of IP rights norm-setting implies that the developed countries can pursue their interests irrespective of the objectives and principles of TRIPS and the consequences for the multilateral system. This led to unilateral measures by developed countries on the standards of protection in other developing countries. Hence, effective cooperation among developing countries would be a complementary mechanism to counter the pressure from developed countries and to address the limitations of TRIPS. In this regard, it is important to look at the nature of cooperation among developed countries in advancing further their interests on IP protection without due regard to the multilateral system.

⁹ WTO (2000), Report of the Panel in *United States – Section 110(5) of the US Copyright Act*, WT/DS160, is a good example.

¹⁰ Biadgleng (2007), p. 171, 173-175.

¹¹ *Id.*

¹² *Id.*, p. 185.

¹³ WTO (2000), Report of the Panel in *US - Section 301 Trade Act*, para. 7.109. Moreover, Article 23 of the Understanding does not exclude unilateral enforcement mechanisms with respect to TRIPS-plus obligations arising from treaties other than the WTO, including the WIPO treaties not incorporated to the TRIPS Agreement by reference, and bilateral agreements.

II.2 The Developed Countries, Cooperation on IP Rights and Implications for Governance

The North, especially the United States, European countries and Japan promote the highest standards of IP rights and enforcement at the multilateral level that reflect their domestic priorities. Almost all important treaties on the protection of IP rights are initiated by the developed countries. Understandably, the promotion of higher standards on IP rights remains the priority of the developed countries. The debate in the United States Congress is a clear example of the major policy consideration on IP rights in developed countries. The debate focuses on issues of differences with the European system and further mechanisms for the enforcement of IP rights.¹⁴ The Congress is debating whether to shift from a first-to-invent to a first-to-file system for determining the priority of claims in patent applications. The enforcement of IP rights is also at the centre of the European policy debate together with efforts to strengthen the regional patent system.¹⁵

The EU and the United States usually coordinate their global strategies and interests on IP rights and technology. The most important achievement by the North in coordinating policies was the adoption of TRIPS under the WTO. TRIPS functions as the *de facto* and strategic base for subsequent unilateral, bilateral, and multilateral measures on IP rights. In this regard, the WIPO advances further international norms on IP rights. Substantial areas where TRIPS defined minimum standards are upgraded under treaties negotiated and adopted subsequently under the WIPO.¹⁶

The developed countries pushed for the Substantive Patent Law Treaty (SPLT) and the protection of the rights of broadcasting organizations in the WIPO until their efforts were critically challenged by developing countries and progress was derailed. They maintain a trilateral working group (consisting of the patent offices of the United States, Japan and Europe), established in 2003 to accelerate the development of the SPLT in the WIPO.¹⁷ Since progress in the WIPO has been slow, the trilateral working group has been working outside WIPO to develop the text of the treaty and reach an agreement that addresses their countries' priorities and concerns.¹⁸ They intend to bring back the draft treaty text to the WIPO.¹⁹

The requirements on the enforcement of IP rights under TRIPS have not been affected by subsequent norm-setting exercises under the WIPO. Nonetheless, the EU and the United States adopted a trans-Atlantic agenda in 2006 on the enforcement of IP rights in the Council for TRIPS and the WIPO. The EU and the United States have agreed on a joint "Action Strategy for the Enforcement of Intellectual Property Rights in the Third Countries."²⁰ Bilaterally, the United States and the EU will coordinate their action on enforcement of IP rights in China and in Russia, as well as other allegedly infringing and trans-shipment areas of key concern in Asia, Latin America and the Middle East.²¹ Based on this agreement, the EU has requested a structured discussion in the Council for TRIPS on the operation of the enforcement provisions of the TRIPS Agreement.²² The submission, if accepted, could be considered as another critical transformation of IP rights after the adoption of TRIPS. The approach of the EU is supported by a subsequent joint submission with Japan, Switzerland, and the United States.²³

¹⁴ IPO (2007).

¹⁵ Intellectual Property Watch (2007a).

¹⁶ WIPO (1996), the WCT and WPPT (jointly called the 'internet treaties') and the Revised Trademark law Treaty form the core set of rules developed after the TRIPS Agreement in the WIPO. Furthermore, WIPO continues to develop standards, recommendations and guidelines related to patents, trademarks and industrial designs.

¹⁷ WIPO (2004a), SCP/10/9.

¹⁸ Intellectual Property Watch (2006).

¹⁹ Id.

²⁰ European Union (2006).

²¹ Id.

²² WTO (2006a), IP/C/W/468.

²³ WTO (2006b), IP/C/W/485.

The EU/United States trans-Atlantic agenda on IP rights is supported by a wave of bilateral Free Trade Agreements (FTAs). The FTAs incorporate standards higher than those required under TRIPS for the protection of IP rights. FTAs are used as a strategic opportunity to consolidate changes in the area of IP rights and in order to:

- a) Extend protection of IP beyond what is required under TRIPS. For example, with respect to the protection for pharmaceuticals and agricultural chemicals, FTAs require the extension of patent terms in proportion to the delays in marketing approval processes and the 5-10 years of protection of data submitted for approval purposes.²⁴ There is usually a provision in FTAs listing WIPO treaties to be ratified, despite the fact that there is no requirement to do so under TRIPS.
- b) Reduce optional provisions under TRIPS on IP standards and enforcement, for example, by determining the 1991 Act of the UPOV²⁵ as an effective method of compliance with TRIPS.²⁶
- c) Extend the scope of enforcement and require a wider use of the criminal justice system to tackle IP violations as a deterrent to possible future infringements. In this regard, the FTAs review the standards for civil remedies, the threshold for evidence and guarantees, the applicability of boarder measures and measures against individuals and companies found in infringing activities.²⁷
- d) Pre-empt some of the discussions in the multilateral process, including on patent and public health, biological resources, traditional knowledge and cultural expressions.²⁸

Hence, the coordination of policies and strategies on IP rights by developed countries indicate that:

- *Due to similar political and economic interests, the developed countries have been effective in coordinating and promoting IP rights protection in their favour. In particular, the efforts of developed countries in resolving their differences through bilateral and trans-Atlantic cooperation have helped them to effectively influence the multilateral process.*
- *The EU-United States joint strategy on the enforcement of IP rights and the trilateral project on SPLT are typical examples that would impact the norm-setting process in the WTO and the WIPO. In response to the suspension of the discussion on SPLT upon the demands of developing countries, the developed countries have intensified their efforts to resolve their differences on the SPLT and develop draft treaty texts that they can submit to the WIPO;*
- *The close link in economic interest and the effectiveness of coordination among developed countries indicate the strong likelihood that IP rights protection would continue to evolve reflecting the interests of the industries in the North, unless the South is equipped with stronger and effective mechanisms for cooperation*

²⁴ See, for example, USTR (2003), United States- Chile FTA (2003), Article 17.10.1.

²⁵ UPOV (2006) -International Convention for the Protection of New Varieties of Plants, as last amended in 1991.

²⁶ Id. Article 17.1:3.

²⁷ Id. Article 17.11:22.

²⁸ The European FTAs had included provisions attempting to resolve some of the multilateral disputes under the proposed Economic partnership Agreement with Western African Countries. The provisions state that the Convention on Biological Diversity (CBD) and the TRIPS Agreement should be implemented in a mutually supportive manner.

Box 1: Use of FTAs and WTO Accessions to Secure Adherence to the WIPO Treaties

	WIPO Internet treaties	TLT	PCT	UPOV 1991
Algeria ²⁹	EU FTA	EU FTA		EU FTA
Bahrain	US FTA	US FTA	US FTA	US FTA
Cambodia	WTO Accession		WTO Accession	WTO Accession
Chile	EU FTA	EU/US FTA	EU/US FTA	EU/US FTA
Colombia	US FTA	US FTA	US FTA	US FTA
Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua	US CAFTA	US CAFTA	US CAFTA	US CAFTA
Egypt			EU FTA	EU FTA
Jordan	US FTA		EU FTA WTO Accession	EU/US FTA
Lebanon		EU FTA	EU FTA	EU FTA
Morocco	US FTA	US FTA	EU/US FTA	EU/US FTA
Oman	US FTA	US FTA	US FTA	US FTA
Peru	US FTA	US FTA	US FTA	US FTA
Singapore	US FTA	US FTA	US FTA	US FTA
Tunisia			EU FTA	EU FTA

Note:

1. WIPO Internet treaties- WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonograms Treaty (WPPT), 1996, TLT- Trademark Law Treaty, 1994, PCT-Patent Cooperation Treaty, 1984/2002 and UPOV- International Convention for the Protection of New Varieties of Plants, 1991.
2. The FTAs of the EU are usually referred as Association Agreements. (3) The list of commitment to accede to the treaties is without prejudice to whether the countries have taken the step to ratify the treaties.

II.3 Relationship between the WTO and WIPO: Governance Issues and Developing Countries

The state membership of the WIPO and WTO and the coverage of IP issues to some extent overlap. This helped to mandate cooperation between the two organizations in accordance with Article 63 (2) and 68 of the TRIPS Agreement.³⁰ The TRIPS under article 71 (2) provides a facilitated procedure for WTO members to adjust to higher levels of IP rights protection achieved under multilateral agreements. The challenges of the implementation of TRIPS and the legal and technical relationships between the WTO and the WIPO required countries to coordinate their policies in both organizations. It was the WIPO that was entrusted with the task of assisting developing countries in implementing the

²⁹ Algeria has agreed to ratify UPOV 1991 after five years. Alternatively the agreement provides that ratification may be replaced by the implementation of an adequate and effective sui generis system of protection of plant varieties *if both parties agree*. Algeria and Lebanon also agreed that they will ensure accession to or the implementation of the TRIPS Agreement, although they are not yet Members of the WTO.

³⁰ See WIPO (1995), Agreement between the World Intellectual Property Organization and the World Trade Organization, 1995. The Advisory Committee on Enforcement of the WIPO coordinates with organizations such as the WTO and the private sector, undertakes training programmes for all relevant stakeholders and exchanges of information on enforcement issues through the establishment of an Electronic Forum, See, WIPO (2006a), WIPO/ACE/3/2.

TRIPS. Moreover, it has become the only multilateral forum to advance new IP rights standards that, by definition, have to be higher than required by TRIPS.

Developments in the WTO on TRIPS and Public Health were accompanied by the expiry of the transition for the implementation of TRIPS by developing countries and the availability of pharmaceutical products patents, in 2000 and 2006, respectively. The developments required the examination of the role of the WIPO on the implementation of TRIPS and the adoption of the new treaties pertaining to IP rights. Accordingly, the needs and priorities of developing countries in the WIPO started to take a new shape. In 2004 Argentina and Brazil submitted a proposal for the establishment of a development agenda for the WIPO (WIPO Development Agenda).³¹ It took three years to arrive at modest results consisting of 45 out of the total list of 111 proposals put forward. WIPO is required to look beyond the WTO and to intensify its cooperation on IP related issues with UN agencies, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations. The WIPO was requested to establish a Committee on Development and IP to implement all the proposals recommended for adoption on the development agenda.³²

WIPO is experiencing a dynamic process in which the push for higher IP rights protection is in direct collision with strong demands for the re-examination of the IP rights system and the role of international law and organizations to address the development challenges related to IP rights. It failed to make progress on a substantive patent law treaty, the protection of broadcasting organizations, and audiovisuals that are primarily initiatives to upgrade the standards for the availability, scope and protection of IP rights. However, it is also facing challenges to make progress towards a binding international treaty on the protection of traditional knowledge and cultural expressions as demanded by the developing countries and indigenous communities. Norm-setting, technical assistance and other activities of the WIPO would be influenced by the implementation of the WIPO Development Agenda. However, it should be noted that important elements of the WIPO Development Agenda are to be implemented in consultation with member states. This would require the agreement of the WIPO member states on each course of action to be taken by the WIPO. It can be said that:

- *WIPO maintains critical role in influencing the governance of IP norm setting but it will be forced to consider complex policy issues on the relationship between IP rights and development, the balance of competing interests, and an assessment of the impact of its activities. It will remain the battlefield between the North and South on IP rights;*
- *Success in the WIPO is critical to both developed and developing countries. Implementation of the Development Agenda, the negotiation of new treaties in the WIPO would have an impact on the relationship of WIPO and TRIPS. For example, the review of IP standards and their economic implications could influence the review of TRIPS in accordance with Art. 71.*

II.4 The UN, IP Right Norm-Setting and Developing Countries

The discussion on governance on IP rights and technology would not be complete without determining the role of the UN system other than the WIPO. The various organs of the UN maintain important mandates and functions on global policy development with respect to science and technological development. The UN Commission on Science and Technology for Development (CSTD) has the mandate for the formulation of recommendations and guidelines on science and technology matters within the United Nations system. Other agencies such as the UNCTAD, the United Nations Industrial Development Organization (UNIDO), the Food and Agricultural Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) maintain mandates on

³¹ WIPO (2004b).

³² WIPO (2007a), A/43/13 REV.

technological development issues. Important contributions were made by the UNCTAD³³ and the Millennium Development Goals Task force on Science, Technology and Innovation.³⁴ However, questions arise as to what role the UN system plays in shaping more pragmatic and pro-development IP rights norms at the multilateral level.

The promotion of policy coherence between the UN and the WTO system has been pursued in a loose political structure focusing on finance and trade.³⁵ However, policy coherence within the UN system itself is difficult to achieve.³⁶ During several negotiations, the UN organs have been restrained from dealing with IP rights issues, sometimes in favour of the mandates of the WTO and WIPO, or experienced difficulty in bringing the North and South to agree on specific issues that include IP rights. The efforts of developing countries in the UNCTAD to develop a code of conduct on technology transfer and multinational corporations are notable examples in the pre-TRIPS scenario. Recent developments show how the IP rights maximisation strategies of the developed countries critically affect the role of the UN in global IP and technology issues.

- a) When members of UNESCO were discussing the adoption of the Convention on Cultural Diversity and Artistic Expression, provisions to prevent the use of IP rights for misappropriation of traditional knowledge and cultural expression proved to be controversial. After a series of debates, where there was especially pressure from the United States, all elements of the drafts that dealt with IP rights were removed from the substantive clauses of the final draft of the Convention.³⁷ The United States also pushed for excluding any possibility of the Convention taking precedence over trade instruments. Article 20 of the Convention, which deals with its relationship to other treaties, provided that "nothing in this Convention shall be interpreted as modifying rights and obligations of the parties under any other treaties". However, it also stipulates that countries "shall take into account" the UNESCO Convention "when interpreting and applying the other treaties to which they are parties or when entering into other international obligations." This became the basis for the United States to disassociate itself from the adoption of the Convention.
- b) One of the most controversial points in the adoption and subsequent implementation of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) relates to the prevention of IP rights from creating restrictions on access to plant genetic resources shared through the multilateral system established in the treaty. The controversy resulted in the adoption of an ambiguous provision (article 12.3 (d)) that can be described as 'an agreement to disagree.' The provision created ambiguity as to when IP rights can be claimed without limiting the facilitated access to plant genetic resources, reflecting the North - South divide on genetic resources and IP rights;³⁸
- c) The WHO maintains an Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG). The IGWG was established as a result of the May 2006 World Health Assembly Resolution (no. WHA59.2467), which called for a global framework and plan of action on promoting R&D for diseases affecting developing countries disproportionately and, access to medicines.

³³ UNCTAD contributes to various multilateral processes that deal with IP rights and science and technology. See, UNCTAD (2003).

³⁴ Juma, *et al.* (2005).

³⁵ WTO (1994b), Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy Making.

³⁶ See Art. 2 of the Agreement between the United Nations and the World Intellectual Property Organization, UN, Chief Executive Board for Coordination (1974). The agreement requires the WIPO to recognise the responsibilities for coordination by the UN General Assembly and of the Economic and Social Council. Accordingly, the Organization agrees to cooperate in whatever measures may be necessary to make coordination of the policies and activities of the UN and its agencies fully effective.

³⁷ South Centre and CIEL (2005), IP Quarterly Update, first quarter, 2005, pp. 16&17 and Second Quarter, 2005, p.17.

³⁸ South Centre and CIEL (2004), IP Quarterly Update, 2004, third quarter, p.5.

The IGWG is expected to report back with recommendations to the World Health Assembly in 2008 “giving particular attention to needs-driven research and other potential areas for early implementation.” The IGWG is preceded by the Commission on Intellectual Property Rights, Innovation and Public Health, that adopted its report on April 2006.³⁹ The report is yet another manifestation of the North-South divide and the inability of the multilateral system to respond to the special needs of developing countries. On 23 May 2007 the World Health Assembly adopted a resolution mandating the provision of technical assistance for the use of TRIPS flexibilities and relevant decisions in order to promote access to pharmaceutical products.⁴⁰ The United States disassociated itself from the decision.⁴¹

- d) The Internet Governance Forum (IGF) was created by the United Nations World Summit on the Information Society (WSIS). It serves as a platform for multi-stakeholder discussions on public policy issues related to Internet governance and is mandated to foster the sustainability, robustness, security, stability and development of the Internet. However, the forum faces challenges as to the exact scope of its mandate to develop recommendations on any of its discussions including the development dimension of internet governance, the rights of users, IP rights and access to knowledge.⁴²

The challenges in the use of the UN system to advance development objectives remain a basic dilemma in the UN reform system. The process of the UN reform does not indicate any agenda on IP rights and science and technology. Under the discussion in the WIPO development agenda countries have agreed that the WIPO should intensify its cooperation with various UN organs. The results of such cooperation however, may not necessarily be a positive outcome for the developing countries. Developing country delegates and civil society organizations have already raised serious concerns on the proposed agreement for cooperation between the WIPO and the FAO.⁴³

In summary, although the UN system has helped to advance some of the interests of the developing countries, policy coherence within the UN system itself remains critical. The role of the UN on IP rights has become a North-South issue, resulting in the disassociation of some of the developed countries from final decisions and treaties after important concessions have been made by developing countries.

- *The UN system that is dependant largely on funds from technologically advanced countries would continue to experience difficulty in playing an effective role in responding to the interests and priorities of developing countries.*
- *Although developing countries need to continue to participate effectively in the UN system for the development of norms that support their economic development endeavours and other objectives, such as health and environment, a complementary mechanism is necessary to advance their interest.*

³⁹ WHO (2006b).

⁴⁰ WHO (2007a), WHA 60.30.

⁴¹ Intellectual Property Watch (2007b).

⁴² South Centre and CIEL (2007), IP Quarterly Update, first Quarter 2007, p.12.

⁴³ Tansey (2007), pp. 56 and 57.

III. ANALYSIS OF A SUBSTANTIVE AND INSTITUTIONAL FRAMEWORK FOR SOUTH-SOUTH COOPERATION

The review of the international regime on IP rights, in particular the role of various actors and the limitation in achieving substantive progress on issues of interest for developing countries at the multilateral level form the basis for the exploration of an alternative mechanism. Efforts to balance interests and costs and benefits of IP rights would continue to dominate the debate in norm setting at multilateral and bilateral levels. However, there are areas that require further reinforcement when the negotiations face deadlocks at the multilateral level, or if the concession expected becomes too high for one side. The developed countries utilise their political and economic power to shape the norms and standards of IP rights and effectively utilise the multilateral system for their advantage.

South wide mechanisms should be explored to enhance the endeavour towards a holistic and integrated approach to development and IP rights. The case for South-South cooperation does not rest on a loose assumption that mechanisms that exclude the North from participation are the most optimal tools to achieve the interests of developing countries. Rather, it can function as a strong complementary process to incorporate the interests of the South in the development of international law. A strong mechanism for South-South cooperation would allow the South to develop norms that build on shared interests and coordinated strategies in promoting governance in technology and IP rights.

There is a dilemma as to what concerns the ‘South’ and the human race in general. When one lists the challenges of developing countries, such as poverty, income inequality, indebtedness, unemployment, accessibility of food, medicine and education, one would wonder if these issues are not really the concerns of human kind.⁴⁴ In practice, the bulk of civil society, especially consumer groups, NGOs working on health, education and sustainable development, some private sector groups such as small and medium size enterprises and generic pharmaceutical manufacturers as well as the academia in developed countries demonstrate similar and closely related interest on IP rights with developing countries. Taking one example, civil society, from North and South was the main force behind the efforts of the developing countries to ensure the implementation of TRIPS in a manner supportive of measures for the protection of public health.⁴⁵ The intersection in interest between developing countries and public interest groups in the North would not however, weaken the argument for cooperation exclusively among developing country governments. In the end governments make the rules of international law.

III.1 The ‘South’, ‘Developing Countries’ and Technological Development

The use of terms such as ‘developing countries’ and the “South” is not a claim for homogeneity of the countries conveyed by such use. Although the history of the use of the terms ‘south’ and ‘north’ dates back to the cold war era giving rise to an ideological connotation, it is basically used here to describe the development gap, in terms of technological capability and living standards. However, the ‘South’ or ‘developing countries’ vary in scientific, technological, social and economic infrastructure and income levels. Fredrick Abbott noted that:

⁴⁴ The intersection between the interests of developing countries and the people in the North was one of the major criticisms in the report of the South Commission on *the Challenges of the South*. See Szentes (1998), p.102.

⁴⁵ Drezner (2005).

... over the past decade, a number of major developing country actors have entered a new “middle ground” which places them squarely in neither camp. (This type of transition reflects also the historical pattern of countries, which today is part of the OECD.) The emergence of China and India as centres of innovation is fundamentally altering the dynamic between the “haves” and “have-nots”. Both these countries are presently undergoing difficult internal IP policy transformations as their interests in promoting and protecting domestic innovation achieve greater parity with their interests in making low-cost use of externally-generated innovation.⁴⁶

The distinction between the ‘haves’ and ‘have-nots’ is not yet clear among developing countries. Although there are some countries often categorised as developing countries, their transformation into active innovators and proponents of expanded IP systems make them different from the rest. However, the number of such countries is very limited. Significant numbers of developing countries are still technological learners, although they may vary on absorptive capacity and how active they are in the learning process.

The overall knowledge competitiveness of developing countries based on indicators of national policy orientation, technological infrastructure, socio-economic infrastructure and productive capacity show certain levels of improvement.⁴⁷ This is mostly due to the success of some developing countries, largely in Asia. Recent trends show that some of the past passive learners in the developing world are climbing the technology ladder. The share of high-tech production in total manufacturing has increased for some developing countries. Some countries, particularly Singapore, Malaysia, Taiwan Province of China Hong Kong, China, the Republic of Korea, and China have experienced persistent increases in their share of high-technology manufacturing.⁴⁸ These Asian economies also emerged as important players in R&D and showed potential for a further increase in competitiveness.

There is a need to scrutinize the recent trends and data pointing to the emergence of the South as an active innovator. First, when countries such as China, Singapore, the Republic of Korea, Taiwan Province of China, and India are removed from the matrix, the picture remains murky for the rest of the developing countries. Secondly, even for the successful countries the impact of the new business models of multinational corporations and cost-efficiency seeking investment flows dilute the real picture. The business models have resulted in the location of manufacturing outlets in Asia from the North in high-tech goods, without necessarily resulting in technological mastery and control by the developing countries. Beyond the figures on patents⁴⁹ and various indicators on technological competitiveness of countries, the international regime on IP rights has to be evaluated in terms of the value chain for the production and trade in technological goods. Indicators of technological competitiveness and trade figures on technological goods conceal the real ownership structure and the economic gains accrued to the manufacturers of the goods. The emergence of some developing countries as manufacturing outlets for technological goods does not necessarily correlate to the innovative capabilities of the domestic economy and industries. The share of foreign-invested affiliates in technology-intensive industries in developing countries remains very high.⁵⁰ Outsourcing and international sub-contracting allow only the participation of companies in developing countries in certain components of R&D. Much of the high skill outputs in the South take the form of services transactions with companies in the North.⁵¹

⁴⁶ Id.

⁴⁷ See Asfaha, *et al* (2007 and forthcoming), Executive Summary and South-South Cooperation for Industrial Development, and National Science Board (2006), (of the government of the United States of America), Appendix table 6-10.

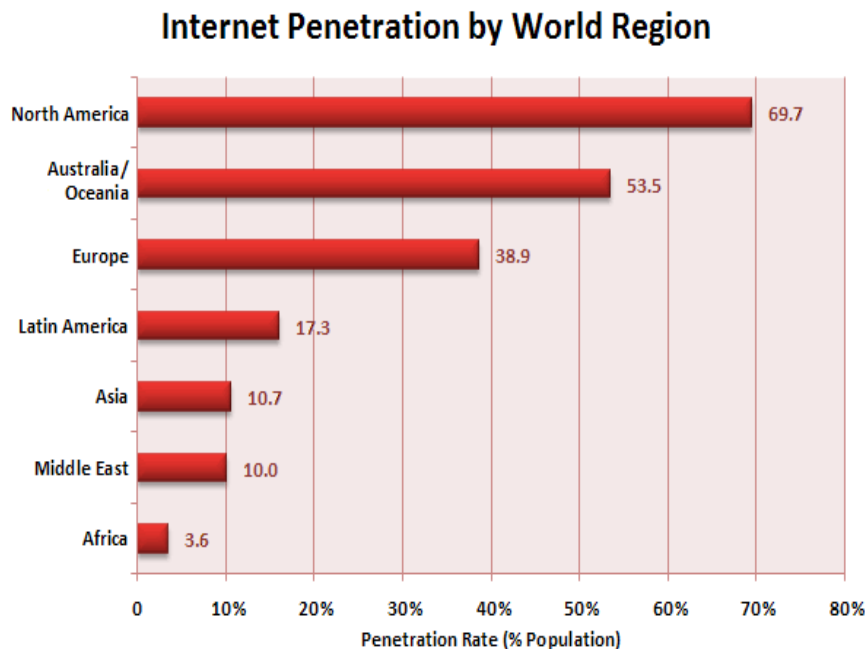
⁴⁸ National Science Board (2006), p. 6-24.

⁴⁹ WIPO (2007c).

⁵⁰ Ernst (2003), p. 8.

⁵¹ UNCTAD, (2005a) pp. 158-159.

As result, only a small number of countries such as the Republic of Korea and Singapore can be considered as active innovators. Countries such as Brazil, China and India may have success stories in selected industries, the number of scientists and engineers and total R&D expenditure compared to other developing countries. However, that would not amount to leadership in innovation and technology or allow the countries to be net exporters of knowledge or, to compete with developed countries. Moreover, significant numbers of developing countries have very weak technological and knowledge bases. Hence the South consists of *technological learners at different levels of capacity*. The rate of internet penetration below shows the huge gap in technological infrastructure between the developed countries (North America, Australia and Oceania, and Europe) and developing countries (Latin America, Asia, the Middle East and Africa).



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Note: the figure could be lower for Africa, Asia and Latin America where countries such as South Africa, Algeria and some island states in Africa, Brazil and the Republic of Korea, Taiwan Province of China, Hong Kong China and Singapore were excluded from the data.⁵²

The South as a technological learner with various levels of capacity should be able to define its priorities in international norm-settings relevant for technological development. Technologically learning includes the process of imitation and reverse engineering and conscious efforts to lead active local innovation. Treaties on IP rights protection being the main players in defining access to and ownership of technology, cooperation among developing countries would make a difference on how the international regime respond to their priorities.

⁵² For the original and country by country data, please visit, Internet World State, <http://www.internetworldstats.com/>.

III.2 Institutional Framework for South-South Cooperation

There are institutional mechanisms for intra-South cooperation on major global political and economic issues. The Group of Seventy Seven (G-77) was among the first initiatives that formulated an institutional mechanism to advance major political agendas of the developing world in the global political debate. The G-77 has adopted several declarations and action plans advancing the political and economic aspirations of the developing world. Technological development and IP issues have appeared as major concerns of developing countries in several declarations of the G-77.⁵³

The UN and its specialised agencies have a long history of supporting South-South Cooperation. The term South-South Cooperation is used in the UN and G-77, in varying contexts. UNCTAD for example, analyses South-South Cooperation under the UNCTAD XI Forum on Regionalism and South-South Cooperation on investment agreements. UNCTAD considers the development goals under investment agreements as typical features of South-South Cooperation.^{54/55} The South Centre, on the other hand, functions as an independent think-tank of developing countries. The South Centre is intended to meet the need for analysis of development problems and experience, as well as to provide intellectual and policy support required by developing countries for collective and individual action, particularly in the international arena.⁵⁶

The UNIDO, FAO and UNESCO develop and implement various intra-South technical assistance, technology transfer and exchange of experience programmes for industrial development, food security, cultural industries and other development goals. The FAO maintains a mechanism for South-South cooperation under its programme for food security which promotes collaboration between developing countries through the exchange of successful technologies and technical experts in the field of agriculture.⁵⁷ UNIDO promotes a regional system for accreditation and certification, standardization and quality, investment promotion, and technology transfer based on the basic theme of industrial development, trade and poverty alleviation through South-South cooperation.⁵⁸ UNESCO also has its own initiatives in the field of education and cultural industries.⁵⁹

The organizations working on South-South cooperation do not promote substantive norm-setting exercises among developing countries. The G-77 has been active in developing soft laws and principles under various declarations that contribute to the expression of political unity and the position of the South on important global issues. Similarly the critical work of the South Centre identifies policy issues for multilateral negotiations, domestic policy development and South-South cooperation without supportive institutional frameworks to carry forward actual norm-setting exercises.⁶⁰

In cases of IP rights and technological development, issues promoted by the G-77 remain at only the declaration level.⁶¹ The India-Brazil-South Africa collaboration also resulted in a high level Ministerial Communiqué that reflects the countries' aspirations and strategies for working together on pertinent areas of IP rights.

⁵³ Group of Seventy Seven (2000), para. 20 and Group of Seventy Seven (1967), First Ministerial Meeting of the Group of 77: Charter of Algiers, Algiers, para. 6.

⁵⁴ UNCTAD (2005b), p.36.

⁵⁵ UNCTAD (2005c).

⁵⁶ See South Centre, A South IGO, available at www.southcentre.org.

⁵⁷ See, UNIDO, The Special Programme for Food and Security, available at, http://www.fao.org/SPFS/south_en.asp.

⁵⁸ See, UNIDO, South –South Cooperation, available at, <http://www.unido.org/doc/59119>.

⁵⁹ UNESCO (2006).

⁶⁰ For example, the UNCTAD-ICTSD Capacity Building Project on IPRs and South Centre Programme on Innovation and Access to Knowledge, 2006.

⁶¹ See, for example, the Group of 77 (2002), South-South High-Level Conference on Science and Technology , the Dubai Declaration for the Promotion of Science and Technology in the South, para. 15.

Intra-South mechanisms involving norm setting exercises occur at regional level. Many of the regional economic integration arrangements have been active in designing laws and regulations with region wide applications. There are also organizations that specialize in IP rights. This includes the African Regional Intellectual Property Organization (ARIPO), l'Organisation Africaine de la Propriété Intellectuelle (OAPI) and the Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC). Some of these organizations were set up in defence of the territorial extension of IP rights from former colonial administrations.⁶² The regional IP organizations mainly pool resources of their member countries in industrial property matters in order to avoid duplication of financial and human resources.⁶³ They focus on the technical processing and administration of IP rights. However, based on empirical studies, some aspects of the substantive laws governing these organizations do not necessarily reflect the needs of their respective member states.⁶⁴

Box 2. New Delhi Ministerial Communiqué 2007 of the India-Brazil-South Africa (IBSA) Dialogue Forum⁶⁵

INTELLECTUAL PROPERTY

26. The Ministers underscored the importance and welcomed the continued discussions on the establishment of a "Development Agenda for WIPO".

27. The Ministers also reaffirmed the need to reach a solution to the problem arising out of granting of intellectual property rights on biological resources and/or associated traditional knowledge, without due compliance with relevant provisions of the Convention on Biological Diversity. In this regard, the Ministers highlighted with great appreciation the presentation in the WTO of the proposal co-sponsored, among others, by the three IBSA countries to amend the TRIPS Agreement by introducing a mandatory requirement for the disclosure of origin of biological resources and/or associated traditional knowledge used in inventions for which applications for intellectual property rights are filed. The Ministers also reaffirmed their support for the principle of prior informed consent and equitable benefit sharing.

28. In the context of continued increase in the grant of patents on bio-resources and traditional knowledge and also registration of trade marks, the Ministers resolved to further co-operate and intensify their efforts in resolution of these issues.

29. The Ministers reaffirmed the understanding enshrined in the Doha Declaration that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health and that accordingly each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

SOUTH-SOUTH COOPERATION

32. The Ministers reaffirmed the role of South-South cooperation as a continuing process vital to confront the challenges faced by the South, in particular its role as an important tool crucial for fostering and strengthening the economic independence of developing countries and achieving development as one of the means of ensuring the equitable global economic order.

34. In order to expand both the strength and the scope of South-South cooperation, the Ministers resolved to enhance their policy coordination and high-level dialogue on the common challenges faced by developing countries, such as MDGs and international development cooperation, financing for development, market access in the global trading system, fighting environmental degradation and infectious diseases. The Ministers further agreed to enhance South-South cooperation in wide ranging fields, inter alia, trade and investment, S&T, infrastructure, health and education....

⁶² Cullete, (2005), p.16.

⁶³ Id.

⁶⁴ Elbeshbishi, (2007), p. 9.

⁶⁵ Department of Foreign Affairs, Republic of South Africa (2007).

An example of a South wide negotiation involves the Global System of Trade Preference (GSTP) negotiations with the technical support of UNCTAD.⁶⁶ However, the negotiations have not yielded the expected results.⁶⁷ The extensive tariff reductions by developing countries as a result of the WTO and the mandate of the GSTP negotiations are some of the factors that weaken the enthusiasm for a South wide trade preference scheme.⁶⁸

As a result, the development of strong and complementary South-South cooperation requires further consolidation of South wide organizations, especially the G-77, with specific and standing or *ad hoc* bodies for the promotion of technological development, access to knowledge and IP rights. The lesson learned from the GSTP negotiations may help to develop a workable institutional framework by focusing on norm-setting and the development of an integrative set of policies with a view to bringing about more balanced and development oriented IP rights. The incentive for negotiation policies on IP rights is different from the GSTP. South wide negotiation on promoting the balance in IP rights basically assists the developing world to reassess its priorities and needs as well as to defend expansion of IP rights standards developed in the North.

Developing countries can compliment their efforts at multilateral and regional level through broad South–South Cooperation. In this regard consideration should be given to:

- *developing South-South cooperation as a strong complementary process for the integration of development priorities in international norms, in particular on IP rights and as a response to the strategies of developed countries that narrowly focus on their respective industrial competitiveness;*
- *promoting a specialised institutional mechanism lead by the G-77 political machinery on innovation, IP rights, access to knowledge and technological development issue;*⁶⁹
- *address the leadership gap in promoting South-South cooperation; a proactive engagement of developing countries with political and economic leadership roles in their respective regions (such as Brazil, South Africa, and India) can help to create incentives for South wide engagement on norm setting as well as implementation;*
- *reviewing the operation of South –South technical cooperation and technology transfer under UNIDO, UNDP, FAO, UNESCO, WHO and other specialized agencies of the UN.*

III.3 Substantive Frameworks for South-South Cooperation

Cooperation on IP rights and technological development requires a substantive framework and objective and defined economic interest shared by developing countries. Although the South consists of technological learners at different levels of capacity, the framework for cooperation on governance issues needs to reflect the global context that gives rise to the need for cooperation.

First, IP rights are promoted at the international level based on the unexamined objective of (1) rewarding innovation and creativity, (2) reducing the transaction cost between innovators and users in marketing, disseminating and transferring knowledge, (3) maintaining the balance of interest among producers and users, and (4) maximising the benefit for society in general.⁷⁰ These objectives under TRIPS are assumed to exist or be achieved by the mere fact of the protection of IP rights as required by the agreement. In *Canada- Patent Protection of Pharmaceutical Products* the panel upheld the

⁶⁶ UNCTAD, Global System of Trade Preferences.

⁶⁷ RIS (2006), p.2.

⁶⁸ Id.

⁶⁹ Some aspects of South-South cooperation can be brought back to the multilateral forum, such as the UN specialised agencies for Secretarial assistance, monitoring of cooperation and implementation.

⁷⁰ See Article 7 of the TRIPS Agreement (WTO, 1994a).

existence of the balance of interest by the strict implementation of Article 28 (rights conferred by patent) and Art. 30 (condition on the adoption of limitation and exception).⁷¹ The Panel agreed with the European Commission agreement that the balance of interests under Art. 7 is a statement that describes the balancing of goals that had already taken place in negotiating the final texts of TRIPS. As a result, whatever standards that were established under TRIPS should be assumed to achieve the objectives of the agreement irrespective of the realities on the ground.⁷² The promotion of international treaties under the WIPO and FTAs follows these assumed objectives without any examination. The protection of IP rights becomes an end in itself.

Secondly, the development of norms and the implementation of standards of protection on IP rights are pursued in isolation to the general economic development endeavour of countries. Where particular problems are faced by the protection of IP rights, the developed countries tend to favour solutions outside the IP rights system. It makes perfect sense for big corporations that exercise control over the use of technologies and for their governments to ensure the protection of IP rights at all cost. For example, in cases of the use of biological resources and traditional knowledge (TK), the United States and Japan vehemently oppose a mandatory requirement for patent applicants to disclose the use, source and origin of biological resources and TK. They prefer to shift the burden to developing countries to invest in building databases on biological resources and TK.⁷³ Experience in the implementation of Art. 66.2 of TRIPS also show the reluctance of developed countries to address socio-economic challenges arising from IP rights. The article requires developed countries to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDCs. The implementation of the provision has been controversial in the WTO. The periodical report by the developed countries on the implementation of Article 66.2 and subsequent decisions of the WTO on the matter do not show any significant contribution of the WTO to technology transfer. The developed countries usually resist controlling the practices of their multinational corporations, or to renew the IP system or to allow more active government and international organization policy interference to support development and the transfer of technology to developing countries. As a matter of policy, advanced countries insist on liberalisation and promotion of foreign direct investment as the preferable mechanism for technology transfer. There are additional measures pursued by the developed countries in order to ensure that IP rights achieve a special status against all other laws. Competition policy and regulations are almost excluded from application in the case of exploitation of rights conferred by IP.

Finally, alternative models for innovation, production and use of technologies that do not rely on IP rights fail to receive normative support at international, regional and national levels. Open and collaborative models of software development are expanding faster in other technological fields, including biotechnology.

The development of IP rights norms as ideologically favoured by big corporations and governments, institutionally isolated from other socio-economic objectives, and economically sheltered from competition, could not be the basis for cooperation among learners of technologies. Instead, the substantive framework for South-South cooperation should primarily be to contribute to the establishment of a holistic and integrative approach on IP rights, innovation, access to knowledge and development.

A holistic and integrative approach to IP rights and all other socio-economic challenges has been the basis of the engagement of developing countries and civil society at multilateral negotiations. The notable examples are the WIPO Development Agenda and the Doha Agenda related to TRIPS, the global strategy for innovation in diseases that disproportionately affect developing countries in the WHO, the Geneva Declaration on the Future of the World Intellectual Property Organization, and the

⁷¹ WTO (2000), Report of the Panel in *Canada – Patent Protection of Pharmaceutical Products*, para. 7.24 and 7.92.

⁷² Biadgleng (2007), p. 167.

⁷³ South Centre (2007), Policy Brief 11, p. 3.

Adelphi Charter on Creativity, Innovation and Intellectual Property (2005). These initiatives have contributed to addressing various aspects of governance issues on IP rights.

1. ***The WIPO Development Agenda:*** The establishment of the WIPO Development Agenda by the 2007 General Assembly of the WIPO was the result of the coordinated efforts of developing countries and civil society organizations. The original objective of the agenda was to integrate the development dimension into the activities of WIPO and IP rights norm-setting. The contribution of the final result of the WIPO development agenda for the promotion of governance on multilateral standards on IP rights and practices is critical. In particular, the WIPO is required to:

- intensify its cooperation on IP related issues with UN agencies, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations;
- take into account flexibilities in IP rights, different levels of development, the balance between the costs and benefits of IP rights during its norm-setting, legislative and technical assistance activities;
- consider the preservation of the public domain;
- facilitate discussion on access to knowledge and exchange of experiences on open collaborative projects; and
- strengthen its capacity to perform objective assessments of the impact of the organization's activities on development.

These results directly counter the approach to IP rights and the activities of WIPO based on the unexamined objectives of IP rights, the emphasis on IP rights as the only tools for the promotion of innovation and, the treatment of IP rights in isolation to the socio-economic contexts in which the rights will be exercised.

2. ***The Doha Agenda on the TRIPS Agreement:*** The work of the Council for TRIPS in the WTO under the Doha trade negotiation mandate authorised the continuation of the work on the review of TRIPS by taking into account its development dimension. The efforts of the developing countries during the launch of the Doha Rounds of trade negotiation have led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health.⁷⁴ The General Council of the WTO also adopted an interim waiver to Article 31 (f) and (h) of the TRIPS Agreement in August 2003 to enable the import and export of pharmaceuticals produced under compulsory licence. The August 2003 Decision is incorporated into the TRIPS Agreement by a protocol amending Article 31 of the TRIPS Agreement. With respect to least-developed countries, the WTO has extended the transition period for implementation of the TRIPS Agreement until 2013. The developing countries have proposed to amend the TRIPS Agreement to introduce a mandatory disclosure requirement for patent applicants to disclose the origin and source of biological resources and TK and the arrangements for benefit sharing.⁷⁵ In addition, developing countries will continue their efforts in the WIPO since 2001 for the development of binding international obligations on TK and cultural expression.⁷⁶

3. ***Global Health and the WHO:*** The developing countries' effort in the WTO focuses on addressing the impact of the TRIPS provisions. Their effort in the World Health Organization (WHO) is more complicated- an attempt to address the basic incentive structure and limitations of the patent system to encourage innovation and R&D medicines for diseases that disproportionately affect developing countries. The WHO pursues the development of a global strategy and plan of action through an Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG).⁷⁷

⁷⁴ WTO (2001), WT/MIN(01)/DEC/2.

⁷⁵ WTO (2006c), WT/GC/W/564/Rev.2-Rev.5, TN/C/W/41/Rev.2-Rev.5, IP/C/ W/474-Add.5.

⁷⁶ WIPO (2007b), WIPO/GRTKF/IC/11.

⁷⁷ See WHO (2006a), WHA59.24 and WHO (2007b).

4. Access to Knowledge Treaty as an Overarching Framework Governing the Generation, Use and Dissemination of Knowledge: Civil society and the academia have been active on what can be called the ‘access to knowledge movement.’ The movement concerns fairness and access to knowledge. It also supports creative and inventive communities. To reconcile conflicts of interest, the movement promotes new paradigms for the creation and management of knowledge resources.⁷⁸ In this regard, civil society has developed a draft treaty on access to knowledge. The Yale University, Information Society Project furthers the debate on access to knowledge into a broad conceptual framework governing the generation, use and access to knowledge in broad technological fields.⁷⁹ The Adelphi Charter on creativity, innovation and intellectual property is a reflection of an integrative and holistic approach to IP rights based on socio-economic realities.⁸⁰ The WIPO Development Agenda did not result in mandating negotiations on an access to knowledge treaty. WIPO is required only to facilitate discussion on access to knowledge and exchange of experiences on open collaborative projects.

Box 3. Adelphi Charter on Creativity, Innovation and Intellectual Property

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We call upon governments and the international community to adopt these principles.

1. Laws regulating intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves.
2. These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life.
3. The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws.
4. Intellectual property protection must not be extended to abstract ideas, facts or data.
5. Patents must not be extended over mathematical models, scientific theories, computer code, methods for teaching, business processes, methods of medical diagnosis, therapy or surgery.
6. Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary.
7. Government must facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature.
8. Intellectual property laws must take account of developing countries' social and economic circumstances.
9. In making decisions about intellectual property law, governments should adhere to these rules:
 - * There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights.
 - * The burden of proof in such cases must lie on the advocates of change.
 - * Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being.
 - * Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.

⁷⁸ See Consumer Project on technology, Access to Knowledge, website, available at <http://www.cptech.org/a2k/>.

⁷⁹ See Yale University, Information Society Project, available at <http://isp.law.yale.edu/>.

⁸⁰ See the Adelphi Charter (2005).

The various efforts of developing countries, civil society and academia to enhance the endeavour towards a holistic and integrative approach on IP rights demonstrate the need for a better coordination of developing countries. There was a very wide participation of developing countries on the WIPO Development Agenda. One important lesson from the negotiations on the WIPO Development Agenda was the challenges of managing the proliferation of proposals largely from developing countries addressing similar issues contained in the detailed proposals of the ‘Group of Friends of Development’ in WIPO.⁸¹ Another important lesson however, would require looking beyond the negotiation process. Several countries have pushed for enhancing the role of WIPO in utilising the flexibilities provided under international treaties on IP rights. However, this does not mean the same countries maintain domestic laws and regulations to utilise flexibilities provided under international agreements.⁸²

Hence, the substantive framework for South–South cooperation has to be *based on principles and objectives to develop a holistic and integrative system of IP that can bring together developing countries to a certain defined perspective.*

The developing countries would enhance cooperation among themselves by agreeing on a basic set of principles of IP rights, the relation with development, balance of interests, and technological development. Such principles and objectives can enhance the contribution of South–South cooperation for governance on IP rights at the multilateral level. In order to achieve a holistic and integrative approach on IP rights and socio-economic challenges, the following principles could be taken into account.

- 1) Countries should develop IP policies in a holistic manner that integrates the technological development needs of their country, the science and technology or innovation policy of the country, as well as the development of vital sectors, especially agriculture, health, and education. International instruments on IP rights should always support balanced approach on competing interests on the protection of IP rights and allow countries to maintain dynamic and flexible domestic policy making on innovation and technology relevant to their levels of development.
- 2) National policies on IP rights should be developed based on broad consultation with the various stakeholders and the local context of knowledge generation and utilisation. There should be a presumption against the upgrading of IP rights protection based on laws in the technologically advanced countries, or accession to treaties.
- 3) National, regional and multilateral rules on IP rights should continuously be examined and assessed, through objective and independent mechanisms to ensure that their implementation contributes to, but not unduly hinders innovation, access to knowledge, and socio-economic development.
- 4) National, regional and multilateral rules should recognise, preserve, and protect traditional knowledge, cultural expressions, and biological resources.
- 5) Governments and multilateral organisations must facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature and, to implement and utilise the flexibilities provided under international agreements in addition to the protection of IP rights.

⁸¹ The Group of Friends of Development in WIPO consisted of developing countries from all regions: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Peru, Uruguay and Venezuela from Latin America and the Caribbean, Egypt, Kenya, Tanzania, Sierra Leone and South Africa from Africa, and Iran from Asia. The group received support during the negotiations from India and several Asian Countries. See WIPO (2005a), IIM/1/4. Further submissions were received from Morocco, on behalf of the African Group, WIPO(2005b), IIM/3/2, Chile, WIPO (2006b) PCDA/1/2, Colombia, WIPO (2006c) PCDA/1/3, Mexico, WIPO (2005c), IIM/1/3 and Bahrain (cosponsored by Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates and Yemen).

⁸² Lewis-Lettington and Munyi (2004) and Musungu and Oh (2006).

IV. CONCLUSION

Multilateral IP norm-setting is dominated by technologically advanced countries. The lesson from the multilateral IP rights standards demonstrates the sharp contrast in the interests of the developed and developing countries. There are no major policy changes expected from the technologically advanced countries in order to develop a holistic and integrative set of multilateral systems on IP rights and technological development. Recent trends in the United States and the EU, the North-South FTAs, the WIPO treaties and negotiations and, the IP rights enforcement agenda in the Council for TRIPS, demonstrate the aggressive approach of IP rights protection without taking into account socio-economic realities in poor countries. The UN system also demonstrates the minimal influence of its analytical work and policies on innovation and development on IP rights norm setting. The developed countries coordinate their policies on IP rights. The EU and the United States agreed on an approach to IP rights enforcement strategies under a trans-Atlantic forum and brought back their strategy to the TRIPS Council. The Group B+ of the developed countries in WIPO is developing a draft text of SPLT among themselves with a view to bring back the developed draft text to the WIPO. With a few exceptions, the multilateral treaties and the FTAs consolidate the standards and interests of the technologically advanced countries in IP rights.

Although the developing countries should maintain effective participation in multilateral negotiations, there is a need for a complementary process that assists their efforts at the multilateral level. South-South Cooperation is among technological learners, with various levels of absorptive and learning capacity. Developing countries can influence international law on IP rights and protect their systems of learning and technological development by developing norms for South wide application. The ultimate contribution would be to complement the development of international law on IP rights and technology related issues integrating the development needs of the South.

**COMMENTS ON THE RECOMMENDATION ON AN INSTITUTIONAL
FRAMEWORK FOR SOUTH-SOUTH COOPERATION BY PETER DRAHOS:**

TOWARDS A DEMOCRATIC G-GROUP IN THE WTO

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The Research paper makes important observations on the trends on international IP rights policy setting and the challenges of governance. The recommendation with respect to the institutional framework however, cannot address the major leadership gap by proposing specialized institutions within the G-77. The real problem is that while a few developing countries can resist developed country IP agendas they are doing so in a nuanced way, picking and choosing their issues and interests. The smaller players are being rapidly integrated into the global architecture by means of FTAs. This combination of circumstances makes it very difficult to build a broad-based coalition that has real force and can generate hard law as opposed to soft norms. Below is my briefing previously submitted for Oxfam on South-South Cooperation in the area of IP rights.

Since this briefing was written in 2003, the need for a cooperative multilateral leadership on IP by developing countries has become more urgent. The monopoly control of the production of oseltamivir (Tamiflu) by Roche and the lack of global coordination by countries in dealing with the problem of inadequate stockpiles of oseltamivir, especially in high risk developing countries shows that the patent system has become a factor in the management of pandemic risk. Similarly, the diffusion of climate change technologies will be crucially affected by intellectual property rights over those technologies. Clearly, developing countries should be collectively thinking about ways in which to manage intellectual property in the context of global risks like pandemics and climate change. Their current philosophy of mild cooperation in multilateral fora while defecting to short term gains in bilateral contexts is inconsistent in the management of risk, just like the person who thinks one should not drive a passenger bus while drunk, but lets drunken individuals drive their own cars.

Towards a Democratic G-Group in the WTO

One of the positive features said to have come out of the Cancun Ministerial Conference is the emergence of the G-22 as a force in the WTO. With leadership coming from Brazil, China, South Africa and India, the G-22 is being seen by many commentators as a new power within the WTO that is capable of gaining successful standards on development issues such as agriculture.

This note assesses whether this is a realistic possibility. It suggests how the G-22 might build on its achievements so as to form a counterweight to the United States, the EU and Japan, the three key players in the Quad group.

Lessons from the Uruguay Trade Round (1986-1993)

Developing countries have formed veto coalitions in the past in the GATT to resist United States and EU agendas. Typically this resistance takes the form of an informal blocking group. Prior to the

commencement of the Uruguay Round in 1986 a group of ten developing countries resisted the United States proposal for a new themes agenda for the GATT that included intellectual property, services and investment. Ultimately they were unsuccessful.

During the course of the Round, the United States placed developing countries under trade pressure using its trade enforcement tools. Countries such as Brazil and India came in for special attention. The Uruguay Round experienced collapses like Cancun, including the total breakdown of the talks in 1990 over agriculture. The United States kept on increasing bilateral pressure and it also concluded NAFTA. Ultimately it got most of the new themes agenda it had put forward in the early 1980s.

This United States strategy is being employed again in the Doha Round. Developing countries continue to come in for bilateral attention and the United States is making extensive use of FTAs - Jordan (2001), Singapore (2003), Chile (2003) and is currently negotiating with the Southern African Customs Union, Central American countries, Morocco and Australia.

Reasons for Failure of Developing Country Groups

Developing country groups have learnt to talk as one in multilateral fora, but unfortunately in the past this cooperation amongst them has rarely extended back to the capitals. The large number of bilateral agreements that the United States has and is concluding is eloquent testimony to this fact.

Since the creation of the WTO, the United States has continued to run a centrally coordinated strategy of shifting between bilateral, regional and multilateral fora to achieve its negotiating objectives. Developing countries have no centrally coordinated countervailing structure to respond to this strategy.

Developing country groups in the WTO tend to be single issue groups that are poorly resourced and organized. Successes are temporary and tend to take the form of veto coalitions.

A Democratic G Group

The one success story in the Uruguay Round for developing countries was the Cairns group. It included developed countries (Australia and Canada), it was highly organized (a Secretariat was provided by Australia), it backed its proposals with high quality analytical work, had a division of labour within the group and had a leadership that was able to exploit divisions between the United States and the EU.

Developing countries have the numbers in the WTO to form a structure that is democratic and that could symbolize what the WTO should be. Drawing on the lessons of the Cairns Group, developing countries should aim to create a more organized structure that would in the first instance be aimed at developing high quality analytical resources and strategies. The role that this more organized structure would play in negotiations would be organically determined, dependent upon the levels of trust and identity that emerged amongst developing countries. Unlike the Cairns Group, the Democratic G Group would not be a single issue group.

Key Elements of a Democratic G Group

















1. The leadership of the Democratic G Group would not be confined to obvious candidates such as India, Brazil, China and South Africa, but would include a lead nation from the LDC group and other groupings of poorest nations. In the past poor nations have had no

- meaningful representation at the hard end of a trade round. This leadership would act as a counterweight to the Quad group or its variants. Leadership could be rotated.
2. The Democratic G Group would operate on a principle of pooling and sharing analytical resources, the aim being to overcome the capacity problems that many countries experience at an individual level.
 3. The principle of pooling and sharing resources would require countries with resources to take responsibility for organizing committees on the key areas of a given trade round. India, for example, could take the lead on investment and competition, Brazil on agriculture and services, South Africa on intellectual property and special and differential treatment and so on. Other developing countries would join those working committees in which they had interests and expertise, perhaps forming sub-committees on particular issues (e.g. Kenya could form a sub-committee on trade in genetic resources).
 4. The Democratic G Group would be guided by pro-development values and its membership would be open to all countries that accepted and acted in ways consistent with those values.
 5. The Democratic G Group would not be confined to the life of a single trade round, but rather would be a permanent resource. This would give members of the group an opportunity to develop more coordinated strategies in response to the United States strategy of forum shifting.
 6. A more formally organized group along the lines of the Democratic G Group would encourage the formation of permanent and open lines of communication amongst its members. This would also create greater levels of trust and cohesiveness. These are needed to support the multilateral system. Developing countries, by defecting to bilateral and regional agreements with the United States are undermining their bargaining power, thereby making themselves individually and collectively worse off.

For further details See Peter Drahos, When the Weak Bargain with the Strong: Negotiations in the World Trade Organization, International Negotiation 8 (2003), 79-109.

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