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Neil Weinstock Netanel

The Development Agenda

Global Intellectual Property and Developing
Countries

THE DEVELOPMENT AGENDA

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THE DEVELOPMENT AGENDA

**GLOBAL INTELLECTUAL PROPERTY
AND DEVELOPING COUNTRIES**

EDITED BY NEIL WEINSTOCK NETANEL

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PREFACE AND ACKNOWLEDGMENTS

NEIL WEINSTOCK NETANEL

Do broad, universal intellectual property rights bring the benefits of innovation, creativity, technical know-how, and foreign investment to developing countries? Or do treaties that require developing countries to accord greater intellectual property (IP) protection actually stifle development and impede access to the knowledge and essential medicines that the world's poor so desperately need? The debate over such questions has raged for decades among scholars and diplomats, lawmakers and policymakers, nongovernmental organizations and international agencies, IP industries and development policy analysts. In parallel, countries have tussled repeatedly over IP and development issues within the international treaty arena. They have argued before the World Intellectual Property Organization (WIPO), a special agency of the United Nations charged with "promoting creative intellectual activity and facilitating the transfer of technology related to industrial property to developing countries"; before the World Trade Organization, overseer of "TRIPS," the Agreement on Trade-Related Aspects of Intellectual Property, which requires countries to provide specified minimum intellectual property protections or face trade sanctions; and before the United Nations Commission on Human Rights, which has cautioned that TRIPS might run counter to countries' obligations under the International Covenant on Social, Economic, and Cultural Rights, including countries' obligation to ensure access to essential medicines so as to provide their citizens with the "highest attainable standard of physical and mental health."

The WIPO Development Agenda is the fruition of developing countries' most recent campaign to ensure that the intellectual property treaty regime permits—and, indeed, empowers—developing countries to tailor their intellectual property laws as they deem necessary to promote development and serve the welfare of their citizens. The Agenda's adoption by the WIPO General Assembly in September 2007 may well constitute an historic watershed for that organization, which has long viewed its mandate as the unequivocal promotion of greater intellectual property rights throughout the world. If so, this book, a collection of essays about the complex issues that underlie the Development Agenda and what the Agenda might portend, has been a part of that history in the making. It began in March 2007 with a conference, "Intellectual Property and Developing Countries: The WIPO Development Agenda," at the University of California at Los Angeles. Representatives of WIPO and the governments of Brazil, Nigeria, and the United States began the conference by reporting on recent progress made toward agreement on a Development Agenda for WIPO but cautioned that many obstacles remained. The first drafts of many of this book's chapters were

prepared without knowing in what form, or even whether, the Agenda would be adopted. Yet as published, this book both looks back upon WIPO's adoption of the Agenda in its final form and assesses some of the initial currents that the Agenda has unleashed within WIPO and elsewhere.

The debate over IP and development has often been infused with ideological fervor. It has pitted a faith in the efficacy of markets against a belief in government as guarantor of social welfare. It has juxtaposed a belief in the rights of authors and inventors to the fruits of their intellectual creations against the view that access to knowledge and invention is a fundamental human right.

In that vein, for better or for worse, WIPO itself has been animated by a fervent belief in intellectual property rights. The cupola of WIPO's headquarters in Geneva bears a Latin inscription penned by the organization's renowned director general, Arpad Bogsch. In English translation, it reads:

HUMAN GENIUS IS THE SOURCE OF ALL WORKS OF ART AND INVENTION *
THESE WORKS ARE THE GUARANTEE OF A LIFE WORTHY OF MEN * IT IS THE
DUTY OF THE STATE TO ENSURE WITH DILIGENCE THE PROTECTION OF THE
ARTS AND INVENTIONS.¹

The Development Agenda does not erase that marble inscription. Nor does it deny the value of creative arts and invention. But it does insist that intellectual property law be placed in the service of development. And, as such, it calls for a nuanced account of how intellectual property law actually operates in developing countries. It recognizes, and demands that WIPO recognize, that creativity and innovation require access to existing knowledge and that a robust public domain can be no less crucial to development than are intellectual property rights. It thus insists that countries have the flexibility to fashion intellectual property law in line with their level of development and the shape of their indigenous industries. It is in that spirit that this book presents a granular, multidisciplinary study of how and when intellectual property rights promote—or impede—development.

This book would not have been possible without the generous support of the Ann C. Rosenfield Symposium Fund of the UCLA School of Law and the UCLA Anderson CIBER Center for International Business Education and Research, which co-sponsored the conference from which this book arose, and of the UCLA Dean's Fund for its funding of this book's initial copyediting. I am very grateful for their support. In particular, I want to thank Robert Spich, Faculty Program Director of the Center for International Business Education and Research at the UCLA Anderson School of Management, for his personal assistance in bringing together scholars, policy analysts, and diplomats from various disciplines and countries for our conference, and Michael Schill, Dean of the UCLA School of

1. See Gerald J. Mossinghoff and Ralph Oman, *The World Intellectual Property Organization: A United Nations Success Story*, 160 *World Affairs* 104 (1997).

Law, for his enthusiastic support of scholarship at UCLA, including my own, and for making the School of Law funding available for this project. I also thank Wyatt Sloan-Tribe and Elke Kolodinski for their fine work in copyediting this book's chapters and, of course, my wonderful Oxford University Press editors, Sarah Bloxham and Chris Collins.

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1. INTRODUCTION

The WIPO Development Agenda and Its Development Policy Context

NEIL WEINSTOCK NETANEL*

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The World Intellectual Property Organization General Assembly adopted the Development Agenda in September 2007, after three years of often acrimonious debate.¹ The Agenda radically transforms WIPO’s mandate and reverberates throughout the international intellectual property regime, including in ongoing battles within the World Trade Organization over the future direction of “TRIPS,” the Agreement on Trade-Related Aspects of Intellectual Property. Yet despite its powerful symbolic message, the full extent of the Development Agenda’s actual impact on the ground, both within WIPO and without, remains to be seen.

In 1967, the Convention Establishing the World Intellectual Property Organization provided unequivocally that WIPO’s central mission would be “to promote the protection of intellectual property throughout the world.”² In that vein, WIPO has long favored the “upward harmonization of intellectual property laws”—ever greater intellectual property protection and enforcement in developing and developed countries alike. WIPO’s IP maximalist approach remained constant even after 1974 when WIPO became a specialized agency of the United Nations. In 1974, the United Nations stood at the center of the New International Economic Order (NIEO), a far reaching program for revamping the global economic system to jumpstart third world development, which included calls for

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1. WIPO Doc. A/43/16 Annex A. The 45 proposals adopted as the Development Agenda are reproduced as Appendix A to this Introduction.

2. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3.

compulsory transfers of technology.³ In language responding to those calls, the UN-WIPO agreement gave WIPO responsibility for “promoting creative intellectual activity and facilitating the transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development.”⁴ Yet WIPO’s leadership refused to recognize any contradiction between the organization’s assigned task as UN agency of spurring development versus its traditional core objective of extending greater copyright and patent protection “over the world.”⁵ Rather WIPO has insisted that promoting greater, universal IP rights is the means by which the organization facilitates technology transfer and promotes development. As a 2003 WIPO publication, authored by then Director General Kamal Idris, proclaimed, “intellectual property is a ‘power tool’ for economic development and wealth creation,” one “that is not yet being used to optimal effect in all countries, particularly in the developing world.”⁶

The Development Agenda decisively rejects that IP-centric view. It posits that strong intellectual property protection does not consistently promote creative activity, facilitate technology transfer, or accelerate development. The Development Agenda accordingly places the benefits of a rich and accessible public domain, national flexibilities in implementing IP treaty norms, access to knowledge, UN development goals, curbing of IP-related anti-competitive practices, and the need to balance the costs and benefits of intellectual property protection firmly within WIPO’s central mission. The Development Agenda by no means abandons the idea that intellectual property rights can fuel creativity, innovation, and development under some local conditions. But for the first time in WIPO’s history, it places the need for balance, flexibility, and a robust public domain on par with promoting IP protection in all WIPO matters affecting developing countries.

The Development Agenda is not only a rebuke of WIPO’s uncritical promotion of intellectual property rights. It reflects developing countries’ growing

3. See, generally, *THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE* (Jagdish N. Bhagwati ed., MIT Press 1977).

4. Agreement between the UNITED NATIONS and the World Intellectual Property Organization, Art. I, entered into effect, Dec. 17, 1974 [hereinafter UN-WIPO Agreement].

5. WIPO officials viewed WIPO’s UN agency status as a means to further the organization’s mission of having copyright and patent protection “extended over the world, or at least to the great majority of countries.” Arpad Bogsch, *The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992*, at 28 (WIPO Publication No. 881 (E), 1992), quoted in Debora J. Halbert, *The World Intellectual Property Organization: Past, Present, and Future*, 54 J. Copyright Soc’y U.S.A. 253, 261 (2007). Bogsch was WIPO’s Director General when the UN-WIPO agreement took effect.

6. KAMIL IDRIS, *INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH I* (World Intellectual Property Organization 2002). Kamil Idris is the outgoing Director General of WIPO.

resistance to the upward harmonization of IP protection required by the TRIPS and subsequent “TRIPS-plus” bilateral free trade agreements as well. Indeed, the WIPO Development Agenda should be understood as part of a broad, multi-pronged rejection of the “Washington Consensus” that shunted aside the NIEO and came to dominate development policy in the 1980s and early 1990s. That neoliberal approach advanced an ironclad belief that unregulated markets, unhindered cross-border trade, and the spread of formal property rights are the best tool to promote economic growth and development.⁷ But in the last decade, in the wake of the spectacular failure of that approach in a number of areas, the World Bank and other international economic institutions have moved away from the Consensus’s sweeping free market prescriptions. They have embraced instead a new development framework that eschews across-the-board solutions in favor of nuanced consideration of local conditions, recognizes the need for governments actively to assist developing countries to reap the benefits of liberalized trade, and, in line with Amartya Sen’s seminal argument for “development as freedom,”⁸ intertwines issues of social justice and human rights with the goal of generating economic growth.⁹ This development-as-freedom lodestar also infuses the United Nations Development Programme, which assesses development in terms of life expectancy, education, literacy, gender equality, and political participation, in addition to gross national product.¹⁰

In line with this new development framework, the WIPO Development Agenda similarly rejects the notion that unregulated markets in the products of creative expression and innovation, secured by countries’ uniform enforcement of broad, proprietary rights in those products, will promote development. It posits, rather, that a robust public domain and national government flexibility in defining and delimiting IP rights will best serve developing countries’ needs.

In its embrace of UN development goals, indeed, the WIPO Development Agenda jettisons the unregulated market approach to intellectual property along the same two fronts as development agencies have distanced themselves from the Washington Consensus in the arena of development policy generally. First, the Development Agenda rebuffs the neoliberal belief, which has been a driving force behind TRIPS as well WIPO treaty initiatives, that broad IP rights will

7. See David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT; A CRITICAL APPRAISAL* 95, 128–150 (David M. Trubek and Alvaro Santos eds., Cambridge Univ. Press 2006).

8. AMARTYA SEN, *Development as Freedom* (Alfred A. Knopf 1999).

9. See Kennedy, *supra* note 7, at 151–58. See also JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL; HOW TRADE CAN PROMOTE DEVELOPMENT* (Oxford Univ. Press 2005) (presenting a mainstream criticism of the Washington Consensus and presenting a detailed proposal for a liberalized trade regime that is geared toward the special interests of developing countries).

10. See United Nations Development Programme, *Human Development Indices*, <http://hdr.undp.org/en/humandev/hdi>.

bring affordable technology, innovation, and foreign direct investment to developing countries. Although not eschewing IP's potential for promoting innovation and economic growth in certain local circumstances, the Agenda views technology transfer through ready access to knowledge, unimpeded by exclusive IP rights, as no less a cornerstone of economic development.

Second, the Agenda calls into question whether economic development and wealth creation are the sole metrics for measuring development. The Agenda itself and the developing country campaign to bring the Agenda before WIPO have been informed by a new development framework that seeks to attain social, material, and political conditions conducive to human freedom, of which economic growth is an important contributing factor, but not an end in and of itself.¹¹ The initial "Friends of Development" proposal for a WIPO Development Agenda explicitly underscores that view: "As a United Nations specialized agency, WIPO has an obligation to ensure that its technical cooperation activities are geared towards implementing all relevant UN development objectives, which are not limited to economic development alone."¹²

As the new development framework posits, there is no single path to development. A configuration of government regulation, market, and intellectual property rights that spurs development in one country might be ill suited to economic conditions, market and governmental institutions, and cultural traditions in another. So, too, does the WIPO Development Agenda require WIPO to work toward intellectual property norms that "take into account different levels of development" and to assist Member States in tailoring intellectual property laws to their "country specific" conditions, reflecting "the priorities and special needs of developing countries." It is no longer WIPO's mission to serve intellectual property producers' interest in obtaining uniformly high levels of protection throughout the world. WIPO, rather, must henceforth be guided by distinct, country-specific understandings—for example, that patent law norms that well serve pharmaceutical industries and innovation in the United States and Europe might be less than optimal in China, wholly ill suited to India, and inimical to Senegal.

Academic studies support the Development Agenda's rejection of the neoliberal belief that developing countries' across-the-board adoption of robust IP protection will bring economic growth, foreign direct investment, and technology transfer. Even those who contend that IP rights can enhance technology transfer under certain conditions concede that empirical evidence for that proposition is mixed and that strong IP rights can merely impose costs without bringing technology

11. For illuminating discussion of the Development Agenda's rejection of WIPO's "unreflective alignment with a model of development as growth," see Denis Borges Barbosa et al., *Slouching Towards Development in International Intellectual Property*, 2007 Mich. St. L. Rev. 71, 120–23.

12. WIPO, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WO/GA/31/11 (Aug. 27, 2004), Annex, ¶ VII, at 4.

transfer or other efficiency benefits when, as is typically the case with pharmaceuticals, related know-how is not needed for the diffusion of the technology product.¹³ Indeed, some studies show that a developing country's expansion of IP rights and enforcement can even lead foreign firms to close manufacturing facilities in those countries because increased protection makes it more feasible to import IP-rich products produced elsewhere, thus blunting technology transfer and foreign direct investment.¹⁴ For these reasons, there appears to be consensus among leading, mainstream development economists that uniformly strong levels of IP protection are highly detrimental to developing countries. As Joseph Stiglitz and Andrew Charlton state,

The TRIPS Agreement has considerable implications for technological and industrial policy. By strengthening intellectual property rights in developing countries, it is likely to increase the royalty payments demanded by technology holders there, and also to create or reinforce monopolistic positions in small markets. It also restricts reverse engineering and other important methods of imitating innovation, thereby limiting the ability of firms in developing countries to reduce their technological disadvantage.¹⁵

Similarly, Jagdish Bhagwati, a prominent proponent of liberalized global trade, summarizes,

As regards intellectual property protection (IPP), demanded insistently by the United States and then by other rich countries, most economists believe that having patents at twenty-year length (as put into the WTO) is, from the viewpoint of worldwide efficiency, suboptimal, just as having no patents almost certainly is. Many also consider it to be a transfer from most of the poor countries to the rich ones and hence as an item that does not belong to the WTO, whose organizing principles should be the inclusion of mutually gainful transactions, as indeed noncoercive trade is.¹⁶

To emphasize: that is *not* to say the IP protection is inimical to development as applied to every developing country and industry. Indeed, as several contributors to this volume point out, robust IP protection may well spur economic growth in

13. See Ashish Arora et al., *Markets for Technology, Intellectual Property Rights, and Development*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY IN A GLOBALIZED INTELLECTUAL PROPERTY REGIME 321 (Keith E. Maskus & Jerome E. Reichman eds., Cambridge Univ. Press 2005) [hereafter INTERNATIONAL PUBLIC GOODS]. See also Lee G. Branstetter, *Do Stronger Patents Induce More Local Innovation?* in INTERNATIONAL PUBLIC GOODS at 309 (finding that economic studies fail to find evidence that stronger patents spur domestic innovation).

14. Carlos M. Correa, *Can TRIPS Foster Technology Transfer?* in INTERNATIONAL PUBLIC GOODS, *supra* note 13, at 227, 231.

15. STIGLITZ & CHARLTON, *supra* note 9, at 103.

16. JAGDISH BHAGWATI, *FREE TRADE TODAY* 75–76 (Princeton Univ. Press 2002).

developing countries with large domestic markets and emerging economies and may nourish cultural industries even in least developed countries. Nonetheless, it is apparent that the neoliberal one-size-fits-all approach to property and markets has no more purchase as it pertains to intellectual property than it does with respect to development generally. Thus, to determine how the Development Agenda should be implemented, WIPO officials, national governments, nongovernmental organizations, and scholars need to focus on granular, empirical study. They must understand how intellectual property law might differentially impact particular countries, institutions, markets, cultural traditions, and creative sectors. General economic theories of how intellectual property law can be expected to promote innovation and development continue to provide a helpful analytic perspective. But such theories, current thinking on development tells us, only go so far.

This book aims to further that granular study. Its contributions address issues of intellectual property and development from a variety of disciplinary and national perspectives. The contributors use case study, empirical research, and sector- and country-specific analysis to shed light on how intellectual property can impact development.

My introduction to this anthology of illuminating, varied contributions unfolds in two sections. I first present and explicate the principal features of the WIPO Development Agenda. I then present an outline of the chapters to come.

I. THE WIPO DEVELOPMENT AGENDA

The Development Agenda adopted by the WIPO General Assembly in September 2007 contains 45 items divided into 6 “clusters.” Of these, the Assembly identified 19 items for immediate implementation, but without implying that the remaining 26 are of lesser priority.¹⁷ I have reproduced the Agenda in full in the appendix to this introduction and noted in bold the items that are set for immediate implementation. I focus here on the Agenda’s overall themes and most important provisions.

A. “Technical Assistance and Capacity Building”

The Development Agenda provides that “WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven, and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs,

17. The 19 items were chosen primarily because their immediate implementation does not require the engagement of additional staff or financial resources. See Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), WIPO Development Agenda; Preliminary Implementation Report in Respect of 19 Proposals, Feb. 28, 2008, at 1, available at <http://ip-watch.org/files/WIPO%20comments%20on%20DA%20recs%20-%20part%201.pdf> [hereafter “Preliminary Implementation Report”].

as well as the different levels of development of Member States.” In particular, WIPO must assist Member States in “making national IP institutions more efficient” and in promoting “fair balance between IP protection and the public interest.”

To the uninitiated, “WIPO technical assistance” might sound like mundane bureaucratic activity. In fact, its importance can hardly be overestimated. Developing countries often lack the resources and expertise required independently to evaluate and implement intellectual property treaty obligations in a manner that best serves their national interests. As a result, they rely heavily on WIPO for guidance. Over the years, WIPO has accordingly advised developing countries on how WIPO-administered treaties are to be implemented, assisted in drafting national legislation, generated model intellectual property laws, trained officials and lawyers, and sought to bolster the competency and efficiency of national intellectual property offices.¹⁸ Of particular importance, pursuant to its cooperation agreement and joint initiative with the World Trade Organization, WIPO provides developing countries legal-technical assistance regarding their obligations under TRIPS.¹⁹

In line with its mission of promoting “the protection of intellectual property throughout the world,” WIPO has historically provided that technical assistance with single-minded devotion to teaching developing country officials and citizens why intellectual property protection is in their best interests. In that regard, WIPO has viewed strong intellectual property rights as unequivocally conducive to economic growth and development. As WIPO’s Intellectual Property Handbook states, “The protection afforded by intellectual property laws results in more creations, innovations and inventions, more investment and effort in research and development (R&D) in technical fields, leading to technological improvements, and thereby to improvement in the quality of industrial output, and by greater access to creations of foreign origin, in an educational and cultural climate that promotes development in general.”²⁰ Among the many examples of how this view has impacted WIPO’s advice to developing countries, the Handbook’s chapter on intellectual property and development contains a lengthy section on licensing and technology transfer that focuses entirely on voluntary commercial licensing. It makes no mention of the compulsory licenses that are permitted under TRIPS and other intellectual property treaties and that developing countries view as crucial means for gaining access to knowledge, medicines, and technology.

18. See World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use 196–203 (WIPO Publication No. 489, 2d ed., 2004), available at <http://www.wipo.int/about-ip/en/iprm> [hereinafter WIPO Handbook].

19. See WTO-WIPO Cooperation Agreement, Art. 4 (Legal-Technical Assistance and Technical Cooperation), entered into force Jan. 1, 1996. Pursuant to their Cooperation Agreement, WIPO and the WTO launched a joint initiative in July 1998 to assist developing countries in complying with TRIPS. See Handbook, *supra* note 18, at 359–60.

20. See Handbook, *supra* note 18, at 200.

The Development Agenda mandates a wholesale revision of that approach. It requires WIPO to provide assistance in line with what developing countries identify as their specific needs rather than aiming to promote a one-size-fits-all model of intellectual property. It also calls upon WIPO to assist developing countries in taking advantage of the leeway given to them under IP treaties to tailor their intellectual property laws to best promote development, including through the use of competition law to define and combat anti-competitive IP licensing and through maintaining a balance of IP protection and a robust public domain. In particular, the Agenda provides that “[w]ithin the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on . . . the understanding and use of flexibilities contained in the TRIPS Agreement.” Such flexibilities are found in TRIPS provisions permitting various exceptions and limitations to intellectual property rights, requiring that intellectual property laws serve broader societal interests, and providing least developed countries a moratorium on TRIPS compliance until the date determined by the TRIPS Council, currently January 1, 2013, for copyright, trademark, and patent generally, and 2016 for pharmaceutical patents.

The WIPO General Assembly designated the fundamental change in WIPO’s approach to technical assistance as one of the items requiring immediate implementation. In response, WIPO’s Preliminary Implementation Report states that the organization has already “been reorienting its programs and activities by consistently and comprehensively taking into account country specific needs, priorities and the level of development, particular the special needs of Least Developed Countries.”²¹ With respect to TRIPS, the Report notes that WIPO “will organize meetings to deal specifically with flexible implementation of TRIPS obligations” and that it already provides advice to specific developing countries and LDCs on “the legal options provided under the TRIPS Agreement,” including those regarding the provisions for compulsory licensing of pharmaceutical patents pursuant to “the TRIPS Doha Declaration on Public Health.”²² Moreover, although WIPO views its primary role under the WIPO/WTO Agreement as furthering countries’ “understanding and informed implementation” of TRIPS, the development-oriented technical assistance mandated by the Development Agenda suggests that WIPO should assist developing countries in gaining the expertise needed to further a development agenda within the WTO as well. On that score, the Preliminary Implementation Report states that WIPO will also advise developing countries “in relation to ongoing discussion on various TRIPS related matters in WTO.”²³ At the same time, of course, like in other areas, it remains to be seen whether the Agenda’s broad revision of WIPO’s mandate

21. Preliminary Implementation Report, *supra* note 17, at Annex, p. 1.

22. *Id.*, Annex, p. 22.

23. *Id.*

regarding technical assistance will truly work a fundamental reorientation of the way WIPO provides technical assistance on the ground.

B. Norm-Setting

Cluster B of the Development Agenda governs WIPO norm-setting. WIPO is actively involved in organizing negotiations and preparing drafts and working papers for new intellectual property treaties. The Development Agenda requires WIPO norm-setting to “take into account different levels of development,” “take into consideration a balance between costs and benefits,” “support a robust public domain,” “take into account flexibilities in international IP agreements,” and “initiate discussions on how, within WIPO’s mandate, to further facilitate access to knowledge and technology for developing countries and LDCs.” In addition to those substantive requirements, the Agenda also requires that WIPO norm-setting be more transparent and inclusive. It requires that WIPO’s work in preparing and setting agendas for new treaties and protocols must “be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations and non-governmental organizations.” The Agenda further provides that “WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.”

In principle WIPO norm-setting has always been, in WIPO parlance, “member driven.” WIPO acts as a neutral facilitator and expert to assist its members in coming to agreement on treaty norms. But in practice, WIPO has sponsored treaty initiatives, produced treaty drafts and working papers, and drafted model laws either at the behest or closely aligned with the positions of the United States and Europe. For example, in preparation for the December 1996 diplomatic conference aimed at updating WIPO treaties to the digital age, WIPO produced draft treaties and working papers that would have substantially implemented the United States’ IP maximalist digital agenda, together with some European gloss.²⁴ Pointing to the IP protectionism that has been endemic to WIPO norm setting, commentators have also expressed concern that WIPO’s ongoing efforts to promote patent law harmonization through agreement on a Substantive Patent Law Treaty would, if successful, sharply constrain developing countries’ leeway to craft their domestic patent laws to narrow patentable subject matter, set a high bar to inventiveness for patentability, limit patent holders’ exclusive rights, and impose compulsory licenses.²⁵

24. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int’l L. 369, 374 (1977).

25. Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 Duke L. J. 85, 93–102 (2007).

This IP maximalist bias partly reflects WIPO's traditional institutional mission to "promote the protection of intellectual property throughout the world" and WIPO officials' personal commitment to that mission. Yet it has also arisen from WIPO's norm-setting procedures, which, like those of the WTO, have been widely perceived to favor developed countries.²⁶ The preparatory groundwork for new WIPO treaties is carried out by one of the organization's standing committees, such as the Standing Committee on the Law of Patents or the Standing Committee on Copyright and Related Rights. The WIPO General Assembly does not decide to convene a diplomatic conference to consider a new international instrument unless and until the appropriate standing committee determines that sufficient progress has been made toward treaty adoption.²⁷ Although developing countries are formally represented on the standing committees, their impact on treaty preparation is severely hampered by their lack of resources and expertise. For developing countries, it is often prohibitively costly to send an expert to Geneva to attend committee meetings. As a result, the developing country representative is often a lowly official from the country's diplomatic mission in Geneva. WIPO does sponsor a number of delegates from developing countries to attend norm-setting meetings. But, as a seasoned observer notes, "the truth remains that most of the delegates from developing countries attending Standing Committee meetings are members of the diplomatic corps and are not versed in intellectual property."²⁸ The "well-resourced and technically proficient delegations of developed countries, such as the United States," stand in sharp contrast.²⁹ The Development Agenda seeks to remedy this disparity by requiring WIPO both to promote participation of developing country experts and to consider the viewpoints of inter-governmental organizations and NGOs that give voice to the interests of IP users and developing countries.

C. WIPO's Governance and Relation to Other Organizations

The Development Agenda firmly places WIPO's mission of promoting intellectual property protection in the service of—and subject to—an overriding mandate of fostering development. To that end, the Agenda also aims to further integrate WIPO within an overarching framework of agencies devoted to development.

WIPO was established as a successor to the United International Bureaus for the Protection of Intellectual Property, an independent international agency,

26. See STIGLITZ & CHARLTON, *supra* note 9, at 82 (discussing the infamous "green room" methods of the Uruguay Round of WTO negotiations and continuing disabilities faced by developing countries within the WTO).

27. See Geoffrey Yu, *The Structure and Process of Negotiations at the World Intellectual Property Organization*, 82 Chi.-Kent L. Rev. 1445 (2007).

28. Coenraad Visser, *The Policy-Making Dynamics in Intergovernmental Organizations*, 82 Chi.-Kent L. Rev. 1457, 1459 (2007).

29. *Id.*

known by its French acronym, BIRPI, formed in 1893 to administer the Berne and Paris Conventions. BIRPI was founded as an organization serving intellectual property owners under the supervision of the Swiss Federal Government.³⁰ WIPO effectively reconstituted the organization as an association of sovereign states. Importantly in that regard, WIPO succeeded BIRPI in 1967 as a free-standing, autonomous international agency. Nor did WIPO's designation as a specialized agency of the United Nations in 1974 fundamentally detract from WIPO's independence. As WIPO's Handbook emphasizes, "Each specialized agency has its own constitution, its own governing bodies, its own elected executive head, its own income, its own budget, its own staff, its own programs and activities. Machinery exists for coordinating the activities of all the specialized agencies, among themselves and with the United Nations, but basically each agency remains responsible, under its own constitution, to its own governing bodies, which are the States members of the organization." Nonetheless, WIPO's agreement with the UN does commit WIPO to cooperating and consulting with the UN and its various organs. In particular, the agreement provides that WIPO shall "co-operate within the field of its competence with the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organization . . . in promoting and facilitating the transfer of technology to developing countries in such a manner as to assist these countries in attaining their objectives in the fields of science and technology and trade and development."³¹

The Development Agenda does not diminish WIPO's formal institutional autonomy as a specialized agency of the United Nations. But it does bring the development policies of other agencies and regimes to bear more forcefully on WIPO norm-setting and procedure. In particular, the Agenda provides that "WIPO's norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration."³² It also calls upon WIPO "to intensify its cooperation on IP related issues with UN agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO, and other relevant international organizations,

30. See WIPO Handbook, *supra* note 18, at 4; PAUL JOAN GEORGE KAPTEYN, INTERNATIONAL ORGANIZATION AND INTEGRATION: ANNOTATED BASIC DOCUMENTS I (Brill 1984).

31. UN-WIPO Agreement, *supra* note 4, Art. 10.

32. Proposed language that would have required WIPO to ensure that its norm-setting activities are "fully compatible" with other international instruments that advance development objectives, including international human rights instruments, was not adopted as part of the Development Agenda. See WIPO, Working Document for the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), WIPO Doc. PCDA/3/2, Annex B, ¶ 28, pp. 14–15, Feb. 20, 2007 [hereinafter "Provisional Committee Working Document"].

especially WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs.”

Significantly, although the UN’s development goals do not refer to intellectual property per se, they embrace an understanding of development as freedom that stands at odds with one-dimensional support for broad intellectual property rights.³³ On that score, a UN-commissioned independent report on achieving the Millennium Development Goals expressly criticizes TRIPS for taking “too little account of levels of development and varying interests and priorities” and for providing for insufficient flexibility in implementing the Agreement’s requirements.³⁴ Furthermore, almost all the UN agencies identified in the Development Agenda’s call for intensified cooperation have taken positions at odds with IP maximalism. Both WHO and UNESCO have expressed concern that uniformly strong IP rights run counter to human rights, particularly with regard to access to essential medicines; UNCTAD has sharply criticized the erosion of least developed countries’ flexibilities in setting IP policies, particularly under TRIPS-plus agreements, as erecting barriers to development; and UNIDO has placed a premium on promoting technology transfer to least developed countries.³⁵

One would thus expect that WIPO’s close cooperation with other UN agencies would reinforce the Development Agenda’s fundamental reorientation of

33. UN General Assembly Resolution 55/2—The United Nations Millennium Declaration, Sept. 18, 2000. The UN has since expressed concern that the benefits of economic growth in emerging developing countries have been unequally shared in those countries as well as in the world at large. United Nations, *The Millennium Development Goals Report 2007* 4–5 (2007).

34. Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* 219 (2005). Of import for WIPO’s role in advising developing countries regarding TRIPS, the report refers to the recent need to renegotiate TRIPS rules on access to essential medicines and strongly suggests that TRIPS remains ill suited to developing-country needs: “There is a clear case for revisiting more of the rules to examine their impact on developing countries and any additional flexibility required. This remains relevant for access to essential medicines.” *Id.*

35. See World Health Organization, *Globalization, TRIPs and Access to Pharmaceuticals*, WHO Policy Perspectives on Medicines, No. 3, WHO/EDM/2001.2 at 5 (Mar. 2001) (asserting that “[a]ccess to essential drugs is a human right” and encouraging countries to take advantage of existing TRIPS “safeguards” to “enhance the affordability and availability” of patented pharmaceuticals); UNESCO, *Report on the Experts’ Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications* 3–4 (UNESCO Pub. SHS-2007/WS/13, June 7–8, 2007) (reporting UNESCO’s support for a right to enjoy the benefits of scientific progress and concern over the tension between that right and intellectual property); United Nations Conference on Trade and Development, *Least Developed Countries Report 2007* 128–29 (UNCTAD/LDC/2007 2007); United Nations Industrial Development Organization, *Strategic Long-Term Vision Statement*, GC11/8/Add.1, Oct. 14, 2005, ¶ 5(A)(h) (noting focus on “assistance in diffusion and transfer of modern and relevant technologies”).

WIPO's goals and priorities. But the Agenda's general call for greater cooperation leaves considerable room for variable interpretation and implementation. WIPO's report on Development Agenda items not listed for immediate implementation states that the organization is "already engaged in enhanced cooperation with UN agencies and other international organizations."³⁶ Yet it is too soon to gauge the extent of that cooperation or its potential impact on WIPO's work and objectives.

In addition to pressing WIPO to intensify its cooperation with UN agencies, the Development Agenda requires that the organization "ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation."³⁷ Similarly, as noted above, the Agenda requires that WIPO norm-setting "be a participatory process," which takes into account the viewpoints of non-state "stakeholders, including accredited inter-governmental and non-governmental organizations."³⁸

WIPO has long worked closely with NGOs. Indeed, some two dozen NGOs were observers at the meetings at which WIPO was established. But following on its BIRPI heritage, WIPO has traditionally consulted only organizations representing intellectual property producers, as evidenced by the fact that the NGOs present at WIPO's formation were all unions and associations devoted to lobbying for greater intellectual property rights.³⁹ In 2005, WIPO caused an uproar when it announced that it would bar numerous public interest organizations from discussions on the Development Agenda because those organizations were not accredited as permanent WIPO observers.⁴⁰ Since then, however, WIPO has considerably broadened civil society participation. It has now accredited some 250 NGOs as permanent observers, and these include groups, such as the Electronic Frontier Foundation, that typically oppose broad IP rights as well as those favoring such rights.⁴¹ The Development Agenda seeks to deepen and solidify this participatory trend in WIPO norm-setting procedures.

D. Technology Transfer

The Development Agenda contains a number of action items related to technology transfer. A seasoned observer comments that technology transfer is

36. See Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), WIPO Development Agenda; Initial Working Document for Implementation of Agreed Proposals, Feb. 29, 2008, at 29, available at <http://ip-watch.org/files/WIPO%20comments%20on%20DA%20recs%20-%20part%201.pdf> [hereinafter "Initial Working Document for Implementation"].

37. Development Agenda, ¶ 42.

38. Development Agenda, ¶ 15.

39. See Bogsch, *supra* note 5, at 125 (listing observers).

40. Electronic Frontier Foundation, *WIPO Shutting Out Public Interest Organizations*, Mar. 5, 2005, <http://www.eff.org/press/archives/2005/03/07>.

41. WIPO, Observers, NGOs, IGOs, <http://www.wipo.int/members/en/admission/observers.html>.

“an issue hitherto viewed with disdain in WIPO.”⁴² Yet WIPO’s leadership seems not to have misprized technology transfer per se, but simply to have adhered unquestioningly to the neoliberal notion that developing countries can better acquire technological know-how and direct investment in local technology production by legislating strong IP rights than by implementing compulsory licensing.

Although the Development Agenda certainly does not forswear further promotion of intellectual property rights as a possible tool for technology transfer, it does put an end to WIPO’s monolithic “IP as power tool of development” approach. In particular, the Agenda ties “IP-related policies and initiatives necessary to promote the transfer and dissemination of technology” with taking “appropriate measures to enable developing countries to fully understand and benefit from . . . flexibilities provided for in international agreements,” including, no doubt, compulsory licensing.⁴³ In response to that action item, WIPO proposes both to “undertake empirical economic studies that seek to understand the role of IP rights in international technology transfer in different contexts,” including “country-specific and industry-specific studies,” and to “provide assistance and advice by exploring and explaining all legal and policy options available to each country under relevant international treaties, while keeping in view the country’s international obligations and its national priorities.”⁴⁴ More specifically, the Development Agenda instructs WIPO to advise LDCs on how to gain access to and make use of IP-related technology and to “undertake initiatives agreed by Member States, which contribute to transfer of technology to developing countries, such as requesting WIPO to facilitate better access to publicly available patent information.”⁴⁵

Although the Development Agenda creates openings for WIPO to promote technology transfer through cracks in and limitations on IP rights, it stops far short of supporting wholesale compulsory licensing to bring technology and know-how to developing countries. As I will shortly discuss, indeed, a number of more far-reaching proposals, including one calling for a Treaty on Access to Knowledge and Technology, were not incorporated into the Agenda. Critics have long bemoaned what they view as the lip service paid to technology transfer, followed by inaction on every front except that asserting that greater IP rights provide incentives for IP holding firms to disseminate know-how and technology. As in other areas, the jury is still out on whether the Development Agenda will lead to concrete steps to enhance developing countries’ access to knowledge and technology in a more direct and proactive manner.

42. Sisule F. Musungu, *WIPO Development Agenda—As the Dust Settles*, Thoughts in Colours Blog, July 9, 2007, <http://thoughtsincolours.blogspot.com/2007/07/wipo-development-agenda-as-dust.html>.

43. Development Agenda, ¶ 25.

44. Initial Working Document for Implementation, *supra* note 36, at 17–18.

45. Development Agenda, ¶¶ 30 and 31.

E. Competition Policy

The Development Agenda contains a number of items regarding the potential conflicts between intellectual property and competition policy. With regard to technical assistance, for example, the Agenda provides that WIPO must “promote measures that will help countries deal with IP related anti-competitive practices” by assisting developing countries “to better understand the interface between intellectual property rights and competition policies.”⁴⁶

Competition law and policy represent a largely untapped area that developing countries might deploy to limit what they regard as overreaching and overly constraining intellectual property rights. Intellectual property rights have long been seen to pose possible conflicts with competition policies. As William Landes and Richard Posner describe it, indeed, the traditional view in the United States is that “intellectual property law and antitrust law are enemies—that intellectual property authorizes patent and copyright (and perhaps also trademark and trade secret) monopolies that offend antitrust principles.”⁴⁷ That antagonism has significantly subsided in developed countries. Much current thinking is that antitrust and intellectual property law fall within a common rubric of innovation policy and that, in the new information economy, each focuses on dynamic efficiency.⁴⁸ Certainly in the United States, moreover, in contrast to antitrust’s traditional antipathy toward the limited monopolies that intellectual property law makes possible, contemporary antitrust jurisprudence recognizes that innovation may often be fueled by the prospect and proper exercise of market power.⁴⁹

Yet even developed countries take different approaches to competition issues. For example, European competition law is typically more protective of competitors and views vertical restraints considerably more harshly than does U.S. antitrust law.⁵⁰ Accordingly, there would appear to be ample room for developing

46. Development Agenda, ¶ 7.

47. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 372 (Harvard Univ. Press 2003).

48. The current, express position of the U.S. federal antitrust enforcement agencies is that “[t]he intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.” United States Dept. of Justice and Fed. Trade Commission (1995), *Antitrust Guidelines for the Licensing of Intellectual Property*, §I.O, available at www.usdoj.gov/atr/public/guidelines/ipguide.htm.

49. See, generally, Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 *BERKELEY TECH. L. J.* 535 (2001); Richard A. Posner, *Antitrust in the New Economy*, 58 *Antitrust J.* 925 (2001). See also Massimo Motta, *COMPETITION POLICY: THEORY AND PRACTICE* 55–66 (Cambridge Univ. Press 2004) (demonstrating that although established monopolists might have a lesser incentive to innovate, the expectation of market power to appropriate investments in R&D, such as can be gained through intellectual property rights, may be a critical incentive to make those investments).

50. See Eleanor Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 *N.Y.U. L. REV.* 1781, 1791–92 (2000); James C. Cooper et al., *A Comparative Study of*

countries to tailor their competition laws in line with their national priorities and to use competition law far more aggressively than do either the United States or the European Union in defining as anti-competitive various uses of broad intellectual property rights, including IP holder refusals to license others to use IP on commercially reasonable terms.

TRIPS recognizes but does not define the scope of such leeway. Article 8 of TRIPS provides, "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."⁵¹ The Development Agenda does not further specify what might qualify as an abuse of IP rights or which types of licensing practices constitute unreasonable restraints of trade—and a proposal that would have required WIPO to "promote model approaches on how to implement the relevant provisions on anti-competitive practices of the TRIPS Agreement" was deleted prior to the September 2008 meeting of the General Assembly.⁵² But the Development Agenda, as adopted, does commit WIPO to raising awareness of possibilities for crafting competition law and policy to better serve developing country interests in delimiting exclusive IP rights.

F. Genetic Resources and Traditional Knowledge

The protection of genetic resources, traditional knowledge, and folklore has been a high priority for developing countries for a number of years. Although developing countries generally oppose the upward harmonization of patent, copyright, and trademark, they regard international treaty recognition of proprietary rights in genetic resources, traditional knowledge, and folklore as an opportunity for requiring protection of resources that they have in relative abundance. However, the United States and other industrialized countries have thus far blocked any commitment to adopt a treaty recognizing such rights.⁵³

Discussions on a possible treaty have continued apace. In 2000, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to progress toward a "shared international understanding" of how best to protect

United States and European Union Approaches to Vertical Policy, 13 GEO. MASON L. REV. 289 (2005).

51. Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 8.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments, Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

52. Provisional Committee Working Document, *supra* note 32, Annex B ¶ 16, p. 7.

53. *Assembly Approves Work on Development Agenda, Broadcast Treaty, Traditional Knowledge*, BNA International World Intellectual Property Report, Nov. 2007, <http://www.hostref4.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=BNAL:10.1048/Enu>.

traditional knowledge and genetic resources “against misappropriation and misuse.”⁵⁴ The World Trade Organization has also waded into this area, directing the TRIPS Council “to examine . . . the protection of traditional knowledge and folklore.”⁵⁵ Meanwhile, a number of developing countries have enacted domestic legislation protecting traditional cultural expression and knowledge, but advocates for protection have been frustrated by the lack of progress on an international treaty.

The proposed Development Agenda action item in this area would have requested WIPO to adopt a treaty for the protection of genetic resources, traditional knowledge, and folklore “in the nearest future.”⁵⁶ That language was diluted in the negotiations leading to adoption of the Development Agenda. As adopted, the Development Agenda provides that WIPO must “urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge, and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.”

The IGC met for its 12th session in February 2008, following adoption of the Development Agenda. It is apparent that there remains considerable disagreement over how, if at all, genetic resources, traditional knowledge, and folklore should receive international recognition and protection in areas within WIPO’s purview. Options on the table, assuming consensus can be reached on substance, include model laws, a nonbinding “soft law” instrument, and a political declaration of principles, as possible alternatives to a binding international treaty.⁵⁷

G. Bolstering Exceptions to IP Rights: Rejected but Still Under Consideration

A number of proposed action items that would have significantly bolstered exceptions and limitations to IP rights were not included in the Development Agenda as presented to the General Assembly. These included, most prominently, requirements that WIPO (1) provide technical assistance to “ensure . . . that flexibilities existing in international treaties are taken full advantage of,”⁵⁸ (2) maintain “a list of essential technologies, know-how, processes, and methods

54. WIPO Member States Extend International Work on Protection of Traditional Knowledge, Genetic Resources, and Folklore, World Intellectual Property Organization; available at www.wipo.int/pressroom/en/articles/2007/article_0072.html (last visited Nov. 25, 2007).

55. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/english/thewto_e/minist_e/minor_e/mindecl_e.htm.

56. Provisional Committee Working Document, *supra* note 32, Annex B ¶ 18, p. 9.

57. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, Summary of Options for the International Dimension of the Committee’s Work, Dec. 6, 2007, WIPO/GRTKF/IC/12/6.

58. Provisional Committee Working Document, *supra* note 32, Annex B ¶ 3, p. 3.

that are necessary to meet the basic development needs of African countries,”⁵⁹ and (3) “establish a Treaty on Access to Knowledge and Technology.”⁶⁰ By assisting developing countries actually to take full advantage of treaty flexibilities, WIPO would need both to define the full scope of those flexibilities and to advise developing countries to refrain from entering into bilateral TRIPS-plus agreements that trump the flexibilities found in TRIPS and other international instruments. By maintaining a list of essential technologies, WIPO would provide African countries a solid basis for imposing compulsory licenses to obtain such technologies under TRIPS. By moving to establishing a treaty on access to knowledge, WIPO would likely fuel calls to embed minimum, mandatory requirements for proscribed exceptions and limitations to copyright.⁶¹

Although these proposals were not incorporated into the Agenda, somewhat diluted versions were. For example, an item for immediate action under norm-setting requires WIPO “to initiate discussions on how, within WIPO’s mandate, to further facilitate access to knowledge and technology for developing countries and LDCs.”⁶² Further, as noted in WIPO’s implementation report, the issue of mandatory limitations and exceptions to copyright is under consideration in the Standing Committee on Copyright and Related Rights. Indeed, the SCCRR has given priority to considering a proposal by Brazil, Chile, Nicaragua, and Uruguay to evaluate the possible need for mandatory exceptions and limitations.⁶³

II. CONTRIBUTIONS TO THIS VOLUME

Our study of the issues surrounding the Development Agenda encompasses a rich variety of insights and perspectives. Our contributors hail from 14 countries, some developed, some developing, some emerging. They include political scientists, economists, lawyers, historians, policy analysts, and diplomats. Their chapters explore the Development Agenda’s background, content, and ramifications, guiding us to understand the Agenda in its historical, geopolitical, and development policy context. Their studies span a broad range—from the Agenda itself, to WIPO’s interaction with developing countries, to TRIPS, to how particular

59. Provisional Committee Working Document, *supra* note 32, Annex B ¶ 43, p. 18.

60. Provisional Committee Working Document, *supra* note 32, Annex B ¶ 35, p. 16.

61. The draft Treaty on Access to Knowledge, May 9, 2005, which was prepared by civil society groups and presented to WIPO, contains various such provisions. The draft is available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf. For discussion, see Laurence A. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1012–14 (2007).

62. Development Agenda, ¶ 19.

63. WIPO Press Release PR/2008/541, Member States Consider Future Work of Copyright Committee, Mar. 13, 2008, http://www.wipo.int/pressroom/en/articles/2008/article_0013.html.

countries and industries grapple with issues of development and intellectual property, to the interplay between IP and competition law in the development arena.

We begin by examining the Development Agenda in the context of the international IP treaty regime. We are especially fortunate to have Henrique Choer Moraes and Otávio Brandelli, two Brazilian diplomats with extensive firsthand knowledge of their country's efforts to promote the Development Agenda, present their personal assessment of the IP treaty regime issues that fueled the Agenda proposal and analysis of the Agenda's potential impost. Daniel J. Gervais, who recently moved to Vanderbilt University from the University of Ottawa, then places the Development Agenda within the ongoing debate about whether TRIPS and robust IP protection benefit developing countries. The answer, he underscores, is that there is no across-the-board answer. We have moved beyond both the "addition narratives" of early TRIPS proponents, according to which universally high levels of IP protection would jumpstart economic growth in developing countries, and the "subtraction narratives" of TRIPS critics, in whose opinion the lesser the impact of TRIPS, the better developing countries would be. We are now in a third phase, one informed by "calibration narratives," which recognize that IP protection may benefit certain developing countries but not others, and thus that we need different implementations of TRIPS, tailored to level and nature of development, instead of "cookie cutter" norm implants.

Part II examines the Development Agenda in historical and institutional context. Pedro Roffe and Gina Veá, of the International Centre for Trade and Sustainable Development, find parallels in the late nineteenth and mid-twentieth-century negotiations over the Paris Convention to current debates over how to strike a balance between public and private interests in a way that promotes development. Their focus is the Paris Convention's evolving treatment of "working requirements," countries' requirements that patent holders actually use patents in local production or face patent forfeiture or compulsory license. Roffe and Veá note the connection between such working requirements and the emphasis on local production found in the import substitution industrialization policies that Latin American countries favored as a means of development through the 1970s. As the authors highlight, many of the arguments that developing countries have traditionally advanced for imposing such working requirements find echoes in the Development Agenda today.

Carolyn Deere, of Oxford University and Intellectual Property Watch, situates the Development Agenda firmly within the political realities on the ground in developing countries. As Deere insightfully reminds us, the Development Agenda's implementation will rely heavily on the political process and organization of IP decision-making at the national and regional levels in developing countries, including the specific ways in which WIPO's activities influence the IP reform process. Developing country governments vary considerably in the degree of national debate regarding IP norms, the internal organization and

capacity of government agencies to weigh the benefits and costs of IP protection, and the degree of coordination with other governments and international fora. As Deere details, far beyond whatever the Development Agenda might provide, these country-specific factors heavily impact developing countries' abilities to carve out IP policies that suit their national interests rather than caving in to the considerable pressure to rubber stamp universally high levels of IP protection.

Part III then presents two cautionary notes regarding the Development Agenda, each coming from a different direction. Ruth L. Okediji, of the University of Minnesota, hails the Agenda as a potentially important milestone within WIPO but expresses some skepticism that the values, coalitions, and priorities that ensured the Agenda's adoption will resonate deeply within WIPO's infrastructure. Okediji then places the Agenda within the framework of development policy generally. She considers lessons learned from the failure of the New International Economic Order—what she characterizes as the transnational development “experiment” of the 1970s—and proposes some ways in which IP might be re-envisioned to promote human welfare in the digital age.

Keith E. Maskus, of the University of Colorado, similarly believes that the Development Agenda may herald some desirable reforms in WIPO, an agency he describes as “excessively hidebound and insular,” and may enable governments to recognize officially that IP policies impact development and need to be varied across national levels of per-capita income and technological attainment. Maskus warns, however, that developing country governments should not view IP flexibilities as a substitute for sound development policy. Middle-income and larger developing countries, he argues, do appear to be generally well served by high levels of IP protection and the voluntary technology transfer that such protection engenders. And although lesser protection is an appropriate policy for poorer developing countries, such countries must couple that policy with transparent enforcement and judicial procedures to ensure that what IP rights are on offer are actually protected because transparency and certainty are significant factors in attracting foreign direct investment and other forms of technology transfer.

Part IV examines IP and development from the perspective of various countries. Hong Xue, of the University of Hong Kong, presents a case study of how developing countries acquiesce in demands for greater IP protection. She examines China and its Internet Copyright Regulations, which were enacted to implement the WIPO Copyright Treaty. Xue concludes that China has incorporated wholesale many features of the U.S. Digital Millennium Copyright Act even though it was not required to so by the Treaty. She argues, on the basis of this example, that developing countries too readily view the way of developed countries as the prescribed path, failing in the process to develop their own internal capacity for normative innovation.

Yi Qian, of Northwestern University, evaluates the effects of patent protection and technology transfers on pharmaceutical innovations for 26 countries that

established pharmaceutical patent laws during the period from 1978 to 2002. She concludes, based on her regression analysis, that national patent protection alone does not stimulate domestic innovation or the establishment of new multinational subsidiaries. However, domestic innovation accelerates in countries with higher levels of economic development, educational attainment, and economic freedom. Additionally, Qian finds, there appears to be an optimal level of intellectual property rights regulation above which further enhancement actually reduces innovative activities.

B. Zorina Khan, of Bowdoin College, and the late Kenneth L. Sokoloff, of UCLA, also present a sweeping comparative analysis of patent law, but, as befitting of economic historians, theirs assesses the evolution of institutions designed to stimulate innovation across countries over the past two centuries. Their study highlights the extent to which countries have tailored such institutions to suit their particular social and economic circumstances. They note, for example, that the United States took a more democratic approach to patent law than did its European industrialized country counterparts, charging relatively low fees to apply for and maintain patents and eschewing working requirements, thus making it easier for individual inventors to obtain patents and share a stake in the patent system. They suggest, in conclusion, that developed countries' current efforts to achieve upward harmonization of patent law stands in contrast to the leeway those countries have historically enjoyed to tailor patent law to their own needs and ideologies and that restricting the menu of choices available to developing countries is likely to constrain development.

Part V addresses an issue that, arguably, has been the primary driving force behind developing countries' growing resistance to upward harmonization: access to medicine. Carlos Correa, of the University of Buenos Aires, provides a granular account of the linkage between pharmaceutical patents and drug registration, particularly how that linkage can effectively broaden the scope and lengthen the period of market exclusivity for a patented pharmaceutical. Like all drugs, generic pharmaceuticals must typically receive regulatory drug safety and efficacy approval before being put on the market to compete with the pharmaceutical for which the patent has expired. Because such approval can take a couple years, the generic producers' ability to work the patent in order to obtain regulatory approval upon or prior to expiration of the patent term is critical to reducing drug prices through competition at the earliest possible date. In addition, questions may arise regarding whether a new drug infringes on the patented pharmaceutical at all and thus whether the new drug may be put on the market during the patent term. Drug regulatory agencies are ill suited to consider patent disputes. As Professor Correa points out, however, the United States Trade Representative has consistently acted, through bilateral free trade agreements and the threat of unilateral trade sanctions, to require developing countries to accord pharmaceutical patent holders with far-reaching rights, extending even beyond those that patent holders enjoy in the United States itself.

Sudip Chaudhuri, of the Indian Institute of Management in Calcutta, studies the impact of TRIPS on India's pharmaceutical industry. Until India revised its patent law in 2005—the deadline for developing countries (but not least developed countries) to comply with TRIPS—India was a leading producer of generic drugs. Professor Chaudhuri finds that research and development expenditures have increased dramatically for a segment of India's pharmaceutical industry since TRIPS took effect in the mid-1990s. He finds, moreover, that whereas Indian firms' R&D efforts were previously engaged primarily in developing new processes for drug manufacture, they are increasingly involved in developing new, sometimes patentable chemical entities. Professor Chaudhuri attributes this increase and change in R&D to pharmaceutical patent protection in developed countries, where the primary markets for pharmaceuticals lay, not to TRIPS compliant patent regimes in developing countries. While Indian pharmaceutical companies have demonstrated their ability to produce generics, they have yet to prove their competence in innovating new products. He concludes, accordingly, that India's experience does not justify stronger patent protection for R&D and innovation.

Francesco Laforgia, Fabio Montobbio, and Luigi Orsenigo, all of the Centre of Research on Innovation and Internationalization and Bocconi University, examine pharmaceutical patenting in Brazil after TRIPS. Based on their case study, they conclude that there are, indeed, profound trade-offs between providing incentives to innovate and ensuring public access to medicines, trade-offs for which no obvious and simple solutions exist. In line with that recognition of complexity, they argue that the effects of strengthening patent protection depend on a wide variety of conditions in any given country and that, with pharmaceutical patents in particular, the existence of price controls, the nature of health-care delivery systems, the state of basic research, and other country-specific factors play key roles in determining whether increased protection will yield net benefits.

Part VI moves from medicines to culture. Diana V. Barrowclough, of the United Nations Conference on Trade and Development, presents evidence that some developing countries, far from being only consumers of intellectual property, have the potential to be extremely dynamic players in the new markets for creative industries. They are already producing and exporting at an extremely rapid rate of growth, much greater than in older, more conventional goods and services. Creative industries offers new opportunities for employment growth, both direct and indirect, and can be an important portal into the global knowledge economy—with the appropriate industrial policies in place. Hence, she argues, the WIPO Development Agenda debate is subtly different in the creative-industries context, given the nature of its products and the fact that developing countries can be producers as well as consumers. In the cultural industries—copyright context, therefore, policies geared toward boosting creativity and getting creative ideas into marketable form are as important as policies geared toward capturing or liberating IP—indeed, maybe more so. At the same time, she maintains, there is a need to seek more equitable and fair methods of rewarding creators than those existing under current regimes.

Nagla Rizk, of the American University in Cairo, takes a close look at the Arab music industry in light of the region's sociocultural, economic, political, and legal realities. In so doing, she compares and contrasts popular stars with underground musicians. Given the lack of published data on the Arab music industry, her research is based primarily on extensive interviews with music industry players and government officials in Egypt. Along the way, she describes models for disseminating Arab music that emanate from the actual practices on the ground rather than being imposed from the top. Given the ethic of sharing that permeates the culture of much Arab music, she characterizes these models as a "de facto commons." Professor Rizk concludes that such models for Arab music should be acknowledged and accommodated through flexible IP systems that maximize access to users and reward the music creator rather than record labels.

Michael D. Birnhack, of Tel-Aviv University, explores the clash between a global copyright regime that views copyright law as an instrument of trade and the complex set of local factors that form each country's culture. Using Israel as a case study, he focuses on what he calls "foreign leverage," the process by which local interest groups turn to global players, including both lobbying associations and foreign governments, to pressure local government to grant high levels of copyright protection sought by those particular interest groups. Professor Birnhack's conclusion, as he describes it, is "rather dim." Copyright used to be about culture, education, and human flourishing, but it has become a matter of trade, promoting the material flourishing of certain industries over the interests of the public at large.

Part VII looks at issues of industry structure, innovation, and access. John H. Barton, of Stanford University, assesses whether it would serve developing countries' economic interests to counter the upward harmonization of IP protection that TRIPS and other treaties demand with a strong antitrust law (or what is called in Europe and elsewhere "competition law"). In examining the actions that developing countries might take in the antitrust area, he looks both at national legislation and international arrangement and presents approaches that reflect sound economic analysis while still comporting with current law. Professor Barton considers three important contexts where antitrust might be employed to blunt abusive uses of IP rights: the response to a (generally foreign) monopolist, the response to a (generally primarily foreign) global oligopoly or cartel, and the management of relations between a major (generally foreign) firm and a local licensee. His analysis is specific to each scenario, but he concludes generally that the current process of national enforcement of antitrust law is suboptimal from a traditional competition-law perspective and thus that developing nations should explore possibilities for an international agreement, either in the form of a WTO antitrust agreement or of a WIPO intellectual property/antitrust agreement.

Leonardo Burlamaqui, of the Ford Foundation and the State University of Rio de Janeiro, analyses the interactions among IP issues, innovation, and development from a Schumpeterian perspective. In so doing, he aims to build a more coherent framework within which the discussions of both institutional building

and policy design toward development can proceed. In particular, Professor Burlamaqui introduces the concept of a “market features approach” for structuring competition policies that support both innovation *and* a less restrictive IP regime. He devotes special attention to how competition policies should address intellectual property issues under a market feature’s approach and to the institutional design of public agencies dealing with intellectual property issues.

Part VIII presents two perspectives on intellectual property and developing-country citizens’ freedom. Madhavi Sunder, of the University of California at Davis, builds upon Amartya Sen’s influential vision of “development as freedom.” She argues, accordingly, that the “development agenda” for intellectual property must focus as much on freedom, equality, health, and participation as on economic prosperity. At the same time, Professor Sunder cautions, the development agenda should not focus solely on limited IP rights. Rather, Sen’s vision highlights the importance of recognizing and rewarding the cultural creations of the poor as we think about development in a Knowledge Age. A broader understanding of intellectual property and development as freedom would recognize the importance of not just producing more knowledge goods, but also of participating in the process of knowledge creation.

P. Bernt Hugenholtz, of the University of Amsterdam, and Ruth L. Okediji, of the University of Minnesota, take up the proposal, which following the Development Agenda is now before the WIPO Standing Committee on Copyright and Related Rights, for an international instrument that would require minimum limitations and exceptions to copyrights. They sketch the rationales for such a multilateral approach to the question of exceptions and limitations and explore the flexibilities within the current international copyright treaty regime, particularly the three-step test that has become the standard for demarcating the permissible scope of countries’ exceptions and limitations to copyrights. In so doing, they assess the three-step test’s import for the validity of a proposed international instrument that would not only allow, but would actually require, certain minimum limitations and exceptions to copyright. They then provide a preliminary proposal setting out the basic contours of such an instrument, taking into account feasibility, political sustainability, and normative priorities.

As should be apparent from my summary descriptions, our contributors do not present a common perspective regarding how the Development Agenda should be implemented or how intellectual property rights should be tailored to promote development. Rather, as befitting their diverse disciplines, professions, and nationalities, they tackle multiple facets of the Development Agenda and the issues it raises, and do so from a variety of approaches and viewpoints. If there is anything held in common in their perspective, it is that intellectual property and development must be understood from the bottom up. Experience since TRIPS teaches us—and the Development Agenda recognizes—that the optimal scope and nature of intellectual property protection varies from one industry, country, and level of development to another.

APPENDIX

The WIPO Development Agenda
Items for Immediate Implementation are in bold

CLUSTER A: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

1. WIPO technical assistance shall be, *inter alia*, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.
2. Provide additional assistance to WIPO through donor funding, and establish Trust-Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra-budgetary resources, to promote, *inter alia*, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.
3. **Increase human and financial allocation for technical assistance programs in WIPO for promoting a, *inter alia*, development-oriented IP culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on IP.**
4. **Place particular emphasis on the needs of SMEs and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of IP.**
5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.
6. **WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.**
7. **Promote measures that will help countries deal with IP related anti-competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between intellectual property rights and competition policies.**
8. Request WIPO to develop agreements with research institutions and with private enterprises with a view to facilitating the national offices of developing countries, especially LDCs, as well as their regional and sub-regional IP organizations to access specialized databases for the purposes of patent searches.
9. Request WIPO to create, in coordination with Member States, a database to match specific IP-related development needs with available resources, thereby

expanding the scope of its technical assistance programs, aimed at bridging the digital divide.

10. To assist Member States to develop and improve national IP institutional capacity through further development of infrastructure and other facilities with a view to making national IP institutions more efficient and promote fair balance between IP protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with IP.

11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.

13. WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

CLUSTER B: NORM-SETTING, FLEXIBILITIES, PUBLIC POLICY AND PUBLIC DOMAIN

15. Norm-setting activities shall:

- be inclusive and member driven;
- take into account different levels of development;
- take into consideration a balance between costs and benefits;
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations and non-governmental organizations; and
- be in line with the principle of neutrality of the WIPO Secretariat.

16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.

17. In its activities, including norm-setting, WIPO should take into account the flexibilities in international IP agreements, especially those which are of interest to developing countries and LDCs.

18. To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

19. To initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO.

20. To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

21. WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.

22. WIPO's norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.

The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: (a) safeguarding national implementation of intellectual property rules (b) links between IP and competition (c) IP-related transfer of technology (d) potential flexibilities, exceptions and limitations for Member States and (e) the possibility of additional special provisions for developing countries and LDCs.

23. To consider how to better promote pro-competitive IP licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.

CLUSTER C: TECHNOLOGY TRANSFER, INFORMATION AND COMMUNICATION TECHNOLOGIES (ICT) AND ACCESS TO KNOWLEDGE

24. To request WIPO, within its mandate, to expand the scope of its activities aimed at bridging the digital divide, in accordance with the outcomes of the World Summit on the Information Society (WSIS) also taking into account the significance of the Digital Solidarity Fund (DSF).

25. To explore IP-related policies and initiatives necessary to promote the transfer and dissemination of technology, to the benefit of developing countries and to take appropriate measures to enable developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided for in international agreements, as appropriate.

26. To encourage Member States, especially developed countries, to urge their research and scientific institutions to enhance cooperation and exchange with research and development institutions in developing countries, especially LDCs.

27. Facilitating IP-related aspects of ICT for growth and development: Provide for, in an appropriate WIPO body, discussions focused on the importance of IP-related

aspects of ICT, and its role in economic and cultural development, with specific attention focused on assisting Member States to identify practical IP-related strategies to use ICT for economic, social and cultural development.

28. To explore supportive IP-related policies and measures Member States, especially developed countries, could adopt for promoting transfer and dissemination of technology to developing countries.

29. To include discussions on IP-related technology transfer issues within the mandate of an appropriate WIPO body.

30. WIPO should cooperate with other intergovernmental organizations to provide to developing countries, including LDCs, upon request, advice on how to gain access to and make use of IP-related information on technology, particularly in areas of special interest to the requesting parties.

31. To undertake initiatives agreed by Member States, which contribute to transfer of technology to developing countries, such as requesting WIPO to facilitate better access to publicly available patent information.

32. To have within WIPO opportunity for exchange of national and regional experiences and information on the links between IP rights and competition policies.

CLUSTER D: ASSESSMENT, EVALUATION AND IMPACT STUDIES

33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development-oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.

34. With a view to assisting Member States in creating substantial national programs, to request WIPO to conduct a study on constraints to intellectual property protection in the informal economy, including the tangible costs and benefits of IP protection in particular in relation to generation of employment.

35. To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States.

36. To exchange experiences on open collaborative projects such as the Human Genome Project as well as on IP models.

37. Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between IP and development.

38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organization's activities on development.

CLUSTER E: INSTITUTIONAL MATTERS INCLUDING MANDATE AND GOVERNANCE

39. To request WIPO, within its core competence and mission, to assist developing countries, especially African countries, in cooperation with relevant international organizations, by conducting studies on brain drain and make recommendations accordingly.

40. To request WIPO to intensify its cooperation on IP related issues with UN agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially WTO in order to strengthen the coordination for maximum efficiency in undertaking development programs.

41. To conduct a review of current WIPO technical assistance activities in the area of cooperation and development.

42. To enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.

43. To consider how to improve WIPO's role in finding partners to fund and execute projects for IP-related assistance in a transparent and member-driven process and without prejudice to ongoing WIPO activities.

44. In accordance with WIPO's member-driven nature as a United Nations Specialized Agency, formal and informal meetings or consultations relating to norm-setting activities in WIPO, organized by the International Bureau, upon request of the Member States, should be held primarily in Geneva, in a manner open and transparent to all Members. Where such meetings are to take place outside of Geneva, Member States shall be informed through official channels, well in advance, and consulted on the draft agenda and program.

CLUSTER F: OTHER ISSUES

45. To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations," in accordance with Article 7 of the TRIPS Agreement.

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