

WIPO



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GENEVA

INTER-SESSIONAL INTERGOVERNMENTAL MEETING ON A DEVELOPMENT AGENDA FOR WIPO

First Session
Geneva, April 11 to 13, 2005

PROPOSAL TO ESTABLISH A DEVELOPMENT AGENDA FOR WIPO:
AN ELABORATION OF ISSUES RAISED IN DOCUMENT WO/GA/31/11

Document prepared by the Secretariat

1. In a communication dated April 5, 2005, the International Bureau received from Brazil, on behalf of the "Group of Friends of Development", a submission entitled "Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11". The Permanent Mission of Brazil requested the International Bureau to distribute the submission as an official document of the Inter-Sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO, under item 4(a) of the Draft Agenda (IIM/1/1 Prov.), to be held in Geneva from April 11 to 13, 2005.

2. The said proposal is annexed to this document.

3. *The IIM is invited to note the contents of the attached proposal of Brazil on behalf of the "Group of Friends of Development".*

[Annex follows]

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ANNEX



Permanent Mission of Brazil in Geneva
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Nº . 251/2005

The Permanent Mission of Brazil in Geneva presents its compliments to the International Bureau of the World Intellectual Property Organization and, in reference to the Inter-Sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO, which will take place from 11 to 13 April 2005, is honored to transmit, on behalf of the Group of Friends of Development, the annexed submission entitled "Proposal to Establish a Development Agenda for the World Intellectual Property Organization (WIPO): An Elaboration of Issues Raised in Document WO/GA/31/11".

The Permanent Mission of Brazil, on behalf of the Friends of Development, kindly requests the International Bureau to distribute the annexed submission as an official document of the IIM, under item 4(a) of the Draft Agenda (IIM/1/1Prov.).

The Permanent Mission of Brazil avails itself of this opportunity to renew to the World Intellectual Property Organization the assurances of its highest consideration.

Geneva, April 5, 2005

World Intellectual Property Organization
Geneva



PROPOSAL TO ESTABLISH A DEVELOPMENT AGENDA
FOR THE WORLD INTELLECTUAL PROPERTY ORGANIZATION
(WIPO):
An Elaboration of Issues Raised in Document WO/GA/31/11

Submission by the Group of Friends of Development

I. INTRODUCTION: PROMOTING DEVELOPMENT AND ACCESS TO KNOWLEDGE FOR ALL

During the 31st Session of the WIPO General Assembly (September 27 to October 5, 2004), the delegations of Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela co-sponsored a proposal to establish a "Development Agenda" for the World Intellectual Property Organization (tabled as Document WO/GA/31/11). The present submission by the Group of Friends of Development seeks further to elaborate four different sections of document WO/GA/31/11, with a view to incorporating the development dimension into WIPO's work. The four issues dealt with in this new submission are, namely: WIPO's mandate and governance; norm-setting; technical cooperation; and transfer of technology. This document is intended only as a further contribution to the debate on the establishment of a "development agenda" for WIPO. It is not meant to be exhaustive of all possible initiatives that may be undertaken and issues that may be addressed under that aegis. The Friends of Development reserve the right to make additional contributions to the debate as discussions continue. Future documents may further elaborate the proposals contained in the present submission, or address new issues.

2. The basic concern of the Group of Friends of Development is to ensure that WIPO activities and intellectual property discussions are driven towards development-oriented results. As pointed out by document WO/GA/31/11, several international organizations have recognized that much more needs to be done to reach effective results that meet the challenges of development. Leading this process, the United Nations adopted the Millennium Development Goals, which established a firm commitment by the international community to address the significant problems that affect developing countries and LDCs. The Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society, and the Sao Paulo Consensus adopted at UNCTAD XI, have all placed development at the heart of their concerns and actions. This has also been the case in the context of the current Doha round of multilateral

trade negotiations of the World Trade Organization (the “Doha Development Agenda”), which was launched at the WTO’s 4th Ministerial Conference, in November 2001.

3. The aforementioned examples point to a trend towards adopting development-oriented agendas in international fora, in response to the widespread perception that the international debate must tackle this issue. The proposal to establish a “Development Agenda” for WIPO submits that the Organization’s work should reflect this trend, by bringing the development dimension into all its discussions and activities. The basic proposal of the “Development Agenda” is that development should be a central dimension in any negotiation involving IP systems.

4. Experience demonstrates that WIPO has concentrated its efforts in the diffusion of standardized approaches to IP policies that assume, from an uncritical standpoint, that development follows suit as intellectual property rights protection is strengthened. Current worldwide debate questioning the appropriateness of such an approach has not been reflected in WIPO’s work. Rather, discussions in WIPO have overlooked the importance of a systematic assessment of the implications of increased and standardized IPR protection in terms of access to and diffusion of science, technology and related knowledge and know-how, especially for LDCs and developing countries.

5. The proposal for the establishment of a “Development Agenda” is also based on the premise that development concerns should be given emphasis in WIPO activities, so that the Organization may comply with its UN mandate. One of the intentions of the “Development Agenda”, therefore, is to promote a deeper reflection on the development implications of current and new approaches to different IP policy choices and international norm setting, as well as a more accurate and pervasive discussion on the consequences of their adoption by countries at different stages of social, economic and technological development. It is important to promote a critical examination of the implications for developing countries of the adoption of increased IPR protection, rather than seek to approach this highly controversial issue as if it were governed by absolute truths, solely under the one dimensional perspective of the private rights holders, ignoring the broader public interest.

6. Accordingly, while the “Development Agenda” initiative recognizes that intellectual property is relevant to the process of building technological capacity, it also draws attention to the importance of public interest flexibilities provided for by the IP system itself and the role these flexibilities might play in fostering development-oriented policies. Although a globalized economy poses overwhelming challenges for policy-making, such as the tendency towards uniformity, it is important to bear in mind the serious disparities that continue to exist in the levels of human, economic and technological development among different States. States at differing levels of development face different challenges and have different needs. This fact should always be borne in mind in the realm of intellectual property policy-making.

7. From such a perspective, as pointed out in document WO/GA/31/11, intellectual property should be regarded not as an end in itself, but as a means for promoting the public interest, innovation, and access to science, technology and the promotion of diverse national creative industries - in order to ensure material progress and welfare in the long run. Promotion of intellectual property protection alone is not sufficient if unaccompanied by policies that respond to the specific development needs of each country.

8. As WIPO holds an important position in the field of IP issues, the Organization is expected to be guided, in all its activities, by this wider perspective in which IPRs are regarded as instruments that could facilitate social and economic gains for all countries, provided that different national circumstances are properly taken into account.

9. It is incumbent upon WIPO, therefore, to effectively incorporate development promotion as one of its main goals, as already foreseen by the UN-WIPO Agreement. This brings to the forefront, *inter alia*, the importance of: weighing the costs and benefits generated by IPR protection; safeguarding public interest flexibilities in both ongoing and future negotiations taking place in the Organization; addressing the issue of technical cooperation from a broader perspective – in which countries are helped to frame IP legislation that responds to their specific needs; guaranteeing wider transparency and participation in the discussions; and ensuring that the IP system effectively fosters innovation and technological development. The balance between the public interest and those of rights holders, as well as the balance between the interests of the scientific community and those of the technology and IP based industries should be struck not only in developed countries but also within the specific contexts and conditions of each developing country that is a member of WIPO. This is why IP agreements and minimum international standards should be fine-tuned to address different levels of development of member countries, their respective social needs and industrial challenges as well as their capacity to participate in and benefit from the IP system through generation of patents and IPs resulting from the efforts of their own national communities and industries. These concerns are of a cross-cutting nature, since they relate to all WIPO activities. This highlights the importance of dealing with them in all WIPO fora.

10. The Friends of Development attach importance to the role of intellectual property in the path towards development. In order to ensure the credibility of the IP system, however, more has to be done in order to ensure that peoples all over the world have access to knowledge and technological development. We believe WIPO could have a new role as a relevant actor in this context if it incorporates the development dimension into its work.

II. ELEMENTS FOR THE REVIEW OF THE MANDATE AND GOVERNANCE OF WIPO

11. Document WO/GA/31/11 noted that WIPO as a member of the United Nations (U.N.) family should be guided by the development goals that the U.N. has set for itself, such as the Millennium Development Goals (MDGs), and that development concerns should be fully incorporated into all WIPO programmes and activities. In the proposal, the co-sponsors further pointed out that WIPO's role is not to be limited to the promotion of intellectual property protection.

12. The proposal that WIPO should be guided by the broader goals of the UN system is a response to and reflects recent developments in many different international fora, where it has been recognized that intellectual property protection has serious cross-cutting implications for several different areas of public policy, including education, public health, nutrition, the environment, cultural diversity and the promotion of science and technological development more generally. In this regard, the adoption of the Doha Declaration on the TRIPS Agreement and Public Health at the 4th Ministerial Conference of the World Trade Organization (WTO) represented a crucial milestone, whereupon the international community recognized that TRIPS, as an international instrument for the protection of intellectual property, should always operate in a manner supportive of the public health objectives of all countries. Relevant developments have taken place in other international fora as well. For example, the "Sao Paulo Consensus", adopted by UNCTAD XI, enshrined the concept of "policy space" in the context of economic policy-making, underscoring its relevance to the pursuit of the development objectives of developing countries and LDCs.

13. Now more than ever before, it has become clear that in the increasingly global, knowledge economy, access to knowledge and technology is indispensable for social and economic development and for the well-being of peoples in all countries. Consequently, any policies and international norm-setting, particularly in relation to intellectual property protection, which may have an impact on access to knowledge and technological development, pose a serious development concern for developing countries and LDCs.

II.1. WIPO'S U.N. MANDATE: ADDRESSING POSSIBLE IMPEDIMENTS TO ITS EFFECTIVE IMPLEMENTATION

14. Given the cross-cutting implications of intellectual property protection, in particular for developing countries and LDCs, as well as consumers of new knowledge and technology in both the North and the South, discussions on intellectual property should not and cannot be pursued in a vacuum. In effect, because IP protection has an impact on different areas of public policy of such vital importance to social and cultural development, immediate steps should be taken to ensure the full implementation and monitoring of WIPO's U.N. mandate, by

clarifying the mandate of the Organization and by strengthening its Member-based governance structures. It is important to examine and address, in particular, WIPO's development mandate as a U.N. agency, as well as specific practical measures that need to be taken, in terms of governance, to ensure that the development dimension becomes an integral element of WIPO's work programme in all areas of activity.

15. WIPO was established by the 1967 WIPO Convention as an independent international organisation succeeding the *Bureaux Internationaux reunis pour la protection de la propriete intellectuelle* (BIRPI) to "promote the protection of intellectual property" and "ensure administrative cooperation among the Unions". This objective was, however, explicitly clarified by the 1974 Agreement between the United Nations and WIPO, which established WIPO as a specialized agency of the U.N. family with the responsibility for:

[T]aking appropriate action in accordance with its basic instruments, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs,...¹

16. While intellectual property protection may in particular circumstances promote creativity and innovation, it is neither the only way nor necessarily the most efficient or appropriate means for doing so at all times and in all sectors of the economy. Similarly, it is highly questionable that upward harmonization of intellectual property laws, leading to more stringent standards of protection in all countries, irrespective of their levels of development, should be pursued as an end in itself. WIPO must, as a matter of course, examine and address all features of existing intellectual property rights, including the economic and social costs that IP protection may impose on developing and least developed countries, as well as on consumers of knowledge and technology in both the North and the South. WIPO, moreover, must be open to, and actively consider, alternative non-intellectual property-type systems for fostering creativity, innovation and the transfer of technology, while recognizing the benefits and costs of each system. Higher standards of protection should be undertaken only when it is clearly necessary and appropriate for the promotion of creativity and the transfer of technology, and where the benefits outweigh the costs of protection. Indeed, paragraph 2 of the Preamble to the WIPO Convention, as formulated in 1967, recognized that intellectual property is not an end in itself but should only be used if it promotes creativity. As a matter of fact, given the cross-cutting implications of IP protection, as pointed out above, any attempts to pursue upward harmonization of intellectual property protection, without proper consideration of the potential costs of such initiatives for developing countries and

¹ See Article 1 of the Agreement between the United Nations and the World Intellectual Property Organization, WIPO Publication No. 111, (1975) WIPO, Geneva.

LDCs, as well as for consumers and the public at large, would be at odds with WIPO's U.N. mandate.

17. Furthermore, WIPO should undertake its activities, especially legal-technical and technical assistance with a development focus, based on the 1995 Agreement between WIPO and the World Trade Organization (WTO) with respect to the implementation of the TRIPS Agreement. Under Article 4 of that Agreement, the International Bureau of WIPO and the WTO Secretariat are required to cooperate in matters of legal-technical and technical assistance "so as to maximize the usefulness of those activities". In the context of TRIPS, legal-technical and technical assistance activities have to ensure that the developing and least developed countries are able to implement the pro-development provisions of the TRIPS Agreement, for example, Articles 7, 8, 30, 31 and 40, in addition to subsequent pro-development decisions, such as the Doha Declaration on the TRIPS Agreement and Public Health.

18. In spite of the terms of the 1974 Agreement between the U.N. and WIPO, ambiguities and misunderstandings regarding WIPO's mandate have, for various reasons, persisted over the years. The 1967 WIPO Convention has often been invoked by some to justify attempts to launch negotiations on the upward harmonization of intellectual property laws without a proper, comprehensive and fair consideration of the potential implications and costs of such initiatives for developing countries and LDCs. At other times, some have suggested that the WIPO Convention prohibits the Organization from examining issues such as the control of anticompetitive practices, transfer of technology, limitations and exceptions to intellectual property rights and the protection and enhancement of the public domain. All such restrictive interpretations of WIPO's mandate would seem to run counter to WIPO's role and mandate as a U.N. agency. In effect, given the clear cross-cutting implications of IP for vital areas of public policy, in particular for developing countries and LDCs, such narrow interpretations of WIPO's mandate and mission are not desirable.

19. Several factors may have impeded effective implementation of the Organization's development mandate in the past. Frequently, there has appeared to be a misconception that the development dimension of intellectual property is the same thing as technical assistance and that technical assistance should be provided as a means for enhancing enforcement measures in receiving countries. At other times, the Organization may have lacked clear guidelines from the Member States on how development should be placed at the core of WIPO programmes and activities. This should be remedied by a debate on the subject in the next meeting concerning the Development Agenda. It would be particularly important to mainstream the development dimension into all of WIPO's substantive and technical assistance activities and debates, including the way in which the Organization deals with "enforcement" issues. The objective would be to safeguard in all negotiations the development oriented principles and flexibilities contained in existing Agreements, such as Article 1 of TRIPS, which gives members the freedom to "determine the appropriate method of implementing the provisions of this [the] Agreement within their own legal system and practices", as well as Article 41.5 which establishes in

regards of enforcement that nothing creates “any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general”. In that light, it is also important to maintain the mandate of WIPO's Advisory Committee on Enforcement within the limits of a forum for exchange of information.

II.1 (a) Bringing the WIPO Convention in Line with the Organization's U.N. Mandate

20. As pointed out in Document WO/GA/31/11, one could make WIPO's mandate clearer by means of an amendment to the 1967 WIPO Agreement that would unequivocally inscribe the “development dimension” as an essential element of the Organization's work program. One option is to amend the Convention as indicated in the Appendix to document WO/GA/31/11. The timing and convenience of initiating such negotiations should be properly considered by all Member States in the IIM on the Development Agenda.

II.1(b) The Misconception that the Development Dimension Means Technical Assistance

21. The proposal on a Development Agenda for WIPO is broad and horizontal in nature and strives to address WIPO's work in all its dimensions. In particular, it is critical to clarify that the development dimension of intellectual property is **NOT** the same thing as technical assistance. While technical assistance has a role to play in ensuring that the implementation of intellectual property rules is development-sensitive, the development dimension in intellectual property means that, *inter alia*:

- (a) With respect to norm-setting relating to intellectual property, new subjects and areas for such norm-setting should be identified based on clearly defined principles and guidelines and on an assessment of their development impact. Differing levels of technological, economic and social development should be recognized, and flexibilities and “policy space” for the pursuit of public policy goals should be safeguarded.
- (b) WIPO should be open to examining non-intellectual property-type and/or non exclusionary systems for fostering creativity, innovation and the transfer of technology, for example, open collaborative models for research, open and free software development, and compensatory liability systems and the development of technology for the public good, while recognizing the benefits and costs of each system.
- (c) Specific measures should be undertaken to facilitate the transfer of technology to developing countries and the contribution of such technology transfer to their economic, social and cultural development should be continuously measured, monitored and evaluated.

- (d) Technical assistance should be demand-driven in the sense that it corresponds to the needs and global political objectives of developing and least developed countries, taking also into account the legitimate interests of various stakeholders and not only those of rightholders. Furthermore, the design, delivery and evaluation of technical assistance should be based on clear principles and there should be open and transparent guidelines relating to (1) the separation of the rule-making and technical assistance functions of the WIPO Secretariat, (2) transparency in technical assistance programmes, to be ensured by, for example, making publicly available the roster of consultants, publishing the exact amounts spent on technical assistance in specific countries and on specific activities, and establishing a code of conduct for the Secretariat staff and consultants, and (3) the use of development indicators to assess the results of technical assistance.

22. Due to the cross-cutting nature of the issues relating to the development dimension of intellectual property, the Development Agenda should be pursued in all areas of WIPO's activities, including in the work of all standing committees and other subsidiary bodies. The proposal for a Development Agenda, due to its broad and horizontal nature, cannot be limited to or contained within the work of any specific subsidiary body within WIPO. All WIPO bodies are expected to contribute to the realization of the development dimension. In this regard, it is important to reiterate that while the Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) may be tasked by the General Assembly with some activities, it cannot be the forum for addressing the proposals contained in document WO/GA/31/11.

II.1(c) Guidelines on Incorporating the Development Dimension into WIPO Programmes and Activities

23. As already noted, one of the possible impediments to ensuring the full implementation of WIPO's development mandate may have been lack of clear guidance from the Member States on how development should be placed at the core of WIPO programmes and activities. It is therefore important that Member States develop clear principles and guidelines on the basis of which the development dimension of the Organization's work can be measured. In this regard, this submission proposes specific guidelines and principles with respect to norm-setting, technical assistance and technology transfer.

II.2 STRENGTHENING THE ROLE OF MEMBER-DRIVEN STRUCTURES TO ENSURE THE EFFECTIVE IMPLEMENTATION OF WIPO'S DEVELOPMENT MANDATE

24. The governance and oversight structures of the Organization need to be adequate and properly balanced to ensure the implementation of the mandate, and in particular, that the Organization, and consequently the Secretariat, performs its functions properly. The current governance and oversight structures of WIPO need to be examined and recommendations could be made on how to improve them.

25. As an international multilateral organization, WIPO should operate in a member-driven manner. The Secretariat is guided by the instructions of the General Assembly regarding both the internal and external affairs of the Organization. Each Member State bears a special responsibility to ensure this. For example, formal and informal meetings or consultations held between Members or organized by the International Bureau upon request of the Member States should be held in Geneva, in an open and transparent manner that involves all interested Members States.

26. Some concerns and misunderstandings have been expressed, in the past, with regard to WIPO's nature as an institution, due to its funding structure. The activities of WIPO and the International Bureau are financed by income from four main sources, namely, contributions by Member States, fees paid by private sector users of WIPO's global protection systems (PCT, Madrid, Hague and Lisbon Systems), the sale of WIPO's publications and from interest earnings. In 2002, for example, approximately 86 percent of WIPO's total funding came from fees. This situation has led some actors to argue that WIPO should be more responsive to the interests of the rightholders that use the global protection systems and their associations, since the Organization appears to have become "dependent" on them for financing. This line of reasoning is not compatible with WIPO's intergovernmental nature. Additionally, it is not conducive to a development sensitive Organization that should cater to a multistakeholder constituency of all members countries.

27. In fact, WIPO's existence is not dependent on rightholders, and rightholders do not "fund" WIPO. WIPO as an international intergovernmental organization is answerable to its Member States and its existence depends on its Members only. The global protection systems which contribute significantly to WIPO's income are systems that have been created by Member States. Rightholders must not lose sight of the central role played by Member States in the establishment of these services. Consequently, as much as the International Bureau should strive to provide efficient services as mandated by Members, payment for those services by rightholders should in no way provide a basis for anyone to claim that the users of those protection systems have the right to determine the agenda or priorities of the Organization, or even the manner in which the incomes of the Organization are to be allocated under its Programme and Budget. WIPO must remain a Member-driven Organization, where the role of the Secretariat is focused on facilitating the work of the Members and implementing decisions and instructions received from Member States.

II.2 (a) Establishing an Independent Evaluation and Research Office

28. In order to strengthen the oversight function of Members, as well as the quality and cost-effectiveness of the Organization's *modus-operandi* one should consider establishing an independent evaluation and research office called the WIPO

Evaluation and Research Office (WERO), which would report to the General Assembly. The Head of the Office would be vetted and approved by the General Assembly and appointed for a fixed term after which time such a person may not be employed in the WIPO Secretariat. Similar conditions may also apply to the staff of WERO. The Office would have unrestricted access to all WIPO documents and the results of the its research and recommendations would be fed back into the on-going and subsequent WIPO programmes and activities, including with respect to norm-setting.

29. Such an Office would provide a transparent, independent and objective mechanism, *vis-à-vis* the General Assembly, the WIPO Secretariat and all interested stakeholders, through which WIPO's programmes and activities would be evaluated with respect to their development impact in general, and their impact on innovation, creativity and access to, and dissemination of knowledge and technology. Its creation would not only have the effect of enhancing the credibility of WIPO and its programmes but would also be in line with established international practice. The World Bank Group, the International Monetary Fund (IMF), the European Investment Bank, the United Nations Development Programme (UNDP), among other international institutions, already have similar mechanisms.

30. WERO should provide enhanced coordination both inside and outside of WIPO as well as be mandated to present annual reports of its work, research and findings to the General Assembly. Its functions could include: evaluation of all WIPO programmes and activities with respect to their development impact in general and their impact on innovation, creativity and access to and dissemination of knowledge and technology; carrying out "Development Impact Assessments" with respect to proposed norm-setting activities in WIPO, as well as impact assessments and research on existing WIPO administered treaties; avoidance of duplication of costs and actions; the promotion of greater cost-efficiency; monitoring and evaluating the design, delivery and implementation of WIPO legal-technical and technical assistance activities based on the principles and guidelines established by the General Assembly and taking into account best practices from other providers of technical assistance; and monitoring and evaluating WIPO's policies and processes more generally. The foregoing list is meant to be merely indicative. It is clear that the possible role and functions of such an independent evaluation unit would have to be carefully examined and discussed by Member States. The idea of establishing WERO should be examined in detail during the next session of the General Assembly, in September of 2005.

II.3 TRANSPARENCY AND INCLUSION: FACILITATING THE PARTICIPATION OF PUBLIC INTEREST GROUPS IN WIPO PROCESSES.

31. Intellectual property law and policy as well as other regulatory regimes relating to innovation and transfer of technology have implications beyond the regulation of monopoly rights over inventions, copyrights, trademarks and other related subject matter. They impact on a much wider range of issues from access to education and

learning materials to the availability and affordability of essential medicines as well on the efforts to bridge the digital divide and the technological gap. When rules and standards touch upon such fundamental issues, they cannot be formulated in accordance only with the expertise and concerns of specialized IP lawyers and rightholders groups.

32. Openness of WIPO discussions and decisions and the participation of public interest groups in discussions on an equal footing with rightholders' associations must be sought. WIPO must take into account in all its key policy and technical committees the interests of the consumers, the public at large and those of rightholders. In this context, among other issues, the role and relevance of the Policy Advisory Commission (PAC) and the Industry Advisory Commission (IAC) should merit re-evaluation.

33. The PAC and the IAC were established in 1998. According to the memorandum of the Director General to 40th series of the Assemblies of the Member States of WIPO in September/October 2004, the mandate of the PAC is to "provide objective and informed external advice to the Director General, particularly with respect to policy-making, medium-term planning, processes and the needs of the market sector".² The IAC, on the other hand, was established for the purposes of ensuring that the "voice of the market sector is heard and that the Organization is responsive to its [market sector] needs"³ and ensure that there is "a direct input of industry into the policy-making process in WIPO".

34. While the role of the PAC and the IAC are purely advisory, the emphasis on the role of industry and the "market sector" has raised concerns among other stakeholders about the preponderant participation of industry *vis-à-vis* public interest groups in WIPO. It is important to ensure that these advisory bodies whose membership is not determined or vetted by Members States do not unduly influence the manner in which the Organisation determines its priorities or implements Member's decisions.

II.4 OPERATIVE SUMMARY

35. To streamline the development dimension in WIPO's work programme and ensure that WIPO's governance structures effectively promote the application of the development dimension in all activities of the Organization, it is proposed that:

- Members States could consider the possibility of amending the WIPO Convention (1967) to bring it in line with WIPO's mandate as a UN specialized agency;

²See, paragraph 2 of document WO/GA/31/1.

³See Report of the first meeting. WIPO Document WO/GA/24/6.

- Principles and guidelines should be formulated to govern WIPO's operation, in all programme areas and activities;
- WIPO should operate as a Member-driven institution, where the role of the Secretariat is limited to facilitating the work of the Members and to implementing decisions and instructions received from Members;
- A WIPO Evaluation and Research Office (WERO) could be established, which would operate independently of the WIPO Secretariat;
- Measures should be taken to ensure wider participation by civil society and public interest groups in WIPO discussions and activities;
- Measures should be taken to ensure that the Membership and functions of the Policy Advisory Commission (PAC) and the Industry Advisory Commission (IAC) are determined by the Member States.

III. PROMOTING PRO-DEVELOPMENT NORM-SETTING IN WIPO

36. Rapidly growing international intellectual property standards have been placing unprecedented limits on the ability of developing countries to tailor their intellectual property regimes to meet their economic, social, and cultural needs, and have also imposed significant implementation burdens. Challenges faced by Developing Countries in "enforcement" of higher minimum international standards of protection favouring right holders must be balanced by effective use and promotion of flexibilities contained in the IP system, such as those of Articles 1.1 and 41.5 of the TRIPS Agreement, which explicitly recognizes that these countries have retained the freedom to determine the appropriate form of implementation of their obligations in the area of intellectual property.

37. These standards have been designed and expanded with little consideration for their actual costs and benefits to developing countries. Norm-setting at the international level has been dominated by a paradigm that regards intellectual property rights as the only and unequivocally beneficial instrument to promote creative intellectual activity. Increased scope and levels for intellectual property protection thus often become ends in themselves in international negotiations, which have failed to take into account the need to promote and enhance access to knowledge and the results of innovation.

38. WIPO, as one of the principal international institutions responsible for negotiating standards and norms to promote creative intellectual activity and to facilitate transfer of technology, has a significant role to play in ensuring that intellectual property rules advance development objectives and bears a special responsibility in overcoming current limitations in international norm-setting. Until now, norm-setting in WIPO has focused on encouraging international agreements solely designed to promote the protection of intellectual property. Attempts by the International Bureau to launch initiatives such as the WIPO Patent Agenda, as well as its active engagement in support of treaties currently under negotiations, which do not respond to development objectives or priorities of developing countries and are not concerned with their access to the socio-economic and cultural benefits of

innovation and creativity, are cases in point. To rectify this situation, WIPO should pursue a more balanced and comprehensive approach to norm-setting, emphasizing the design and negotiation of rules and standards that are guided by and fully address the development objectives and concerns of developing and least developed countries and of the international community.

39. Discussion on the Establishment of a Development Agenda for WIPO in the 2004 WIPO General Assembly reflected broad agreement among WIPO Member States on the need to enhance and mainstream the development dimension in WIPO activities, including norm-setting. The challenge, as pointed out by some Member States, is now determining how norm-setting and other activities within WIPO can effectively incorporate development objectives and concerns. This section of the present submission therefore identifies and elaborates on a number of principles and guidelines that, applied to the various substantive norm-setting activities in WIPO, would foster an inclusive and pro-development approach to negotiations. The submission also proposes several mechanisms for implementing these principles and guidelines in WIPO in the context of the Establishment of a Development Agenda for the Organization.

III.1 PRINCIPLES AND GUIDELINES FOR NORM-SETTING IN WIPO

40. Elaborating rules that effectively promote development and creative intellectual activity requires an adequate framework for negotiations and other WIPO norm-setting activities. Identifying interests behind norm-setting initiatives, assessing the costs and benefits of those initiatives in terms of sustainable development, promoting a balance between protection and dissemination of knowledge and the interests of developed and developing countries, fostering the participation of a broad range of stakeholders, and supporting the compatibility with broader international objectives and commitments constitute, in this regard, concrete and significant steps that can be taken in the context of WIPO norm-setting activities to ensure their outcome reflects development needs and concerns.

41. We should reassess the norm-setting process at WIPO with a view to guaranteeing that the development dimension is part of that process. As a result, a number of principles and guidelines should apply broadly to all WIPO norm-setting activities, including initiatives to implement or modify current international intellectual property standards and to develop new treaties. Such guidelines and procedures have also been agreed to, for example, in the context of the World Trade Organization (WTO) to determine the objectives, scope, and modalities of some negotiations in that Organization. In this regard, possible guidelines and procedures to direct norm-setting activities in WIPO should include:

III.1 (a) Member-driven and Transparent Work Plan and Strategic vision, as well as Individual Initiatives

42. One of the obstacles for norm-setting initiatives in WIPO to adequately respond to development objectives and concerns is the lack of information about the short and long-term objectives of these initiatives, as well as about their impact and the consequences of various possible outcomes. The WIPO Secretariat has often played an active role in norm-setting processes and in general there has not been an adequate debate on the feasibility and desirability of new, expanded, or modified rules. The points of view of developing and least developed countries have been ignored in general and negotiations have been launched without real consensus.

43. To ensure that the concerns of all WIPO Member States and relevant stakeholders are appropriately addressed in norm-setting, the WIPO Secretariat should not play a substantive negotiating role by endorsing or supporting particular proposals for the implementation or development of intellectual property rules or standards. On the contrary, the right and burden should be on Member States to propose initiatives and priorities for the work plan of WIPO and its different bodies, as well as to provide a clear indication of the actual need for, as well as the costs and benefits of the proposed norms, to enhance a balanced and informed debate, as proposed below.

III.1(b) Comprehensive Assessment and Justification in Terms of Sustainable Development

44. Intellectual property protection is not an end in itself, but rather a means to support public policy objectives such as economic, social, and cultural well-being. Any development, implementation or modification of international intellectual property rules should be based on and respond to sustainable development needs and concerns. All norm-setting activities in WIPO should be based on available empirical evidence and on a cost-benefit analysis. Given that intellectual property protection will generate different costs in different circumstances, from implementation burdens to potential loss of public policy space - from the economic, social, cultural, and environmental perspectives -, its necessity and desirability *vis-a-vis* other non-intellectual property-type and/or non-exclusionary options should be thoroughly analyzed on a case-by-case basis.

45. Alternatives within and outside the intellectual property system that would reach similar objectives with less monopoly of knowledge should be particularly considered. For instance, the potential of open access models for the promotion of innovation and creativity should be explored as a feasible and desirable option in many contexts. Given that the granting of exclusive rights frequently entail considerable costs, particularly in terms of access to knowledge and essential goods of crucial importance to social and economic development, any initiative involving the creation of new or expanded intellectual property rights should only be adopted if proven to be superior, in social and economic terms, to solutions based on the

creation of public goods. Indeed, recognizing that current international intellectual property rules have emphasized the protection of rights *vis-a-vis* the public domain, WIPO should now actively seek ways to safeguard and promote the public domain and the innovative and creative activities that depend on it.

46. As stated by the Commission on Intellectual Property Rights established by the government of the United Kingdom, the questions to be answered for each proposed norm-setting initiative include: How much intellectual property protection is a good thing? How should it be structured? Serious answers to these questions shall be found to promote compatibility between sustainable development and norm-setting activities.

III.1(c) Recognition of Different Levels of Technological, Economic and Social Development

47. Another key issue to consider in norm-setting is the need to balance the benefits and costs of any initiative between developed and developing countries and, more generally, between the consumers and producers/owners of proprietary technological knowledge. The design and effectiveness of intellectual property as a tool for development has proven to be directly related to prevailing socio-economic circumstances, as becomes obvious when one considers the historical record and the evolution of national intellectual property regimes, particularly in the developed countries. As a result, the different levels of development of Member States should be an inherent consideration in WIPO norm-setting. Only an unambiguous recognition of the need to gauge intellectual property rules according to differing development needs and concerns, and thus of the need for a more equitable distribution of the costs and gains of intellectual property protection, can validate norm-setting activities in WIPO as being balanced and inclusive of all its Member States.

48. Such an approach should be reflected in operative and substantial special and differential treatment provisions for developing countries and least developed countries. Moreover, a pro-development approach to norm-setting should recognize sustainable development as its *raison d'être*: all international norms on intellectual property –not just a few provisions in each instrument– should be designed to contribute to the economic, social, and environmental welfare, especially of developing and least developed countries, and to stimulate relevant innovation, research, and technology, and promote access to knowledge.

III.1(d) Recognition of the Rights of Different Stakeholder Groups and the General Public as users of the Intellectual Property System

49. As the development dimension requires norm-setting in WIPO to fully consider and take into account the needs and concerns of developing and least developed

countries, it also commands the recognition of the rights of a wide range of stakeholders, all of which constitute the true “users” of the intellectual property system. It is not only the interests of owners of intellectual property that should be contemplated and respected, but also those of society at large, as well as the particularly vulnerable segments of the population. As noted by Member States in the 2004 WIPO General Assembly, intellectual property should strike a better balance between private rights and the public interest. Nevertheless, in many norm-setting initiatives in WIPO, it is solely the interests of those that seek new or increased intellectual property rights that are considered.

50. In discussions currently taking place in the Standing Committee on Copyright and Related Rights (SCCR), for instance, little consideration has been given to the rights of performers, authors, educators, students, consumers, and others who would be directly impacted by the proposed new rules. Similarly, when future work in the area of patent law harmonization was discussed during the Tenth Session of the Standing Committee on the Law of Patents (SCP), only the approach of patent holders was brought to the attention of Member States. A pro-development approach to norm-setting in WIPO requires moving away from such a narrow perception of the constituencies whose interests are at stake in respect of intellectual property-related issues and fostering the consideration of the rights and interests of a broad range of stakeholders, as well as promoting their active and effective participation in WIPO’s work.

III.1(e) Compatibility with, and Support of the Objectives and Provisions of other International Instruments

51. In order to fully incorporate the development dimension, norm-setting in WIPO should not merely consider sustainable development objectives in its processes and outcomes, but also ensure that these processes and outcomes are fully compatible and actively support other international instruments that reflect and advance those development objectives. It is not only a matter of ensuring coherence; it is also one of recognizing the purpose and inherent limitations of intellectual property as an instrument of public policy and the fact that IP protection cannot be seen as an objective or a value in itself. As a result, for instance, under no circumstances can human rights – which are inalienable and universal – be subordinated to intellectual property protection.

52. Likewise, intellectual property must adequately support basic rights and public policy objectives enshrined by the international community, including the Millennium Development Goals (MDGs), the Plan of Implementation of the World Summit on Sustainable Development, and the Convention on Biological Diversity. In this regard, a critical criterion in the analysis of the costs and benefits of norm-setting initiatives should be ensuring that the proposed rules or standards are supportive of these other international instruments and do not run counter to their objectives.

III.2 IMPLEMENTING PRO-DEVELOPMENT PRINCIPLES AND GUIDELINES IN WIPO

53. Recognition and application of the principles and guidelines described above are essential to ensuring that the processes and outcomes of all WIPO norm-setting activities promote a development-oriented international intellectual property system. Consequently, they should be incorporated without delay into both binding and non-binding norm-setting activities, including initiatives to implement or modify current international intellectual property standards and to develop intellectual property rules in new fields. The mechanisms to implement these principles include:

- (a) Undertaking independent, evidence-based “Development Impact Assessment” (DIA) to consider the possible implications of each norm-setting initiative for core sustainable development indicators such as innovation, access by the public to knowledge and products, job creation, poverty alleviation, equity, respect for cultural diversity, protection of biodiversity, health, and education, particularly in developing and least developed countries. Such an independent evaluation could be carried out by the proposed WIPO Evaluation and Research Office (WERO) with the effective participation and engagement of a broad range of key stakeholders. As part of the DIA process, a cost-benefit evaluation should also be requested from other relevant international organizations and bodies, including the United Nations Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization (FAO), the World Bank, the World Health Organization (WHO), the South Centre, and the Commission on Human Rights. In particular, DIAs could be:
- conducted in a staged manner, including through both preliminary and advanced DIAs as the norm-setting activities are proposed and take place;
 - performed through a consideration of the proposed norms and the different policy scenarios, as well as their impact on several country groups, including developed, developing, and least developed countries and the world as a whole;
 - focused not only on direct impacts, but also on indirect and cumulative, impacts;
 - carried out and executed with an emphasis on the relationship between the proposed rules or standards and other international instruments, to ensure they are compatible and support objectives, rights, and flexibilities established by the international community in other fora. In particular, rights or standards that surpass those established by the WTO TRIPS Agreement should be exceptional.
- (b) Incorporating provisions recognizing the difference between developed and developing WIPO Member States in all norm-setting initiatives. These provisions should aim to recognize the over-arching objectives and principles of intellectual property protection, provide longer compliance periods, promote transfer of technology, safeguard the national implementation of intellectual property rules, suppress anti-competitive practices, and generally

ensure intellectual property rules are a coherent part of broader development strategies. Provisions such as these have already been proposed by developing countries in the SCP for the draft Substantive Patent Law Treaty (SPLT). It is our expectation that they will be agreed to by all WIPO Member States, in the SCP and other WIPO subsidiary bodies;

- (c) Holding public hearings prior to the initiation of any discussion toward norm-setting in WIPO, with the broad participation of different stakeholders, including other intergovernmental organizations, academia, consumer groups, and other civil society organizations. Such participation should continue and be promoted in the course of norm-setting discussions and negotiations

IV. Principles and Guidelines for WIPO's Provision of Technical Assistance and Evaluation

54. The proposal for the Establishment of a Development Agenda for WIPO (WIPO document WO/GA/31/11) noted the central importance of WIPO in the provision of intellectual property-related technical assistance and capacity building. Apart from WIPO's own mandate, by virtue of the 1995 Agreement between WIPO and the World Trade Organization (WTO), WIPO plays an important role in the implementation of the TRIPS Agreement in developing countries. Under Article 4 of that Agreement, WIPO and WTO Secretariat are required to cooperate in matters of legal-technical and technical assistance "so as to maximize the usefulness of those activities".

55. In the context of the TRIPS Agreement, legal-technical and technical assistance activities should mean implementing its provisions, including the pro-development ones, such as Articles 7, 8, 13, 30, 31 and 40, as well as subsequent pro-development decisions such as the Doha Declaration on the TRIPS Agreement and Public Health, in a manner responsive to the development needs and aspirations of individual countries.

56. While WIPO has made significant strides in providing developing countries with technical assistance, more needs to be done to ensure that such assistance is useful to development objectives. At the same time, WIPO's technical assistance has come under criticism from various quarters including independent bodies such as the U.K Commission on Intellectual Property Rights, which in its report in 2002 characterized WIPO's technical assistance as too often planned and delivered in isolation from development goals of developing countries.

57. It is clear that for WIPO's technical assistance to be of value to developing and least developed countries, such assistance needs to be planned and delivered based on transparent principles and guidelines on the basis of which an objective assessment of its impact and effectiveness can be made. Principles and guidelines established by the Member States will provide a much needed road map for the

expansion and qualitative improvement of WIPO's technical assistance. This document elaborates on the possible principles and guidelines for the provision of technical assistance by WIPO and on the mechanisms for implementing the principles and guidelines.

IV.1 CONCERNS OVER THE PROVISION OF INTELLECTUAL PROPERTY TECHNICAL ASSISTANCE

58. Technical assistance in many ways is a service to promote and enhance coherent policy formulation, review and legislative reform. As developing countries continue to implement intellectual property-related treaties, such as the TRIPS Agreement, WIPO administrated treaties and to participate in new negotiations at the multilateral, regional and bilateral level, appropriate and effective technical assistance and capacity building will be crucial if these countries are to use intellectual property and other tools for fostering creativity and technological development effectively in the pursuit of their development goals.

59. The type of intellectual property technical assistance that has been provided in the last decades, as already noted, has raised a series of concerns. These concerns relate to the underlying philosophy, content and process of the technical assistance provision. The most important concerns raised by various stakeholders and the wider literature on intellectual property technical assistance include the following:

- intellectual property may often be seen as an objective in itself. Broader policy concerns such as science and innovation policies, technology transfer, access to technological goods and enhanced competition have been addressed in a very limited manner;
- solutions to the technical and capacity constraints tend to be identified and designed by the providers and not by the beneficiaries of the assistance;
- there is a tendency to over-emphasize the benefits of intellectual property while giving very little attention to the limitations and actual costs;
- the content of the technical assistance programmes has mostly focused on the implementation and enforcement of obligations and not on the use of in-built rights and flexibilities in international treaties for developing countries;
- little attention has been given to different levels of development and cultural differences;
- there is insufficient support for local input and capacity building when identifying solutions that are specific to the respective country and its economic structure;
- assistance is mostly targeted to a limited group of beneficiaries (mostly intellectual property offices and certain business groups);
- the widespread provision, over a number of decades, of model laws to developing countries without sufficient or any accompanying advice on

the trade and development effects of these laws and full analysis of the evidence regarding economic effects; and

- There has been little independent evaluation of the technical assistance provided by WIPO, including to determine the impact and effectiveness of the assistance programmes.

60. With a view to addressing the above concerns and the inherent urgency of making good use of the limited resources allocated to intellectual property technical assistance in WIPO, there is need to establish a set of international principles to improve the quality of technical assistance and to adopt guidelines for the design, delivery and implementation as well as evaluation of technical assistance provided by WIPO including in the context of the 1995 Agreement between WIPO and the WTO.

IV.2 PRINCIPLES AND GUIDELINES FOR THE PROVISION OF TECHNICAL ASSISTANCE

61. In order for WIPO's technical assistance to be useful in the long-term, and for there to be a basis for objective review and improvement, the Organization's activities and programmes in this field should be guided by pre-agreed principles and guidelines. Among others, the principles and guidelines could include:

IV.2(a) Development Focused Technical Assistance

62. The provision of technical assistance should have as its objectives the fulfillment of the development goals of the recipient countries and broader development goals such as the United Nations Millennium Development Goals (MDGs). In designing, delivering and evaluating technical assistance, the different levels of development of various countries should be taken into account.

IV.2 (b) Comprehensive and Coherent Assistance Programmes

63. Special attention shall be paid to developing the technical capacity of countries to fully use in-built flexibilities in international agreements to advance national pro-development policies. Coherence and mutual supportiveness with other relevant international instruments must also be promoted. The use of model intellectual property laws without careful evaluation of their effects should be discouraged.

IV.2 (c) Integrated Approach

64. The intellectual property system cannot work in isolation from competition policy and other related regulatory regimes. In designing technical assistance programmes, there is a need to expand its coverage to include matters related to the

use of competition law and policy to address abuses of intellectual property and practices that unduly restrain trade and the transfer and dissemination of technology.

IV.2(d) Neutral, Unbiased and Non-Discriminatory

65. The provision of technical assistance should be neutral and of advisory nature based on actual and expressed needs. The assistance should not discriminate among recipients or issues to be addressed and should not be perceived as being a reward system for supporting certain positions in WIPO negotiations.

IV.2(e) Tailor-made and Demand-driven

66. The technical assistance programmes and activities should ensure that intellectual property laws and regulations are tailored to meet each country's level of development and are fully responsive to the specific needs and problems of individual societies. The assistance should correspond to the needs of various stakeholders in developing and least developed countries and not just the intellectual property offices and rightholders.

IV.2(f) Independence of Providers

67. WIPO technical assistance staff and consultants should be fully independent and potential conflicts of interest should be avoided.

IV.2(g) Continuous Evaluation as to Effectiveness

68. WIPO's technical assistance programmes and activities should be continuously evaluated both internally and independently to ensure its effectiveness.

IV.2(h) Transparency

69. All information about design, delivery, cost, financing, beneficiaries and implementation of technical assistance programmes as well as the results of internal and external independent evaluation should be publicly available.

IV.3 MECHANISMS FOR THE IMPLEMENTATION OF PRO-DEVELOPMENT TECHNICAL ASSISTANCE

70. The adoption of principles and guidelines on technical assistance will not by itself improve the effectiveness of the technical assistance programmes if concrete

mechanisms are not set up to implement and monitor the adherence to these principles and guidelines. In order to implement the above principles and guidelines, a number of measures therefore need to be undertaken. Among others, these could include:

IV.3(a) Adoption of the Principles and Guidelines by the 2005 WIPO General Assembly

71. The principles and guidelines elaborated above should be adopted by the next WIPO General Assembly in September/October 2005 and should form the basis for all future WIPO technical assistance and capacity building.

IV.3(b) Establishment of Databases and Dedicated Webpage to Improve Information sharing

72. There is a need to improve information sharing by using existing resources including databases on technical cooperation by major donors and providers. A web page with all technical assistance information provided by WIPO and other relevant international organizations and donors could be created to enhance transparency and allow for objective monitoring processes. A permanent notification system could assist in keeping such a system operative and updated. Whenever a country requests WIPO's assistance, WIPO could, by means of the website notify Members and other interested parties including observers that its assistance has been sought and where models, drafts etc. are suggested, these should also be publicly available.

IV.3 (c) Defining and Separating the Functions of the WIPO Secretariat

73. Exploratory work should be undertaken to analyze options for separating norm-setting functions from technical assistance functions of the WIPO Secretariat. Two possibilities, among others, could be considered. One option could be for the General Assembly to merge most of the functions of the Economic Development Sector with those of the WIPO World Wide Academy (WWA) and set up a semi-independent arm for research, technical assistance and capacity building. While such a structure could still remain part of the WIPO Secretariat, under the Director General, an independent advisory panel appointed by the General Assembly could be constituted to internally evaluate the performance of technical assistance programmes, monitor the adherence to the proposed principles and guidelines and help set priorities for research and assistance.

74. Alternatively, a wholly independent entity, not part of the WIPO Secretariat, but funded by WIPO, could be established along the model of the Advisory Centre on WTO Law (ACWL). The managing board of such an independent entity could be drawn from the WIPO Secretariat, UNCTAD, UNDP, UNESCO, UNIDO, WTO, WHO and FAO as well as other international organisations with expertise in

development and intellectual property. The board could also have representation from industry and from consumer and public interest groups.

75. Whichever approach is taken, the technical assistance activities of WIPO could at any rate be subject to the independent evaluation and monitoring of the proposed WIPO Evaluation and Research Office (WERO). We have provided the details on the operation and possible functions of WERO in the section on the mandate and governance of WIPO.

IV.3(d) Establishment of a Code of Ethics and Assuring independence of Consultants

76. Consideration should be given to developing an ethics code for the Secretariat's technical assistance staff and consultants to ensure the highest level of professionalism and neutrality. Such a code of ethics could also be useful to protect the staff and consultants from undue influence and/or harassment. In addition, the roster of consultants for technical assistance should be available to the public. The selection process for consultants should look at potential conflicts of interest in relation to parallel public or private activities as well as ethical behavior.

IV.3(e) Development of Indicators and Benchmarks for Evaluation

77. A process for identifying relevant indicators and benchmarks for evaluating the Organization's technical assistance activities should be commenced as soon as possible. UNCTAD, the World Bank and other international organizations could provide inputs in the identification of relevant indicators.

V. GUIDELINES FOR FUTURE WORK ON TRANSFER AND DISSEMINATION OF TECHNOLOGY AND RELATED COMPETITION POLICIES

78. Transfer of technology is a comprehensive term covering mechanisms for transmitting technical information across borders and its effective diffusion into the host economy. It refers to numerous complex processes, ranging from innovation and international marketing of technology to its absorption and imitation. Transfer of technology may be realized through formal –market- as well as informal –non-market- means. A formal or market mechanism is a commercial transaction, based on a legal arrangement between consenting parties. It includes, in the main, trade in goods, foreign direct investment (FDI), licensing, joint research and development (R&D) arrangements.

79. There are also important legitimate informal, non-market channels of transfer of technology. Perhaps most significant is the process of imitation through product inspection, reverse engineering, decompilation of software, and even simple trial and

error. Another means is to study available information about new technologies. Patent applications are available for this purpose. Thus, patents are expected to provide both a direct source of technology transfer, through FDI and licensing, and an indirect form through inspection. To play this role, patent disclosures need to provide sufficient information for engineers to understand the technologies.

80. In brief, under these various mechanisms, intellectual property protection can play a role but not a unique role, for transfer and dissemination of technology. The TRIPS Agreement recognizes precisely that the transfer and dissemination of technology should be a fundamental objective of the global intellectual property system. Moreover, under Article 1 of the Agreement between WIPO and the United Nations (1974), WIPO is recognized as a specialized agency with the responsibility for taking appropriate measures for facilitating transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development.

81. Even in the case of formal technology transfers that occur mainly in voluntary transactions, it has been recognized that this process often does not work as intended and that the unwillingness to transfer technologies might pose a competitive threat. In fact, it is frequently the case that IP right holders choose to exercise the monopoly rights conferred by patents and other forms of intellectual property in a manner that runs counter to the purported principles and objectives of the IP system, including the transfer and dissemination of technology. Policies are thus needed to rectify this situation, by removing impediments to the transfer and dissemination of knowledge and to lower the costs and risks of technology acquisition.

82. As proposed in document WO/GA/31/11, the development dimension of intellectual property policy requires that WIPO, through a dedicated process, explore the type of policies, initiatives and reforms necessary to contribute to the transfer and dissemination of technology to the benefit of all countries. Such work is in fact indispensable if WIPO is to fulfill the second part of its U.N mandate which confers WIPO with the responsibility of taking appropriate action for “facilitating the transfer of technology”. This submission therefore elaborates on how such a process could be undertaken in WIPO and suggests possible guidelines and approaches for a future programme on transfer of technology-related matters in WIPO.

V.1 PRO-DEVELOPMENT APPROACHES TO TRANSFER AND DISSEMINATION OF TECHNOLOGY

83. The issue of transfer of technology to developing countries is not new. It has been in the international agenda for decades. However, drawing on the lessons of the past and a better understanding of the process, a pro-development approach to this subject is called for. To this end, this section of the submission reviews, first, possible mechanisms that developed countries might promote to facilitate the transfer and dissemination of technology to developing countries. Secondly, the paper explores,

in a non-exhaustive manner, possible new initiatives at the multilateral level that could contribute to this endeavor. It, finally, concludes with some observations on the role of competition policies in this area.

V.2 INTELLECTUAL PROPERTY POLICIES AND STANDARDS

84. Historically, the intellectual property system has included elements that are supportive of efforts to promote technology transfer and follow-on innovation, effective mostly under circumstances prevailing in the developing countries. Patents, trade secrets, copyrights, and trademarks, however, can hamper or create impediments to tech-transfer, particularly when considered through the perspective of technology flows from Developed to Developing countries, i.e. from technology producer nations to technology consumer nations. Therefore attention should be paid to a number of intellectual property specific instruments that while effectively recognizing the rights of inventors and creators across the board, produces very unbalanced results in terms of encouraging transfer of technology to developing countries and the establishment of functional national innovation systems in their respective national jurisdictions.

85. From this perspective a more dynamic approach to transfer and dissemination of technology, for the benefit of developing and least developed countries, should incorporate, among others, appropriate policies with respect to:

- protection criteria (e.g. patentability);
- duration of rights beyond a reasonable time to justify rewarding innovation and creativity;
- exceptions to exclusive rights;
- use of public tools (e.g. disclosure and working requirements, compulsory licensing, open source software);
- system of protection relevant to national circumstances;
- administrative and procedural aspects.

86. The above listing, although illustrative, covers a whole range of technical issues that could not be exhaustively covered in this paper. What follows is, however, indicative of what could be done in the context of the Development Agenda.

V.2(a) Supportive IP-related Policies by Industrialized Countries

87. With a view to promoting transfer and dissemination of technology, among other related objectives, WIPO should contribute to a debate with other relevant international organizations, as appropriate, on such initiatives as an undertaking by developed countries to provide:

- technical and financial assistance for improving the ability of countries to absorb technology;
- fiscal benefits to firms transferring technologies to developing countries of the

same type often available in developed countries for firms that transfer technologies to nationally less developed regions;

- same tax advantages for R&D performed abroad as for R&D done at home. For example, to meet the terms of Article 66.2, TRIPS, there might be somewhat greater advantages offered for R&D performed in developing countries;
- fiscal incentives to encourage enterprises to train scientific, engineering and management graduates from developing countries, with a view to their knowledge being used for development of technology in their country of origin;
- public resources, such as those from the National Science Foundation or National Institutes for Health in the United States, could be used to support research into the technology development and technology transfer needs of developing countries;
- grant programs could be established for research into technologies that would be of greatest productivity for the purpose of meeting priority social needs of developing countries. Technologies developed under such programs could be made publicly available, specially those funded through public resources;
- grant programs could be devised that offer support to proposals that meaningfully involve research teams in developing countries, in partnership with research groups in donor countries;
- Universities should be encouraged to recruit and train students from developing countries in science, technology, and management. Incentives for setting up degree programs through distance learning or even foreign establishments may be particularly effective;
- Special trust funds for the training of scientific and technical personnel, for facilitating the transfer of technologies that are particularly sensitive for the provision of public goods, and for encouraging research in developing countries.

V.2(b) Multilateral supportive Measures

88. At the multilateral level, the following initiatives could be considered:

- Adoption of commitments like those contained in Article 66.2 of the TRIPS Agreement, expanded to benefit all developing countries;
- the establishment of a special fee on applications through the Patent Cooperation Treaty, the revenues of which would be earmarked for the promotion of research and development (R&D) activities in the developing and least developed countries;
- the establishment of an intermediary conduit to reduce the asymmetric information problem in private transactions between technology buyers and sellers, for knowledge about successful technology-acquisition programs that have been undertaken by national and sub-national governments in the past. It could serve a useful role in encouraging collaboration and information sharing among member governments. Such programme could involve, for

example, detailed information about past policies and effective partnerships between agencies and domestic firms in acquiring technologies and the terms involved, such as royalty rates and contract clauses that resulted in actual local absorption. They could also describe the most effective roles for public research facilities and universities in facilitating technology transfer. Once enough information of this type has been compiled and studied, it could attempt to develop a model technology transfer contract that could serve as a guideline for transfer of technology and would represent the legitimate interests of both buyers and sellers;

- A multilateral agreement where signatories would place into the public domain, or find other means of sharing at modest cost, the results of largely publicly funded research. The idea is to set out a mechanism for increasing the international flow of technical information, especially to developing countries, through expansion of the public domain in scientific and technological information, safeguarding, in particular, the public nature of information that is publicly developed and funded without unduly restricting private rights in commercial technologies.

V.3 COMPETITION POLICIES

89. Exploitation of intellectual property rights could give rise to anticompetitive behaviour, whether by individual firms or by concerted practices or agreement among firms. An adequate definition and implementation of public policies to deal with this problem represents one of the most important criteria for the efficient functioning of any intellectual property system and thus to the enhancement of the transfer and dissemination of technology. A pro-competitive intellectual property system needs to incorporate appropriate competition policies, among others, to prevent the abuse of intellectual property rights, the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology.

90. However, relationships between intellectual property rights and their potential abuse in technology markets are complex and require considerable expertise in diagnosis and treatment. Moreover, the scope for abusing intellectual property rights depends on the competitive nature of distribution markets and entry possibilities. To rely on this avenue for enhancing transfer of technology may require a broad policy approach to expanding dynamic competition. Work in this area should not be alien to the pursuit of a Development Agenda in WIPO.

91. Intellectual property laws aim at conferring exclusive rights on individuals to enable owners to appropriate the full market value of the protected subject matter. By promising that the intellectual property holder may obtain a full reward from the market, intellectual property rights may serve as an incentive for the creation, use and exploitation of inventions, works, marks and designs.

92. However, it is often the case that intellectual property owners exploit their legal rights to unreasonably block competition. They may do this, for example, by exploiting the unique characteristics of certain protected products that prevent rival firms from developing alternative products or entering certain markets, and refusing to grant licenses to prospective competitors. While the traditional problems of technology transfer in hardware industries persist, new problems have arisen in the service industries, and practices other than those relating to licensing have become more important, in particular in regard to foreign direct investment, cooperation agreements, outsourcing, standardization, interconnection, and access to information.

93. Three types of conflicts may arise between the pursuit of competitiveness and intellectual property rights. First, intellectual property may be used contrary to the objectives and conditions of its protection, a situation called misuse. Second, market power resulting from intellectual property may be used to extend the protection beyond its purpose, such as to enhance, extend or abuse monopoly power. Third, agreements on the use or the exploitation of intellectual property may be concluded in restraint of trade or adversely affecting the transfer or the dissemination of technology or other knowledge, a situation called restrictive contracts or concerted practice. In order to prevent or control such conflicts and to distinguish pernicious practices from competition-enhancing ones, many countries have enacted antitrust regulations or other competition legislation to respond to anticompetitive behaviour. Competition rules are not designed to curb the functioning of the intellectual property system, but rather to safeguard its proper functioning.

94. The TRIPS Agreement sets out general principles to establish and enforce anti-monopoly policies. The relevant competition provisions of TRIPS are Article 8.2 and Article 40. Article 8.2 is part of the “General Provisions and Basic Principles” of Part I of the Agreement. Another relevant competition provision of the Agreement is Article 31(k) dealing with compulsory licenses in the case of practices which have been determined, after judicial or administrative process, to be anticompetitive and need to be remedied by the grant of compulsory licenses.

95. Effective administration and enforcement of an intellectual property-related competition policy appear to be particularly important, in view of the interdependency of intellectual property protection and competition. Where the efficient functioning of intellectual property is impaired by restrictive practices, the market-oriented incentives decline and social costs rise. In this respect, a well-balanced design of intellectual property treaties and national laws as regards, for example, exceptions for prior users, experimental or fair use, adequate disclosure, efficient and working requirements and misuse defences, may help both to unburden competition policy and encourage private action against undue claims for protection.

96. The complexities of the application of substantive competition policy rules relating to intellectual property require specialized and administrative agencies and courts.

97. A major concern that has been expressed in respect of the intellectual property system as regards transfer of technology is the potential for abuse of exclusive rights conferred by patents and other forms of intellectual property. In this context, the work on technology transfer in WIPO may address elements such as:

- the consideration of model approaches on how to implement the relevant provisions of TRIPS;
- the inclusion in new intellectual property treaties of relevant provisions to deal with anti-competitive behaviour or abuse of monopoly rights by rights holders, such as the proposed Substantive Patent Law Treaty (SPLT);
- the development of an international framework to deal with issues of substantive law relating to anti-competitive licensing practices primarily those that adversely affect the transfer and dissemination of technology and restrain trade;
- the provision of technical cooperation to developing countries, at their request, to better understand the interface between intellectual property rights and competition policies;
- implementation of intellectual property policies in developing countries should be matched with appropriate enforcement mechanisms that effectively restrain anti-competitive behaviour;
- Developed countries authorities to undertake, at the request of affected countries, enforcement actions against firms headquartered or located in their jurisdictions.

98. In sum, any implementation of substantive rules of competition policy must take account of a large number of complex factors, such as national and international market conditions and interdependencies and the goals and structure of national intellectual property (including its built-in pro-competitive rules such as experimental or fair use, exhaustion, patent or copyright misuse defences). This is certainly no easy task and not one that can be complied with by isolated policies or by one developing country. Rather this is a complex, challenging and time-consuming endeavour that should be part and parcel of the programmatic work of WIPO.

[End of Annex and of document]