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24

DEVELOPING COUNTRY COORDINATION IN INTERNATIONAL INTELLECTUAL PROPERTY STANDARD-SETTING

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* The author is a former Egyptian delegate to the WTO-TRIPS Council and WIPO. The views expressed in this paper are, however, the personal views of the author and do not necessarily reflect the views of the South Centre or the Government of Egypt. The author is solely responsible for any errors or misjudgements. The author would like to thank Leonardo de Athayde, Charles Clift, Carlos Correa, Carolyne Deere, Graham Dutfield, Sisule Musungu, Julia Oliva, Pedro Roffe, Preeti Saran and Birgit Viohl for their comments.

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PREFACE

In 1998, the South Centre, with funding support from the TCDC Unit of the UNDP, initiated a project to monitor and analyse the work of WTO from the perspective of developing countries. Recognizing the limited human and financial resources available to the project, it focuses on selected issues in the WTO identified by a number of developing countries as deserving of priority attention. As anticipated, the project has helped in establishing a medium-term work programme of the South Centre on issues related to international trade and development, which includes several sub-projects on specific WTO Agreements/issues.

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ACRONYMS

ARIPO	African Regional Intellectual Property Organization
ACTRIPS	Advisory Council on Trade-Related Innovation Policies
CBD	Convention on Biological Diversity
CIEL	The Centre for International Environmental Law
COP	Conference of the Parties
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GRULAC	Group of Latin American and Caribbean Countries
IBSA	India-Brazil-South Africa
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIM	Inter-sessional Inter-governmental Meeting
INDECOPI	National Institute for the Defence of Competition and Intellectual Property
IP	Intellectual Property
IPRs	Intellectual Property Rights
NGO	Non-Governmental Organization
OAPI	Organisation Africaine de la Propriete Intellectuelle
PCT	Patent Cooperation Treaty
SCCR	Standing Committee on Copyright and Related Rights
SCP	Standing Committee on the Law of Patents
SCT	Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications
SPLT	Substantive Patent Law Treaty
TLT	Trademark Law Treaty
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UPOV	International Union for the Protection of New Plant Varieties

Organizations

ILO	International Labour Organization
ITU	International Telecommunications Union
FAO	United Nations Food and Agricultural Organization
OECD	Organization for Economic Cooperation and Development
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Organization for Education, Science and Culture
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

EXECUTIVE SUMMARY

International intellectual property (IP) standard-setting has undergone important changes in recent years as a result, in particular, of the proliferation of fora and processes dealing with IP at the multilateral, regional and bilateral level. Thus, international rule-making on IP is becoming more complex and diversified. However, developing countries, with their limited resources and expertise in the field of IP, are not well prepared to face the challenges arising from this evolution. This is reflected in the lack of coordination amongst developing countries as well as in the inconsistencies in their positions in different fora dealing with IP matters. As a consequence, their ability to influence international IP rule-making, in a manner which takes into consideration their interests and priorities, is weakened.

This paper focuses on developing country coordination in international IP standard-setting. It underlines the need for developing countries to bring coordination at the forefront of their concerns in their participation in international IP rule-making. Developing country coordination in international IP standard-setting encompasses coordination by developing countries at the national level and coordination between developing countries at the international level. Both aspects of coordination are inextricably linked as coalitions of developing countries are most likely to emerge, on a sustained basis, only among countries that have a coherent and coordinated approach to IP policy making at the national level.

Section I of the paper analyses the lack of coordination by developing countries in international IP rule-making as a result both of the growing complexity of global IP governance and the fragmentation of policy making on IP in many developing countries. It provides examples of how this lack of coordination can lead to inconsistencies in the positions taken by developing countries in international IP norm-setting.

Section II focuses on improving coordination by developing countries at the national level in relation to international IP standard-setting. It highlights the examples of two developing countries (India and Brazil) and one developed (the Netherlands) which have established inter-ministerial coordination mechanisms that play an important role in the formulation of their positions in international IP related deliberations. This section underlines the importance of such coordination across government given the inherent limitations bearing on the participation of IP administrations of developing countries in international IP rule-making. It further stresses the need for technical assistance to be supportive of efforts of developing countries to develop such inter-agency coordination mechanisms.

Section III assesses the coordination between developing countries in international IP standard-setting, particularly in the context of the WTO/TRIPS Council, WIPO and the CBD. It contrasts the effectiveness of coordination between developing countries on a cross-regional basis at the WTO/TRIPS Council with the limited nature of such coordination at WIPO until very recently. In this connection, it questions the rationale behind the reliance at WIPO on regional groups, particularly in matters relating to standard-setting, as it can constrain the capacity of developing countries to coordinate on a cross-regional basis. This section also points to the possible impact of bilateral and regional free trade agreements on coordination between developing countries in international IP standard-setting.

Finally, the paper identifies a number of recommendations to be considered by developing countries in order to enhance their coordination in relation to international IP rule-making at both the national and international level. Some of the key recommendations include:

- Developing countries should establish effective and inclusive inter-governmental coordination mechanisms in relation to participation international IP standard-setting, where all relevant ministries and government departments would participate, thus contributing to the institutionalisation of the policy making process.
- Developing countries should examine the possibility of enhancing the role of their ministries of foreign affairs in ensuring the overall coherence of their positions in different fora and processes dealing with IP issues.
- Developing countries should work towards embedding their IP administrations in their wider development policies.
- Developing countries should broaden their representation at WTO and WIPO meetings so as to include representatives from government departments and agencies dealing with key areas affected by international IP standard-setting such as public health, the environment, agriculture, and education.
- Synergies should be established between developing country negotiators at WIPO and WTO, and developing country negotiators in other international fora where IP matters are examined, such as CBD, FAO, ITU, UNESCO, UNCTAD and WHO.
- Developing Countries with more than one mission in Geneva should ensure that there is appropriate coordination between negotiators dealing with the WTO/TRIPS Council and with WIPO.
- Developing countries which have one mission accredited to all international organizations in Geneva, should establish a focal point for IP matters, not only to follow WTO/TRIPS Council and WIPO, but also IP related issues which would arise in the context of the work of other Geneva based international organizations.
- Developing Countries should seek the input of their permanent missions in Geneva in the context of negotiations on regional and bilateral free trade agreements
- Developing countries should reconsider the role of regional groups in relation to standard setting-activities at WIPO so they do not represent a constraint on their efforts to promote cross-regional coordination on important substantive issues in the work of the organization.

“For the great majority of mankind are satisfied with appearances, as though they were realities, and are often more influenced by the things that seem than by those that are.”

*Niccolo Machiavelli
Discourses, 1513-1517*

I. INTRODUCTION

The conclusion of the World Trade Organization’s (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the context of the Uruguay Round (1994), and the subsequent debate about the relationship between the TRIPS agreement and public health, ushered in an unprecedented interest in the protection of intellectual property (IP) at the international level. A significant literature has examined global IP rules, such as TRIPS, and their impact on developing countries. There has also been an important focus on integrating the development dimension in the global IP system. More recently, developments relating to the emergence of TRIPS-plus obligations for developing countries at the bilateral, regional and multilateral level have come under increasing scrutiny.

However, less attention has been devoted to the institutional dynamics relating to the participation of developing countries in international IP standard-setting. One of the few studies on this topic concludes that developing countries are “encircled” in a standard-setting process dominated by developed countries and international business, and that they can only look for “self-help” on these issues.¹

While it is certainly true that the prevalence of industrialized countries in international IP rule-making is a more general reflection of the global power structure in international trade and economic relations, a number of institutional constraints within developing countries hinder their effective participation in international IP standard-setting. They include the low level of priority given to IP issues in comparison to other policy issues as well as their weak institutional capabilities, limited resources and expertise in the field of IP.

Although lack of coordination is also often mentioned as one of the important factors hindering the effective participation of developing countries in international rule-making, it has not yet come under close examination. Lack of coordination is not unique to developing countries. It prevails also in developed countries. However, these countries have longer traditions of joint policy making and cooperation in the field of IP. Furthermore, the detrimental consequences of lack of coordination are much more significant for developing countries given that they are the most newly affected by the recent expansion of global IP rules. Lack of coordination considerably weakens the participation of developing countries in IP negotiations and limits their ability to influence them in a manner, which takes into account their concerns and preserves their “policy space.”² In certain cases, lack of coordination even leads to inconsistencies in the positions taken by developing countries on the same issues in different international fora, thus resulting in outcomes which undermine their efforts to shape a development friendly global IP system. Therefore, developing countries are most urgently in need of a coherent and coordinated participation in international IP rule-making so as to ensure that existing and new IP rules

¹ Drahos (2002), p.788.

² “Sao Paulo Consensus”, UNCTAD .XI, document TD/410, June 25, 2004, para.8 (available at www.unctad.org/en/docs/td410_en.pdf).

are balanced, supportive of important public policy objectives and sensitive to their development concerns and priorities.

From this perspective, this working paper aims to provide a better understanding of the causes of the lack of coordination by developing countries in international IP standard-setting, of its implications, and to identify possible options for developing countries to deal with it. Developing country coordination encompasses coordination by developing countries at the national level and coordination between developing countries at the international level. Both aspects of coordination are inextricably linked, as coalitions of developing countries are most likely to emerge, on a sustained basis, only among countries that have a coherent and coordinated approach to IP policy making at the national level. Indeed, incoherent positions taken by developing countries, in different fora, impact negatively on the possibilities of coordination with other like-minded developing countries.

The paper first examines, in Section I, the main factors contributing to the lack of coordination by developing countries in international IP rule-making. In this regard, it highlights the increasing complexity of global IP governance both in terms of the proliferation of fora dealing with IP issues and the diversification of IP norms. It also underlines the fragmented nature of policy making on IP in developing countries and examines its impact on the participation of these countries in international IP standard-setting. In this connection, it provides examples of inconsistencies in the positions of developing countries on the same issues in different international fora as a result of this lack of coordination.

Section II focuses on the improvement of developing country coordination at the national level. It attempts to identify possible options to strengthen coordination by developing countries in respect of the formulation of their positions in different international fora dealing with IP matters. It points out to the experiences of a number of developing and developed countries, namely, India, Brazil and the Netherlands.

Section III considers the coordination between developing countries in the two main fora involved in international IP standard-setting, the WTO/TRIPS Council and the World Intellectual Property Organization (WIPO). It also addresses coordination between developing countries in the context of the Convention on Biological Diversity (CBD). It examines the means of strengthening coordination between developing countries in these fora particularly in terms of cross-regional coordination.

Much of the analysis in this paper is derived from the author's experience as a former delegate to the WTO/TRIPS Council and WIPO. In this connection, the author is grateful to the many Geneva and capital based delegates, experts, academics and international civil servants from both developed and developing countries, who have generously shared with him over the years, and for the specific purpose of this paper, their insight and views on the participation of developing countries in international IP standard-setting.

II. UNDERSTANDING THE LACK OF COORDINATION BY DEVELOPING COUNTRIES IN INTERNATIONAL IP STANDARD-SETTING

II.1 The Growing Complexity of Global Governance in IP

Global governance in IP is increasingly complex as a result of the proliferation of fora and processes dealing with IP issues. This complexity is reflected in the diversification of international IP rule-making.

A. *The proliferation of fora and processes dealing with IP*

The decade since the conclusion of TRIPS has “seen nothing less than an explosion of interest in IP issues in a broad array of international fora.”³ In reality, the proliferation of fora and processes has become an integral feature of global governance in IP. Although, international IP standard-setting still takes place predominantly in the WTO and WIPO, standard-setting, relating directly or indirectly to IP subjects also occurs in a number of United Nations (UN) bodies, specialized agencies and other international organizations⁴ producing what have been called “competing knowledge networks in the quest for global governance in IP.”⁵

Box 1

Beyond the WTO and WIPO: examples of IP related standard-setting in United Nations bodies, specialized agencies and other international organizations

The Convention on Biological Diversity (CBD)

A number of provisions of the CBD, particularly Article 16, deal directly with IP rights. According to article 16.5, “Contracting parties, recognizing that patents and other IP rights may have an influence on the implementation of the Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.” To this effect the Conference of the Parties (COP), since its second meeting, has addressed IP-related issues pertaining to the implementation of the Convention.

The Committee on Economic, Social and Cultural Rights (CESCR)

The CESCR is in the process of drafting a General Comment on Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides that the State Parties to the Covenant recognize the right of everyone “(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” General comments adopted by the CESCR are often viewed as authoritative interpretations of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³ See Helfer (2004).

⁴ These include, *inter alia*, the Convention on Biological Diversity (CBD), the Commission on Human Rights (CHR), the United Nations Food and Agricultural Organization (FAO), the International Telecommunications Union (ITU) the United Nations Organization for Education, Science and Culture (UNESCO), the United Nations Conference on Trade and Development (UNCTAD), the World Customs Organization (WCO) and the World Health Organization (WHO).

⁵ Sell (2003a).

Box 1 (continued)

The Commission on Human Rights (CHR)

In its Resolution 2004/26 on Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria, the Commission on Human Rights urged “States to consider, whenever necessary, adapting national legislation in order to use to the full the flexibilities contained in the TRIPS Agreement.”

The United Nations Food and Agricultural Organization (FAO)

Several provisions of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) concluded under the auspices of FAO, and which entered into force on 29 June 2004 relate directly to IP issues. This is the case of Article 9 which recognizes Farmers’ Rights and of Articles 12.3 (d) and 13.2 (d) (ii) in Part IV concerning the establishment of a multilateral system of access and benefit sharing. According to Article 12.3 (d) “Recipients shall not claim any IP rights or other rights that limit the facilitated access to plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.”

The International Telecommunications Union (ITU)

Paragraph. 42. of the Declaration of Principles adopted by the First phase of the World Summit on the Information Society (WSIS), December 2003 provides that :

“IP protection is important to encourage innovation and creativity in the Information Society; similarly the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in IP issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.”

The United Nations Conference on Trade and Development (UNCTAD)

Paragraph 101 of the Sao Paulo Consensus adopted by the Eleventh Session of the UNCTAD, 13-18 June 2004 provides that:

“UNCTAD should undertake analysis, including at the regional level, of the development dimension of IP and trade-related aspects of intellectual property rights (TRIPS), including improvements in the transfer of technology to developing countries, the development dimensions and implications of the establishment and enforcement of intellectual property rights, as well as protection of traditional knowledge, genetic resources, and folklore and fair and equitable sharing, without prejudice to the work undertaken in other fora.”

The United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO is the depositary of the Universal Copyright Convention. Under the auspices of UNESCO, a draft convention is currently being negotiated on the protection of the diversity of cultural contents and artistic expressions. Several provisions of the draft convention deal with IP rights particularly in relation to the rights and obligations of States (in Article 7) and the relationship of the Convention to other international instruments (Article 19).

World Customs Organization (WCO)

In February 2003, the WCO Enforcement Committee adopted model provisions for national legislation on border measures.

The World Health Organization (WHO)

In addition to mandating the creation of the Commission on Intellectual property rights, Innovation and Public Health, the World Health Assembly adopted Resolution A57.14 that urged Members to “consider, wherever necessary, adapting national legislation in order to use to the full the flexibilities contained in the Agreements on Trade- Related Aspects of Intellectual Property Rights” and “to encourage that bilateral agreements take into account the flexibilities contained in the WTO TRIPS Agreement and recognized by the Doha Ministerial Declaration on the TRIPS Agreement and Public Health.” (paragraphs 2 (4) and 2 (6) of Resolution A57.14 adopted by the World Health Assembly on the 22nd of May 2004).

At the regional level, a number of regional organizations deal with IP issues. This is the case of the Organisation Africaine de la Propriete Intellectuelle (OAPI), the African Regional Intellectual Property Organization (ARIPO) and the Andean Community. IP is also an area of cooperation under a number of regional arrangements such as the Association of South East Asian Nations (ASEAN). In addition, IP provisions are becoming a key feature of regional and bilateral free trade and investment agreements that have been concluded by the United States and the European Union with developing countries since the 1990s.

“Forum shopping” is acknowledged as one of the important causes of the proliferation of fora involved in IP standard-setting. Nevertheless, there are divergent opinions on the goals and motivations behind these forum shopping strategies and their effects, particularly on the relationship between the different international fora involved.⁶

Although, forum shopping is not entirely new,⁷ it has been mainly instigated successfully, by industrialized countries, which have dominated international IP standard-setting and has been, in general, to the detriment of developing countries. The most salient example of forum shifting was the incorporation of IP rules into the multilateral trading system, in the context of the Uruguay Round, thus ending WIPO’s hitherto almost exclusive predominance in this field. Reflecting on this development, the first Director General of WIPO remarked:

If this duplication becomes a reality, the question will arise in which of the two organizations – WIPO or GATT...the international norms of the protection of IP will be further developed. The writer believes that such norms will probably be developed in both, thereby prolonging the duplication. Incidentally, duplication is a phenomenon that most governments rigorously condemn. But its existence is a reality, not as if the secretariats would cause it.... Rather, it is they the governments, which decide duplication, usually as a result of persuasion by those among them that believe that a second or third organization is a more favorable forum giving more scope for their bargaining power.⁸

Despite a vigorous policy debate on the costs and benefits for developing countries of global IP rules, particularly TRIPS, forum shifting strategies continue to generate an ongoing push for higher IP standards. It appears “that TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning...The TRIPS architects have embarked on an aggressive course to close any existing loopholes, to prosecute non-compliance and to promote TRIPS-plus IP agreements outside the WTO in bilateral, regional, and multilateral agreements.”⁹

Nowadays, the complexity of the issues under consideration, the multiplicity of interests involved, and the fluidity of the policy debates have rendered duplication and forum shopping dynamics even more difficult to fully apprehend. Thus, the proliferation of fora and processes involved in international IP deliberations raises extraordinary challenges to the institutional ability of developing coun-

⁶ Helfer and Sell, *supra*, notes 3 and 5. Also see, Sisule Musungu, General Trends in the field of Intellectual Property: issues and Challenges for the Establishment of a Development-oriented Framework, 2004 presented at the ICTSD/UNCTAD/TIPS *Regional Dialogue on IPRs, Innovation and Sustainable Development in Eastern and Southern Africa*, 29 June- 1 July 2004, Cape Town, South Africa.

⁷ Reserved towards the Berne Convention on Copyright, the United States promoted the conclusion of the Universal Copyright Convention, in 1952, under the aegis of UNESCO. As a consequence, UNESCO played a significant role in the international copyright regime for three decades. However, its activities in this field slowed down, as the United States withdrew from the organization in 1986 and joined the Berne Convention in 1989.

⁸ Bogoch (1992), p.52. It is interesting to note that the author attributes forum shifting exclusively to the strategies of states. In reality, secretariats of international organizations can also play a role in fostering or facilitating forum shifting strategies.

⁹ Sell (2003b), p.174.

tries to effectively participate in international IP standard-setting in a coherent and coordinated manner.

B. *The diversification of international IP standard-setting*

Standard-setting or rule-making can be defined as the creation of rules, standards or guidelines that purport to govern the conduct of particular actors over a specified range of activity.¹⁰

While international IP rule-making has primarily taken place at WIPO and the WTO, it is important to note the differences between the norm-setting processes in these two organizations. Proposals submitted by member States to the WTO/TRIPS Council aim at modifying the minimum substantive standards contained in the agreement, interpreting them or adding new standards to the existing ones. This is the case in areas such as TRIPS and public health, geographical indications, the review of Article 27.3(b) and the relationship between TRIPS and the CBD, the protection of traditional knowledge and folklore. The Doha Declaration on TRIPS and Public Health (2001)¹¹ and 30 August 2003 decision relating to paragraph 6 of the Doha Declaration¹² are examples of standard-setting in the context of the WTO/TRIPS Council.

Rule-making in WIPO aims to create new norms in the field of international IP protection. It takes place, mainly, in three bodies of the organization: the Standing Committee on the Law of Patents (SCP), the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) and the Standing Committee on Copyright and Related rights (SCCR).¹³ Standard-setting in WIPO can be the result of one or two processes: treaty-making or the development of soft law norms.

The WIPO treaty-making process goes through a number of stages: First, member States agree that there is a need to elaborate a treaty in a particular area of IP law. Second, they discuss the possible objectives, scope, and elements of the future treaty. Then they authorize the Secretariat to prepare draft provisions as a basis for further deliberations. They often also submit their own proposals for treaty language. When an agreement occurs on many of the draft provisions under consideration, member states may decide the convening of a diplomatic conference to finalize the treaty and adopt it.¹⁴ The deliberations leading to the adoption of soft law norms are often similar on the substantive level to those relating to the elaboration of a treaty. However, the time frame to develop soft law norms is often shorter and the procedures are simpler. Soft law norms are adopted by the WIPO General Assembly and can take many legal forms such as agreed statements, recommendations, resolutions, declarations etc.¹⁵

¹⁰ Kwakwa (2002)

¹¹ *Declaration on the TRIPS Agreement and Public Health*, WTO Doha Ministerial Conference, 4th Sess., WTO Doc. WT/MIN (01)/DEC/W/2 (Nov.14, 2001).

¹² *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health- Decision of 30 August 2003*, WT/L/540 of 2 September 2003.

¹³ Standard setting is explicitly excluded from the mandate of the Advisory Committee on Enforcement (ACE). The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, often referred to as the IGC, was created in 2000 with a deliberative mandate. Its renewed mandate of 2003 stipulated that no outcome of its work was excluded, including the possible elaboration of an international instrument. The Working Group on the Reform of the Patent Cooperation Treaty (PCT) is engaged in standard-setting given that its task is to examine changes in the rules and regulations of the PCT.

¹⁴ The most recent WIPO treaty concluded through this process is the Patent Law Treaty (PLT) in 2000.

¹⁵ Examples of soft law norms which have been recently adopted by WIPO are the 1999 Resolution Concerning Provisions on the Protection of Well Known Marks, the 2000 Recommendation on Trademark Licenses and the 2001 Recommendation Concerning the Provisions on the Protection of Marks and Other Industrial Property Rights on the Internet.

Beyond the WTO and WIPO, other fora and process are engaged in norm-setting relating directly or indirectly to IP protection in accordance with their own rules and procedures. These norms also take different legal forms ranging from treaty provisions¹⁶ to soft law norms such as resolutions, declarations, guidelines and recommendations.

Negotiating new IP norms, grasping their often far reaching implications and appreciating their inter-relationship requires a certain amount of technical, legal and diplomatic expertise which is often lacking in many developing countries. This problem is exacerbated by the fact that international IP standard-setting is of a dynamic nature in order to adapt to a fast-paced and technologically driven area of law. This may be one of the reasons why the traditional focus of developing countries has been on the negotiation of treaties and legal instruments which create legally binding obligations rather than on soft law development and this, despite the fact that “soft law, whether in the form of declarations, recommendations, guidelines or codes, can impact the behaviour of states and other relevant entities significantly.”¹⁷ In fact, soft law has been gaining importance in the IP norm-setting.

This has been the case at WIPO, for instance, which has increasingly relied on the soft law approach in recent years.¹⁸ Although some underline the advantages of this soft law approach in overcoming the traditional drawbacks of treaty-making, in particular its long and complex procedures,¹⁹ others highlight that provisions in some of these soft law norms, such as the 1999 WIPO Resolution Concerning Provisions on the Protection of Well Known Marks, go “beyond any treaty or domestic law as this protection is unwarranted and potentially limitless in scope. It creates rights in gross that cross international boundaries.”²⁰

Developing countries should follow more closely WIPO’s soft law development particularly as there have been attempts to transform some of these soft law norms into legally binding obligations by incorporating them into bilateral and regional free trade agreements or into existing international instruments administered by WIPO.²¹ Indeed, it appears that,

[t]o the extent that the Resolutions and Recommendations are carefully negotiated, taking into account the real status, rights, and interest of concerned states and other actors on the international scene, and insofar as they contain reasonable and practical provisions for implementation, WIPO believes they will be invariably be regarded as binding instruments. In any event, some of these Resolutions and Recommendations could initially be adopted as a first step towards the conclusion of legally binding obligations, thus providing a basis for a treaty regime.²²

WIPO’s Internet Domain Name process is another interesting example of innovative rule-making to which developing countries have not given enough attention particularly in its relation to other international processes such as the World Summit on the Information Society (WSIS).

Beyond the evolving relationship between treaty law and soft law norms, another aspect of the diversification of international IP standard-setting relates to the fact that the relationship between IP norms that are being generated multilaterally, regionally and bilaterally, in a dispersed and fragmented way, is becoming increasingly complex. For instance, the legal uncertainty concerning the relationship

¹⁶ Such as those relating to IP in the draft convention, currently negotiated in UNESCO, on the protection of the diversity of cultural contents and artistic expressions.

¹⁷ Kwakwa, *supra*, note 10, p.187.

¹⁸ Kwakwa, *supra*, note 10.

¹⁹ Kwakwa, *supra* note 10, p.181. Also see Abbott (2000).

²⁰ Christine Haight Farley, “WIPO and Well Know Marks”. Presentation to the workshop on WIPO Work Program and How to Involve Consumers, Trans Atlantic Consumer Dialogue, Lisbon, October 17, 2003.

²¹ For example, through the inclusion of some of the provisions of the 2000 Recommendation on Trademark Licenses in the ongoing revision of the Trademark Law Treaty (TLT). See Articles 17 to 22 of the Draft Revised Trademark Law Treaty, WIPO-document, SCT/14/12.

²² Kwakwa, *supra*, note 10, p.193.

between the rights of a number of developing countries under TRIPS and the Doha Declaration on TRIPS and Public Health (2001) on one hand and their obligations on patents and medicines included in bilateral and regional free trade agreements on the other hand, has been underlined.²³ Reflecting on this, one analyst commented:

The provisions of the CAFTA and U.S. – Morocco FTA relating to patents and pharmaceutical regulation are not accessible to laypersons. They are confusing to specialists in the field of IP law and medicines regulation. Public international lawyers are needed to work out the complex hierarchical relationships among the conflicting provisions.... Individuals operating in the real world of medicines regulation, procurement and distribution cannot be expected to sort out these incredibly complicated rules. This point cannot be stressed too strongly.²⁴

Another complexity stemming from IP provisions of a TRIPS-plus nature incorporated in bilateral and regional free trade agreements relates to the fact that their legal drafting differs from one agreement to another and that they often do not have international precedents.²⁵ For this reason, it has been affirmed that some bilateral free trade agreements concluded recently add an “uncharted page in the history of IPRs.”²⁶ In addition to bilateral and regional free trade agreements, the role of bilateral investments agreements as possible agents of new global standards for the protection of IP rights has also recently been highlighted.²⁷ It is mentioned, in this regard, that investment protection “generates grey areas that may be used to challenge national measures, even if they are TRIPS- consistent.”²⁸

The diversification of international IP standard-setting is a further challenge to the limited institutional capabilities of developing countries to articulate coherent and well coordinated positions in the different international fora and processes involved in IP rule-making.

II.2 The Fragmentation of Policy Making on IP in Developing Countries

Beyond the proliferation of fora and processes, another important reason contributing to the lack of coordination by developing countries in international IP standard-setting lies in the fragmentation and compartmentalization of policy making on IP in most developing countries.

Deliberations relating to international IP rule-making occur between government representatives. Positions adopted by them in various international fora are closely linked to policy making at the national level²⁹ and as such to the “interaction process among policy actors; that is, among relevant government agencies and interested stakeholders who have somehow been able to acquire a voice in the national policy debate.”³⁰

For many years, when IP was primarily perceived as a complex technical matter, IP policy was narrowly focused on “the design, implementation and enforcement of a system of legal devices com-

²³ Abbott (2004).

²⁴ *Ibid*, p.12.

²⁵ For an overview of such provisions see “TRIPS-plus in Bilateral and Regional Trade Agreements”, CUTS, No2/2004.² For an in-depth examination of the intellectual property provisions contained in one of those agreements, US-Chile, see Roffe (2004).

²⁶ Roffe, *ibid*, p.50.

²⁷ Correa (2004).

²⁸ *Ibid*, p.28.

²⁹ Petit *et al* (2001), p.xi.

³⁰ *Ibid*, p.24.

monly referred to as IP rights.”³¹ IP offices dealing with the administration of patents, trademarks and copyright, as well as a limited number of business groups and professional associations, were the main actors of the domestic policy process. However, the nature and scope of IP policy has changed as a result of the growing realization that IP is a cross-cutting issue with linkages to many other important public policy areas such as agriculture, health, environment and education. Thus, ensuring policy coordination and coherence in policy making relating to IP is an important challenge in many developing countries, particularly given the increase in the number of government departments and agencies dealing with IP issues, their diversity as well as the growing involvement of civil society and non-governmental organizations (NGOs). Nevertheless, at present, decision making procedures on IP matters do not always entail a consultative process including all relevant government departments as well as stakeholders such as the private sector, civil society and academia. In addition, there is still, often, little coordination between government departments among which responsibilities relating to IP are dispersed, especially between those most directly involved in the implementation of IP legislation and those, which are affected by it such as departments in charge of areas like agriculture, health, environment and education. In fact, not only do these government departments and agencies pursue different objectives and priorities but also, depending on their degree of power and autonomy, it can be difficult to reconcile them.

The fragmented nature of policy making on IP has, in many instances, a negative impact on the participation of developing countries in international IP standard-setting as it is replicated and even exacerbated at the international level. Thus, there is, often, little coordination between the positions taken by representatives from different government departments and agencies in international fora and no formal procedure of ensuring the coherence of these positions with overall national policy. In addition, there is also often poor communication between capital based officials and the permanent mission representing the country at a particular forum. Although ministries of foreign affairs often play a role in ensuring the overall coherence of a country’s positions at the international level, their involvement with IP has, in general, been marginal, as it is still perceived as a technical and complex regulatory area. As a result of these considerations, the participation of developing countries in international IP standard-setting can be described as a “cacophony of varied interests and levels of powers.”³²

For instance, in many developing countries, the ministry of foreign trade would be responsible for following up multilateral trade negotiations at the WTO as well as at the regional and bilateral level. However, trade officials of developing countries are often not attentive to developments on IP outside the WTO and to their possible impact on the positions of their countries at the WTO itself and in particular on the proposals they have put forward to the WTO/TRIPS Council. Consequently, they are often willing to concede higher IP obligations, in relation to IP instruments outside the WTO, in exchange, for example, for greater market access for agricultural and manufactured products. Similarly, at WIPO’s bodies dealing with standard-setting, developing countries are, mostly, represented by officials from national IP administrations in charge of copyright, patents or trademarks, who are often not fully aware of the wider public policy implications of IP protection.

At organizations and fora where IP is not the primary issue under consideration, developing countries tend to be represented by government officials from the national authorities which have the overall responsibility for the main issue being dealt with by that organization or forum. In general, these officials are not familiar with IP related issues and the growing complexity of global governance in IP. This is the case, for example, at CBD meetings which are attended by officials from the ministries of environment, at ITU meetings where developing countries are represented by officials from the telecommunications authorities, at UNESCO meetings where they are represented by ministries of education and culture, at WCO meetings which are attended by officials from the custom authorities and at WHO meetings where developing countries are represented by officials from the ministries of health. In cases where developing countries would wish to include in their delegations to these meet-

³¹ *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, UNCTAD-ICTSD Project on IPRs and Sustainable Development, August 2003, p.2.

³² *Supra*, note 29, p.62.

ings officials with an expertise in the field of trade or IP, budgetary restrictions often do not allow it. When funding is made available to developing countries to participate in those meetings, it is almost always conveyed to the national focal point of the department that has the overall responsibility for the main issue under consideration in that particular forum.

The fragmented nature of the representation of developing countries in international IP standard-setting, their limited resources and the importance of individual officials in formulating their positions are well known. This puts them in a vulnerable situation in relation to international entities with a vested interest in promoting upwards harmonization of international IP standards. These entities, with their significant material resources, can deploy strategies of “cooptation” to capture to their benefit the positions of a particular government department or official from developing countries in international IP related deliberations.

As a result of the lack of coordination at the national level, different government agencies and departments of developing countries pursue their agendas in an uncoordinated manner at the international level. This ultimately undermines the overall efforts of developing countries to advance their interests in the area of international IP standard-setting, particularly as coalition building in IP “can only emerge among countries that have a clear and coherent approach to IP policy making at the national or regional level.”³³

While this situation was defensible when IP was perceived as a technical and complex area of regulation, largely self contained and confined to deliberations in a limited number of international fora, such as WIPO and its predecessors, it is difficult to sustain now that the far reaching implications of IP rules are better understood and that developed countries have given such a priority to the enforcement of IP, beginning with the inclusion of TRIPS in the Uruguay round of negotiations.

II.3 The Impact on Developing Country Participation in International IP Standard- setting

A. The WTO/WIPO relationship

In recent years, the majority of developing countries have focused their IP expertise and negotiating skills on the deliberations of the WTO concerning the TRIPS Agreement, and its relationship to public health. This has been illustrated by the intensity of the deliberations at the TRIPS Council on this issue, particularly those leading to the adoption of the Doha Declaration on TRIPS and Public Health (2001)³⁴ and 30 August 2003 decision on paragraph 6 of the Doha Declaration.³⁵ Much of their energy also went to the work of the Council on the review of Article 27.3 (b) and the relationship between TRIPS and CBD, in accordance with article 19 of the Doha Ministerial Declaration. This focus on TRIPS arose out of the very nature of TRIPS being a binding agreement for all WTO members establishing minimum IP substantive standards and operating under the dispute settlement system of the WTO.

The attention given by developing countries to TRIPS Council deliberations has enabled them to advance, with a certain degree of success, their concerns regarding the impact of the TRIPS agreement on access to medicines, and to a lesser extent, its role in the misappropriation of genetic resources and

³³ Musungu and Dutfield (2003), p.22.

³⁴ *Declaration on the TRIPS Agreement and Public Health*, WTO Doha Ministerial Conference, 4th Sess., WTO Doc. WT/MIN (01)/DEC/W/2 (Nov.14, 2001).

³⁵ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health-Decision of 30 August 2003*, WT/L/540 of 2 September 2003.

traditional knowledge. Nevertheless, TRIPS related negotiations have also drained the limited expertise and negotiating skills of developing countries, thus preventing them from addressing, in a systematic manner, the risks and opportunities generated by the proliferation of international fora and processes involved in international IP rule-making, and particularly in relation to their own achievements at the WTO such as the Doha Declaration on TRIPS and Public Health. This situation was further aggravated when developed countries and industry decided to pursue their IP agenda at fora and venues which they perceived as being friendlier to their views and interests, especially, in light of the increasing activism of both developing countries and civil society at WTO.

In this regard, the near exclusive focus of developing countries on TRIPS has been, in particular, to the detriment of their effective participation in WIPO's standard-setting activities. This participation was already weak as the traditional priority of most developing countries, in dealing with WIPO, was the technical assistance provided by the organization and not its standard-setting activities, taking into consideration the fact that adherence to the legal instruments, concluded under the auspices of WIPO, is of a voluntary nature.

Furthermore, in many developing countries, as previously mentioned, different government agencies and departments are responsible for the follow up of WTO and WIPO activities. On one hand, trade officials believe that the importance of TRIPS stems from the fact that it comes under the WTO and thus often consider that developments related to IP outside of the WTO are of no major significance nor do they have a bearing on TRIPS related deliberations. On the other hand, officials from IP offices who attend WIPO meetings are either not well informed of the policy debates concerning TRIPS or do not see their relevance in the context of WIPO's standard-setting process.

For many years after the conclusion of TRIPS, developing countries did not fully grasp the substantive linkages between standard-setting occurring in such different legal and institutional environments such as the one of the multilateral trading system of the WTO and the one of a UN specialized agency such as WIPO. In addition, there was also relatively little interest in the dynamics of the WTO/WIPO relationship in academic circles, which were mostly focused on the implementation of TRIPS and its impact on developing countries.³⁶

This perception of the relationship between WTO and WIPO, prevailing in many developing countries, did not correspond to the reality of a world where "after TRIPS both the WTO and WIPO are integral components of the new global IP regime."³⁷ It has been noted, in this regard, that "developed countries see the bi-polar structure of the international IP system embodied in WIPO and WTO treaties as forming a single system, each of the organizations providing them with the opportunity to achieve higher standards. Developing countries, however, while they have been strongly engaged at the WTO, which they consider alien to IP matters, have not been similarly active at WIPO."³⁸

In fact, there are important linkages between standard-setting in the two organizations.³⁹ At a substantive level, TRIPS incorporates by reference many provisions contained in legal instruments administered by WIPO. The fact that TRIPS is, by its very nature, a minimum standards agreement implies that WIPO's function to "harmonize" IP legislations between countries will most likely produce standards which go beyond the requirements of TRIPS. Furthermore, the agreement concluded

³⁶ It is interesting to note, for instance, that a Literature survey on IP rights and sustainable human development compiled, in February 2002, did not feature WIPO as one of the subject areas under which the references were arranged. See Dutfield (2002). For one of the few works on the linkage between the WTO and WIPO during this period, see Abbott, *supra*, note 19.

³⁷ Sell, *supra* note 9, p.184. Also see, Chapter 8 of the Commission on Intellectual Property Rights (IPR Commission) (2002), pp.155-166.

³⁸ Correa and Musungu (2002), p.21.

³⁹ Abbott, *supra*, note 19.

between the WTO and WIPO, in 1995, made WIPO a key actor in delivery of technical assistance to developing countries in relation to the implementation of TRIPS.⁴⁰

The misgivings of developing countries concerning the relationship between WTO and WIPO, explain, in part, the lack of coordination between their positions in the two organizations in past years. This has been particularly the case in relation to a number of norm-setting activities at WIPO, and in particular, the ongoing negotiations on substantive harmonization of patent law taking place in the context of the SCP.

Indeed, the negotiations on the draft Substantive Patent Law Treaty (SPLT) are a striking example of the inconsistencies of developing countries in relation to international IP standard-setting. Most developing countries were passive during the preliminary deliberations leading to the SPLT. At the fourth session of the SCP, in November 2000, when such deliberations took place more than seventy-five interventions were made of which only five were made by delegations from developing countries.⁴¹ This passivity continued after discussions on the first draft of the SPLT began, at the fifth session of the SCP, in May 2001, and this despite the “risks” that many of the provisions contained in the draft could potentially undermine the same public policy flexibilities in the TRIPS agreement that the overwhelming majority of developing countries were seeking to reaffirm, at the same time, in the context of the Doha Declaration on TRIPS and Public Health.⁴² It was not until the seventh session of the SCP, in May 2002, that a number of developing countries presented proposals for treaty language to be inserted in the draft SPLT reflecting public policy related concerns.⁴³ Gradually a growing number of developing countries became more engaged in these negotiations although the degree of involvement of developing countries remained considerably inferior to their participation in TRIPS related deliberations.

Since then, a number of developments have prompted developing countries to play a more active role in WIPO’s standard-setting process and to be more attentive to the coordination of their positions in WIPO and WTO. For instance, civil society and academia began to show a greater interest in WIPO’s approach to IP protection.⁴⁴ In addition, many developing countries started realizing that WIPO’s standard-setting process was, increasingly, feeding into bilateral and regional free trade agreements concluded by developed countries with them. These agreements, often, required developing countries to adhere to WIPO treaties, which they know little about and had rarely actively participated in their negotiation. In certain cases, free trade agreements which were being negotiated required adherence to treaties that were also still under negotiation in WIPO. This is the case, for example, of the Draft IP Chapter of the Free Trade Area of the Americas (FTAA) as “four future IP treaties that are being or may be negotiated under WIPO could be included in its scope.”⁴⁵

The launch by a group of developing countries of an initiative to establish a development agenda for WIPO at the 40th session of the WIPO Assemblies (20 September-5 October 2004),⁴⁶ which received wide spread support both from developing countries and civil society, reflected the aspiration of these countries to integrate the development dimension into all of WIPO’s areas of work, particularly by preserving public policy flexibilities in its standard-setting activities, thus ensuring a greater

⁴⁰ WTO –WIPO Cooperation Agreement, 1995 (available at www.wto.org/english/tratop_e/trips_e/wtowip_e.htm).

⁴¹ See WIPO-document SCP/4/6.

⁴² Correa and Musungu, *supra*, note 38.

⁴³ See WIPO-documents SCP/7/8, SCP/8/5 and SCP/8/8.

⁴⁴ For WIPO’s views on IP, see Idris (2002). For a critical perspective of WIPO’s orientations, see Musungu and Dutfield, *supra*, note 33.

⁴⁵ Three of these treaties are in the field of copyright and related rights and concern the protection of audio-visual performances, databases and broadcasting organizations. See Vivas (2003), p.16 and p.29.

⁴⁶ WIPO-document WO/GA/31/11 was tabled by the following co-sponsors: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela.

coherence between their positions at WIPO and the WTO.⁴⁷ The same group of countries which launched the initiative, presented, to the first session of the Inter-sessional Inter-governmental Meeting (IIM), held in April 2005, a submission which identified a number of principles and guidelines so as to ensure that “WIPO pursues 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 developing countries and of the international community.”⁴⁸

B. *Examples of inconsistencies in different fora dealing with IP issues*

The near exclusive focus by developing countries on TRIPS, in recent years, also helps to understand their lack of coordination in other international fora where IP issues are examined. In reality, there are many examples of inconsistencies in the positions of developing countries ranging from the anecdotal incidents to the more serious and flagrant policy contradictions. Some examples will be referred to here in order to further illustrate the need for coordination by developing countries in international IP standard-setting.

International deliberations on the relationship between IP, genetic resources and traditional knowledge provide a prominent example of the lack of coordination by developing countries in international IP standard-setting. In discussions on these issues at the CBD, the TRIPS Council, and WIPO, many developing countries have taken different positions with no other apparent justification than the lack of coordination between their respective delegations.

For instance, while many developing countries have repeatedly reaffirmed at the TRIPS Council the limited usefulness of contractual agreements and databases in combating the misappropriation of genetic resources and traditional knowledge, they have accepted that these issues become an important element in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at WIPO. Only at the Seventh session of the IGC, in November 2004, did developing countries strongly manifest their opposition towards future work on contractual agreements leading the Chair to conclude that there was no consensus on the future work of the Committee in this area.⁴⁹

Similarly, while a number of developing countries have presented important proposals concerning genetic resources and the protection of traditional knowledge at the WTO/TRIPS Council, some representatives of these same countries have affirmed, at different sessions of the IGC, that WIPO was “the appropriate forum” to effectively address these issues,⁵⁰ thus concurring with a view mainly promoted by developed countries.⁵¹ Indeed, a number of developed countries have used, in past years, the work of the IGC in order to undermine the proposals of developing countries to the TRIPS Council and to counter demands by developing countries that issues related to genetic resources and traditional

⁴⁷ For an account of developments relating to this initiative at the WIPO Assemblies, see Call for reform of IPR system intensifies, *Third World Economics*, issue no 339, 16-31 October 2004 and Sisule .Musungu “The WIPO Assemblies 2004: A Review of Outcomes”, *South Bulletin*, no.89, 15 October 2004.

⁴⁸ WIPO-document IIM/1/4, para.38.

⁴⁹ WIPO/GRTKF/IC/7/15 Prov. para.202. The Chairman, nevertheless, concluded that no decision should be taken on this matter at the seventh session and that it should be kept on the agenda of the eighth session of the Committee.

⁵⁰ See, for instance, the statement made by the Asian Group at the second session of the IGC, para. 14, document WIPO/GRTKF/IC/4/15.

⁵¹ For example, Switzerland presented its proposal on the declaration of source of genetic resources and traditional knowledge in patent applications at the Working Group on the Reform of the Patent Cooperation Treaty (PCT) at WIPO in May 2003. See document PCT/R/WG/4/13 and, with identical contents, PCT/R/WG/5/11/Rev. It presented two further submissions to the Working Group in May and October 2004 containing more detailed explanations of its proposals. See document PCT/R/WG/6/11.

knowledge be also addressed in the context of the work of the SCP.⁵² This attitude has been criticized by developing countries at the deliberations of the TRIPS council and at WIPO.⁵³ It is at the insistence of developing countries, that the IGC's renewed mandate, adopted by WIPO Assemblies at its 39th session, in 2003, made explicit reference to the fact that the work of the IGC be "without prejudice to the work pursued in other fora."⁵⁴

In the context of the CBD, the meeting of the Seventh Conference of the Parties of the CBD (COP-VII) issued, in February 2004, by consensus an invitation to WIPO to examine, and where appropriate, address the interrelation of access to genetic resources and disclosure requirements in IP rights applications, including options for model provisions on disclosure.⁵⁵ The issuance of this invitation was the result of efforts by a number of developed countries over past years, to assert, within the context of the CBD, the primacy of WIPO in addressing intellectual property matters in the relation to access to genetic resources and benefit sharing. The invitation to WIPO raised concern, not only, because the CBD was resorting to other organizations to examine matters essential to its implementation but because it could also have an adverse effect on efforts by developing countries to make progress on discussions relating to the protection of genetic resources and traditional knowledge in a simultaneous and coherent manner in all relevant fora.⁵⁶ In addition, WIPO's response could potentially undermine the proposals tabled by developing countries at the TRIPS Council on the introduction of a mandatory disclosure of origin requirement in the TRIPS agreement. It was, therefore, at the insistence of developing countries that an *ad hoc* mechanism was approved by the 40th session of the WIPO Assemblies (27 September- 5 October 2004) to deal with the CBD's invitation.⁵⁷ This mechanism should enable Member states of WIPO to give appropriate guidance to the Secretariat, in the preparation of the response, so as to ensure that it is without prejudice to their positions in other relevant fora.

Nevertheless, the question arises as to why did representatives of developing countries at the CBD acquiesce to the issuance of such invitation?⁵⁸ One reason lies in the fact that delegations from developing countries, often of a small size, are not able to engage in deliberations relating to different issues at the same time, as it is the case at the COP. Another reason lies in the fact that officials from the ministries of environment, which mostly represent developing countries at CBD meetings, are often not fully informed of their countries' own proposals on genetic resources and traditional knowledge in other fora such as the WTO/TRIPS Council.⁵⁹ They also seem not to be aware of the intrinsic differences between the work of the WTO/TRIPS Council and WIPO, particularly, in addressing IP issues related to genetic resources and traditional knowledge (for instance the fact that the TRIPS Council was instructed to do so by the Doha Ministerial Conference in accordance with article 7 and 8 of TRIPS and "taking fully into account the development dimension"⁶⁰). In any case, developing coun-

⁵² Such an approach is reflected, for example, in the statement adopted at the end of informal consultations in Casablanca, on February 16 2005, on the future work program of the SCP. See Annex of WIPO-document SCP/11/3.

⁵³ See for instance the submission of the African Group to the TRIPS Council contained in WTO-document IP/C/W/404.

⁵⁴ See WIPO-document WO/GA/30/8, para.93 (ii).

⁵⁵ See COP decision VII/19 on Access and Benefit-Sharing as related to Genetic Resources (Article 15), paragraphs 7 to 9, (available at www.biodiv.org/decisions/default.aspx?m=COP-07&id=7756&lg=0).

⁵⁶ South Centre and CIEL, *South Centre and CIEL IP Quarterly Update*, Second Quarter 2004, South Centre and CIEL, Geneva (2004), p.3.

⁵⁷ See WIPO-document WO/GA/31/15, para.119.

⁵⁸ At COP-7 a small number of developing countries did succeed in introducing a number of changes in the decision containing the invitation, particularly by ensuring that the invitation was addressed to WIPO, and not to any particular body of it, and by adding a reference to UNCTAD.

⁵⁹ For an account of COP7 deliberations, see Chee Yoke Ling, "COP7- some progress, but vigilance needed", *Third World Resurgence*, No163/164, pp.54-61. This comment is based on the author's participation in the Third Meeting of the Ad-hoc Open-ended Working Group on Access and Benefit Sharing of the CBD, which was held in Bangkok (14-18 February 2005).

⁶⁰ Doha Declaration, WTO, 2003, p.9

tries will be faced with the challenge, in upcoming CBD meetings, of ensuring that developments in the CBD are supportive of their proposals at the WTO/TRIPS Council.⁶¹

In contrast to the lack of coordination by developing countries, developed countries tend to approach discussions relating to IP, genetic resources and traditional knowledge in a coordinated and coherent manner in all of the fora where they are discussed. This is the case of Switzerland, for example, which has submitted proposals regarding the declaration of source of genetic resources and traditional knowledge in patent applications to the Working Group on the Reform of the PCT so as to enable “the contracting parties of relevant international agreements, including the TRIPS Agreement, the PCT, the PLT, the CBD and the FAO-IT to fulfil their respective obligations.”⁶² Because it considers these proposals to address an issue raised in different fora, it has submitted them not only to the Working Group on the reform of the PCT but also to the WTO/TRIPS Council⁶³, the IGC⁶⁴ and the Third Session of the Ad Hoc Open-Working Group on Access and Benefit Sharing of the CBD.⁶⁵

There are many other areas of IP standard-setting where there are inconsistencies in the outcomes reached as a result of the lack of coordination by developing countries. For instance, developing countries were able to reach formulations on IP in the Declaration of Principles adopted by the First phase of the WSIS, held in Geneva in December 2003, which reflected to a certain extent their viewpoint on the role of both IP protection and the wide dissemination, diffusion, and sharing of knowledge in encouraging innovation and creativity in the information society. However, the 32nd session of General Conference of UNESCO had adopted a few weeks earlier, in October 2003, a Recommendation on the promotion and use of multilingualism and universal access to cyberspace⁶⁶ which contained wording on IP that was subsequently rejected by developing countries in the course of the WSIS negotiations on the Declaration of Principles (particularly wording in relation to the fact that international copyright and related rights conventions embodied a fair balance between the interests of authors, copyright and related rights, and of the public).⁶⁷ In this connection, developing countries should closely follow the current negotiations at UNESCO on a draft instrument on the protection of the diversity of cultural expressions as the composite text, currently discussed by the meetings of Governmental Experts, includes several provisions in draft treaty language relating directly to IP protec-

⁶¹ This will not be an easy task as shown by the deliberations of the Third Meeting of the Ad-hoc Open-ended Working Group on Access and Benefit Sharing of the CBD (14-18 February 2005). During discussions on the recommendation on measures to support compliance with prior informed consent and mutually agreed terms, Brazil and the African Group called for future meetings of the working group to consider relevant proposals on these issues, in the Council of TRIPS particularly since the Council included an agenda item on the relationship between TRIPS and CBD. This was opposed by developed countries. It was eventually agreed that the Executive Secretary of the CBD would “compile pertinent documentation circulated in other relevant forums, in particular recent proposals submitted by parties to the CBD, in the following international organizations listed in alphabetical order: the FAO, UNCTAD, UNEP, the UPOV Convention, WIPO, and the WTO Council for TRIPS.” (Recommendation 3/4, para.7, document UNEP/CBD/WG-ABS/3/7, available at www.biodiv.org/doc/meetings/abs/abswg-03/information/abswg-03-inf-07-3en.pdf).

⁶² Felix Addor, “*Incorporating the CBD principles in the TRIPS Agreement on the Road to Hong Kong*,” ICTSD/CIEL/IDDRI/IUCN/QUNO Dialogue on Disclosure Requirements, the WTO Symposium, April 2005.

⁶³ WTO-document IP/C/W/400/Rev.1, IP/C/W/423 and IP/C/W/433.

⁶⁴ WIPO/GRTKF/IC/7/INF/5.

⁶⁵ UNEP/CBD/WG-ABS/3/INF7 (available at www.biodiv.org/doc/meetings/abs/abswg-03/information/abswg-03-inf-07-3en.pdf).

⁶⁶ available at <http://www.portal.unesco.org/ci/ev/>.

⁶⁷ Paragraph 23 of the Recommendation stipulated that “Member States should undertake in close cooperation with all interested parties the updating of national copyright legislation and its adaptation to cyberspace taking full account of the fair balance between the interests of authors, copyright and related rights, and of the public embodied in international copyright and related rights conventions.”

tion.⁶⁸ Some of these provisions could entail obligations for developing countries in the field of IP which go beyond those contained in TRIPS.⁶⁹

In the field of enforcement of IP rights, developing countries were able to successfully counter attempts to establish new standards at the multilateral level, particularly in the context of the establishment of WIPO's Advisory Committee on Enforcement (ACE), as they insisted, at its creation that its mandate specifically excluded norm-setting.⁷⁰ Nevertheless, this has not been the case in other important organizations of a more technical nature dealing with enforcement of IP rights. For instance, the World Customs Organization (WCO) has adopted model provisions on border enforcement measures of a clearly TRIPS-plus⁷¹ nature, which were developed in partnership with the private sector and are based on best practices around the world.⁷² This is acknowledged by the Secretariat of the WCO, which underlines that "the document is not binding for members and goes beyond the minimum standards of TRIPS."⁷³ Yet, it is also clear that these model provisions are promoted to member states, including developing countries, which are introducing border measures for the first time or are considering legislative reviews of existing ones. Similarly, very few developing countries are actively involved in the negotiations at the Hague Conference on Private International Law on the mutual recognition of judicial decisions despite the fact that IP is one of the controversial issues addressed in these negotiations and that their outcome could have an important impact on the global enforcement of IP rights.

Further, while the importance of the flexibilities available to developing countries to protect public health under existing global IP rules were highlighted, some regional organizations of developing countries dealing with IP enacted rules, in the field of patents, that went beyond the requirements of TRIPS.⁷⁴

Despite these examples, there are some signs that developing countries are starting to grasp the complex dynamics relating to global IP governance beyond their initial focus on TRIPS. For example, the increasing involvement of a number of developing countries in WIPO's standard-setting activities is, in part, stemming from a realization that many of the agreements concluded, in the context of WIPO, will be incorporated in regional and bilateral free trade agreements. Nevertheless, the problem remains, of a generalized lack of coordination by developing countries in international IP standard-setting.

As it has been shown in this section, the growing complexity of global governance in IP and the fragmented nature of policy making on IP in many developing countries contribute to a lack of coordination by these countries in international IP standard-setting, thus resulting in inconsistencies in their positions in the different international fora where IP related discussions take place. This situation is detrimental to the interests of developing countries. Developing countries, should address it, by improving their internal coordination as well as enhancing coordination between them, as it will be examined, respectively, in sections II and III.

⁶⁸ In particular Article 7 on the obligations of states under the convention and Article 19 on the relationship to other instruments. CLT/CPD/2005/CONF.203/6- respectively p.26 and p.36.

⁶⁹ This is in particular the case of new paragraph 3 in Article 7 (2) according to which "{State Parties} shall ensure {IP rights} are {fully respected and enforced} according to existing international instruments to which they are parties, particularly through the development {or strengthening} of measures against piracy".

⁷⁰ WIPO/GA/28/7 paragraphs 114 (ii) and 120.

⁷¹ See www.wcoipr.org/gfx/ModelLawFinal.doc.

⁷² Address by Kunio Mikurya, Deputy Secretary General of the WCO to the World Economic Forum Session on Fighting Counterfeits, Davos, 28 January 2005.

⁷³ *Supra*, note 71.

⁷⁴ See Rosine Jourdain, "Les droits de la propriété intellectuelle et la santé publique dans l'Accord de Bangui révisé : défis majeurs en santé publique pour les pays africains", in Ricardo Melendez Ortiz, Christophe Bellmann, Anne Chetaille, Taoufik Ben Abdallah (ed.), *Commerce, développement durable et Propriété Intellectuelle vis de l'Afrique*, ICTSD, Enda, Solagral, 2002.

III. IMPROVING DEVELOPING COUNTRY COORDINATION AT THE NATIONAL LEVEL IN RELATION TO INTERNATIONAL IP STANDARD-SETTING

III.1 The Search for Internal Coordination and Policy Coherence

The lack of coordination by developing countries in international IP standard-setting is a more general reflection of the lack of coordination between different government departments and agencies of developing countries in policy making on IP. This as an important obstacle in the pursuit by developing countries of more development-oriented IP policies at both the national and international level. Coordination appears as *a sine qua non* condition in this regard. As noted by the Commission on Intellectual Property Rights: “The ability of developing countries to co-ordinate policy across government in undertaking IP-related reforms is ...crucial.”⁷⁵

The case for integrated policy making in IP for developing countries has been persuasively made and will not be repeated here.⁷⁶ Ideally, “formulation of IP policy in a developing country would be based on a sound appreciation of how the IP system might be best used to promote development objectives, derived from an analysis of the country’s industrial structure, modes of agricultural production, and healthcare and education needs.”⁷⁷

That said, it is interesting to note that few studies have been undertaken on policy making in relation to IP in developing countries, particularly in relation to institutional arrangements and decision-making processes.⁷⁸ This is an important gap in the literature, given that the implementation of TRIPS resulted in a significant number of legislative and institutional changes in developing countries as it brought about a need for coordination between government departments and agencies dealing with IP rights (such as patents, copyright and trademarks) which often came under the jurisdiction of different government agencies and were regulated by different legislations. Furthermore, the impact of TRIPS on many important public policy areas, such as public health and bio-diversity, led a number of countries to engage in a wider consultation process in relation to the implementation of the agreement, often involving different government departments and agencies. Nevertheless, efforts of developing countries, in this regard, have been mostly on an *ad hoc* basis, lacking an appropriate degree of institutionalization and with limited effectiveness. They have also often been caught up in bureaucratic infighting as many government department and agencies are reluctant to dilute the exercise of their responsibilities by coordination with other departments and agencies.

While some information concerning institutional arrangements and decision making process, can be derived from studies available on the implementation of TRIPS by developing countries, particularly in areas such as public health and bio-diversity, in depth analytical research and specific case studies are lacking. Addressing this gap would significantly assist developing countries in learning from each others’ experiences, particularly concerning coordination between different governments departments and agencies dealing directly or indirectly with IP matters.

⁷⁵ Report of the Commission on Intellectual Property Rights, *supra* note 37, p.138.

⁷⁶ Carlos Correa, “Formulating Effective Pro-development National Intellectual Property Policies”, in *Trading in Knowledge, Development Perspectives on TRIPS, Trade and Sustainability*. Earthscan, 2003.

⁷⁷ *Supra*, note 37, p.138.

⁷⁸ One exception, in this regard, is an interesting study dealing, with policy making in relation to genetic resources which addresses, in part, IP issues: see Petit *et al.* *supra* note 29.

Coordination across government must be accompanied by efforts to ensure policy coherence. While the establishment of an inter-governmental coordination mechanism would certainly enhance the coordination between different government department and agencies in IP international standard-setting, it would not necessarily be conducive to more policy coherence if there are deep entrenched policy disagreements between the government departments and agencies involved. It is well known for instance, that there are, within some of the countries of the group of the Like-Minded Megadiverse countries in the context of the CBD, deep disagreements between environmental ministries in charge of bio-diversity issues and IP offices in charge of patents in addressing the relationship between IP rights and access to genetic resources, particularly regarding introducing a mandatory disclosure of origin obligation in IPR applications. This is reflected in the fact that these countries do not have a common position in discussions on this matter in fora, such as WTO and WIPO.⁷⁹ This is a problem of policy coherence, not of government coordination. It can only be addressed in the context of the wider formulation of national policies dealing with these issues.

It is also important to stress that IP is not the only regulatory area of a cross-cutting nature where developing countries face challenges relating to inter-governmental coordination and participation at the international level. This is also the case in others areas such as the environment, information and communication technologies and trade. The strengthening of developing country participation in international decision making in these fields, and particularly through the improvement of inter-governmental coordination, has been the subject of much attention. Efforts made in these areas could provide a useful point of reference for developing countries wishing to improve their government coordination on IP issues given the similarities of the problems experienced (fragmentation of decision making, lack of coordination, weak participation in international standard-setting etc...)⁸⁰

III.2 Examples of National Coordination in Relation to International IP Standard-setting

Ambitious proposals have been made on how to improve IP policy making in developing countries, particularly in the context of the wider innovation policies.⁸¹ To complement these proposals, the following section aims simply to highlight some examples of developing countries, particularly those of India and Brazil, which could be useful to other developing countries in their search for enhancing coordination and coherence in the formulation of their IP policies. The policy coherence approach of the Netherlands also offers an interesting approach to the matter by a developed country.

⁷⁹ This is the case of countries such as Malaysia, Mexico and the Philippines which while being supportive of mandatory disclosure as element of an of the international regime on access and benefit sharing to be developed in the context of the CBD (New Delhi Declaration of Like-Minded Megadiverse Countries, 21st of January 2005) do not co-sponsor submissions on the relationship between TRIPS and CBD at the TRIPS Council suggesting to introduce a mandatory disclosure requirement in the TRIPS agreement.

⁸⁰ See for example: *Strengthening Developing Country Participation in International ICT decision making*, study for DFID by the Commonwealth Telecommunications Organization (CTO) and Panos London, 2002; *Integrating Environmental Considerations into Economic Policy Making Processes*, UNESCAP www.unescap.org/drrpad/vc/orientation/M2_intro_national.htm; Tom Pengelly and Victoria Waite, *Improving Trade Policy Coordination and Dialogue in Developing Countries, A Resource Guide*, Research Report submitted to USAID/Washington by Nathan Associates, December 2003.

⁸¹ For instance, Reichmann's proposal on the establishment of a high level Permanent Advisory Council on Trade-Related Innovation Policies (ACTRIPS) which would become the focal point for inter-agency policy making about the integration into domestic law of existing and evolving legal standards affecting innovation. See, Jerome Reichman, *Managing the Challenges of a Globalized IP Regime*, a paper presented to the Second Bellagio Series of Dialogues 18 to 21 September 2003, Bellagio, organized by UNCTAD/ICTSD (available at http://ipronline.org/unctadisctsd/bellagio/dialogue2003/bell_2_docs.htm).

A. *India and coordination in relation to TRIPS*

India's experience in relation to its implementation of TRIPS and the articulation of its positions on TRIPS related matters at the WTO is particularly interesting given that it was one of the active developing countries involved in the negotiations leading to the conclusion of the TRIPS agreement.

Starting in 1996/1997 the Indian Ministry of Commerce, which has overall responsibility for TRIPS, initiated a wide consultation process on WTO issues, including TRIPS. These consultations included industry and trade organizations, NGOs, research and academic institutions, political parties and parliament. Consultations with NGOs and civil society were particularly important in the process of designing India's Plant Variety Protection and Farmers' Rights Act.

Institutionalised expert level consultations were put in place. In January 1999, the Commerce Minister constituted an Advisory Committee on International Trade under his own chairmanship whose membership comprised industrialists, economists, NGO representatives, experts from research institutions and former public servants with an expertise in WTO matters. A sub-group was formed by this committee to specifically address TRIPS matters and to consider specific issues and proposals for formulating India's positions in the WTO.

Furthermore, at a government level, an inter-ministerial coordination mechanism, involving all relevant ministries and departments, was created for WTO matters. At the level of experts, this coordination mechanism took the form, starting 1997, of Consultation Groups. A separate consultation group was established on TRIPS and environment. Industry associations were associated in these Consultation Groups whose deliberations occurred on a permanent basis through inter-ministerial meetings where specific issues were discussed and decisions taken regarding proposals to be made in the WTO. At a higher level of government, under instructions of the Prime Minister, a Coordinating Group of Secretaries on WTO matters was established and chaired by the Commerce Secretary. This Coordinating Group was mandated to consider all WTO issues including those relating to TRIPS. The Coordinating Group examined and approved proposals made by India at the WTO on TRIPS related matters (for instance the review of Article 27.3 (b) and the relationship between TRIPS and CBD).

This process of consultation and coordination has contributed towards ensuring an overall coherence in India's approach to TRIPS both in terms of its national implementation and its participation in international standard-setting at the TRIPS Council. However, it is to be noted that this coordination process does not extend to IP developments outside the WTO, such as those in WIPO, a matter worthwhile noting given the growing attention given to standard-setting in WIPO.

B. *Brazil and integrated IP policy making*

Brazil has been one of the developing countries closely involved in international IP standard-setting.⁸² As India, it has pursued IP policies in an integrated and cohesive manner as a part of its overall policy of technological and industrial development.

One feature of Brazil's policy making on IP which deserves close attention is its Inter-ministerial Group on IP (IGIP). This inter-ministerial group was formally established, in its current form, by a presidential Decree of 21 August 2001. Its membership includes all relevant ministries and

⁸² This has been particularly the case in the field of patents. In fact, it was as a result of a Brazilian initiative, that the General Assembly of the United Nations adopted, in 1962, its first resolution concerning patents and developing countries, triggering the international debate on this issue, A.Res.1713 (XVI) January 8, 1962. For an interesting account of this Brazilian initiative, see Ulf Anderfelt, *International Patent-Legislation and developing countries*, Unpublished Doctoral Thesis, No 204, HEI, 1971, pp.172-198

agencies.⁸³ According to this decree, the Committee was created, with the objective of “proposing governmental action to conciliate domestic and foreign policies regarding the foreign trade of IP-related goods and services.”⁸⁴ Several specific tasks are assigned to the Committee, in the context of this mandate, among which are “to give advice on pending legislation on IP matters, to give guidance for multilateral and bilateral negotiations regarding IP and to promote inter-ministerial co-ordination concerning the matters that are treated by the Committee.”⁸⁵

Box2

**Text of the Brazilian Decree creating the inter-ministerial committee on IP issues
(Unofficial Translation)**

DECREE OF 21 AUGUST 2001

Creates, in the framework of CAMEX – the Chamber of Foreign Trade – the Inter-Ministerial Group on IP (GIPI), lays down the rules of its composition and functioning, and states other rules.

THE PRESIDENT OF THE REPUBLIC, in exercise of the authority vested in him by Article 84, sections IV and VI of the Constitution,

DECREES:

Art.1° – In the framework of CAMEX – the Chamber of Foreign Trade – the Inter-Ministerial Group on IP (GIPI) is created, with the objective of proposing governmental action to conciliate domestic and foreign policies regarding the foreign trade of IP-related goods and services, and in particular:

- I – To provide inputs for the definition of guidelines of the policy on IP;
- II – To propose a coordinated plan of action by the responsible organs for the implementation of this policy;
- III – To give advice on pending legislation on IP-related subjects;
- IV – To indicate the technical parameters for bilateral and multilateral negotiations regarding IP;
- V – To provide inputs regarding IP for the formulation and implementation of other governmental policies;
- VI – To promote inter-ministerial co-ordination regarding the matters that will be treated by the GIPI;
- VII – To undertake consultations with the private sector in matters regarding IP;
- VIII – To compile information about, and to report on, matters regarding IP.

Art. 2° – The GIPI will be chaired by the Executive Secretary of the CAMEX and will be composed of representatives of the following organs of the Federal Public Administration:

- I – Ministry of Agriculture and Supply;
- II – Ministry of Science and Technology;
- III – Ministry of Culture;
- IV – Ministry of Development, Industry and Foreign Trade;
- V – Ministry of Justice;
- VI – Ministry of Foreign Affairs;
- VII – Ministry of Health.

§ 1° – The National Institute of IP will be always heard on matters within its sphere of competence.

§ 2° – Representatives of other organs of the Public Administration and people with expert knowledge may be invited to participate in the GIPI meetings.

Art. 3° – The GIPI will deliberate in plenary meetings, or, where necessary, within specialized sub-groups.

Art. 4° – The GIPI will have as its Executive Secretariat the Secretariat of the Industrial Technology of the Ministry of Development, Industry and Foreign Trade, which will appoint the Executive Secretary.

Art. 5° – The formulation and implementation, by the organs of the Public Administration, of legal norms and international obligations regarding IP must be evaluated by the GIPI, which will inform meetings of the CAMEX of its conclusions.

Art. 6° – This Decree enters into force on the day of its publication.

Brasília, 21 August 2001; 180th year of independence and 113th year of the Republic.

FERNANDO HENRIQUE CARDOSO
Benjamin Benzaquen Siosú

NOTICE: This text does not substitute the official text published in the Official Journal of the Union, nº 161-E of 22 August 2001, section 1, page 1.

⁸³ These are the Ministries of Agriculture and Supply; Science and Technology; Culture; Development, Industry and Foreign Trade; Justice; Foreign Affairs; Health; the National Institute for IP. According to the Decree, representatives of others organs of the Public Administration and persons with expert knowledge may be invited to participate in the IGIP meetings.

⁸⁴ Article 1, Decree of 21 August, 2001.

⁸⁵ Article1, (III, IV, VI), Decree of 21 August, 2001.

The Committee reflects the high degree of institutionalization characterizing Brazil's inter-ministerial coordination on IP issues. As in the case of India, integrated policies on IP at the national level are closely intertwined with effective participation in international IP standard-setting. They are two sides of the same coin. An important merit of the Committee lies in the fact that it addresses all IP developments at the multilateral level, regardless of the fora where they are raised, thus not limiting its scope to TRIPS related issues at the WTO, and enabling it to effectively address the proliferation of venues and processes involved in IP standard-setting. Furthermore, the membership of the Committee, and the tasks assigned to it, makes it possible for all relevant government departments and agencies to contribute to decision making on IP matters, and does not leave it to the exclusive competence of specialized IP offices, as it is the case in most developing countries.

Another interesting feature in Brazil's integrated model of IP policy making relates to the role of the Ministry of Foreign Affairs. By virtue of the Brazilian Constitution and tradition, the Ministry of Foreign Affairs has the monopoly of representation and negotiation in international fora. This has enabled the Ministry to acquire over time an important role in the articulation of Brazilian positions in economic and trade related fora such as WTO and WIPO or in other fora where IP and trade related issues are addressed such as the CBD. It is significant to note, in this regard, that Brazil is only one out of two developing countries, which have made the Ministry of Foreign Affairs the focal point under Article 69 of the TRIPS agreement.⁸⁶ Brazil is also among the few developing countries that have made the Ministry of Foreign Affairs the Primary National Focal Point under the CBD.⁸⁷ The establishment, in 2001, by the Ministry of Foreign Affairs of an independent unit to follow IP related matters and to contribute towards a more coherent and coordinated approach to these issues by Brazil at the multilateral, regional and bilateral level, is a further reflection of the role played by the Ministry in Brazil's participation in international IP standard-setting.

This feature of Brazil's policy making process is striking given that in most developing countries, ministries of foreign affairs do not usually play a significant role, on a substantive level, in articulating national positions in international IP standard-setting or in ensuring their overall coherence. This often stems from a perception that IP issues are of a purely "technical nature" and are of the sole competence of specialized government departments.

Thus, ministries of foreign affairs often tend to confine themselves to a purely procedural role of "liaison" between the international fora and the relevant specialized government departments. However, the proliferation of international fora and processes engaged in international IP standard-setting, as well as the increasing awareness concerning the cross-cutting impact of such standards, places ministries of foreign affairs in a privileged position to play an important role in the coordination of the positions of the different specialized government departments concerned and to ensure the coherence of these positions with the country's overall developmental objectives.⁸⁸ Ministries of foreign affairs can represent a useful neutral intermediary between the potentially conflicting views of different government departments regarding international IP issues, particularly taking into consideration that they do not have any direct stake in them. In this regard, procedures concerning adherence to new international legal instruments can provide a vehicle for ministries of foreign affairs to play a more active role in relation to their countries' position in international IP standard-setting given that in most countries, these procedures involve some formal approval by the ministry of foreign affairs. In technical regulatory areas, such as IP, their involvement tends to be a purely formal one. However, this doesn't need to be necessarily the case and ministries of foreign affairs can raise the rationale for adhering to a new instrument on IP protection, and can contribute to ensuring that full use is made of the flexibilities available to the country when adhering to the new instrument in question (those can be contained, for

⁸⁶ See WTO-document IP/N/3/Rev.8. The other country to have done so is Jamaica.

⁸⁷ See Brazil under National Focal Points at www.biodiv.org/world/map.asp

⁸⁸ For an interesting account of the coordination role of foreign ministries in adapting to the challenges of globalization, see Hocking (ed.) (1999)

instance, in the reservation clauses of a treaty) or that adherence is consistent with the country's other international obligations.⁸⁹

In recent decades, the scope of activities of ministries of foreign affairs in developing countries has expanded to include many issues, that were once perceived to be of a technical nature, but which have gone to acquire a more global dimension such as environmental issues. This is certainly the case of IP nowadays and has been duly noted by some developing countries. Indeed, at the 40th Session of the WIPO Assemblies (27 September- 5 October 2004), the delegation of Chile announced the creation of a unit at the Ministry of Foreign Affairs specialized in IP matters.⁹⁰ It is also important to observe, that in some developed countries, ministries of foreign affairs play an active role in promoting their countries interests in international IP issues.⁹¹

C. *The Netherlands and policy coherence for development*

The Netherlands is a developed country, which has made sustained efforts to integrate development considerations into its economic and trade policies in the context of what it refers to as "policy coherence for development."⁹² This policy, which was endorsed by the Dutch Cabinet, "implies that governments must always examine how decisions in other areas relate to goals and efforts in development cooperation and that policy areas should reinforce one another."⁹³ The Ministry of Foreign Affairs increased its capacity to deal with coherence issues by establishing a Policy Coherence Unit in 2002. The task of the Unit is to ensure that the development dimension and the interests of developing countries are taken into account in the formulation of the Netherlands's positions in areas, such as trade, both at the European and international level, particularly through awareness raising and coordination with all relevant government departments and administrations. The Unit has played a role in coordinating the positions of the Netherlands's government departments and agencies during the negotiations on paragraph 6 of the Doha Declaration on TRIPS and Public Health, both at the national level and at the EU level. It is worthwhile noting that the Netherlands ranked first in the 2004 Commitment to Development Index.⁹⁴

D. *Lessons learned*

All of the three examples mentioned above reflect distinct efforts to establish effective coordination mechanisms across government departments and agencies involved in policy making in relation to IP. They also reflect the importance of providing coordination across government with a solid institutional basis at the inter-ministerial level. Institutionalising the policy making process on IP, particularly in relation to inter-agency coordination, is an essential aspect of enhancing its effectiveness and inclusiveness in developing countries.

However, the effectiveness of such coordination, in developing countries, is often limited by the fact that "developing national policy positions is a knowledge-intensive procedure, demanding long-term monitoring... and this is a knowledge at best concentrated among a small number of individuals. Few mechanisms seem to be available at the national level to ensure long-term institutional memory regarding policy evolution and feedback to the national level from results in different international

⁸⁹ This is the case in Mexico, for example, See "Mexico: Change and adaptation in the Ministry of Foreign Affairs," in Hocking (ed), *supra*, note 88, p.145.

⁹⁰ Para. 71 in [WIPO-document A/40/7](#).

⁹¹ This is particularly the case in the United States where the Intellectual Property and Competition Policy Division within the Bureau of Economic and Business Affairs of the State Department develops policies to promote effective IP rights protection worldwide in close cooperation with other U.S agencies and the private sector.

⁹² See <http://www.minbuza.nl/default.asp>.

⁹³ *Ibid*.

⁹⁴ available at <http://www.cgdev.org/rankingtherich> .

fora.”⁹⁵ To compensate for this, government departments in developing countries, involved in such coordination, need to devote special attention to institutional capacity building and human resource development in addition to identifying, on a long term basis, goals pursued particularly in relation to IP rule-making.

Despite the difficulties encountered, the need for establishing effective inter-governmental coordination mechanisms in developing countries in relation to IP is not a luxury measure for larger developing countries. It is an urgent need for all developing countries, particularly, for example, in dealing with issues such as genetic resources and traditional knowledge. As has been noted, for instance, in relation to African countries:

[f]or African countries to effectively participate and advance their interests at international negotiations, discussions among all relevant ministries and departments,... are essential in order to develop mutually acceptable positions regardless whether it is in the CBD, WIPO, WTO or FAO. Through this coordination, African Countries will be better able to understand the linkages among, and implications of, the various international processes.⁹⁶

In this connection, it is also important to underline that the existence of a inter-governmental coordination mechanism is not an end in itself but should be a means to the pursuit by developing countries of more integrated pro-development IP policies, at the international level, that are supportive of important public policy objectives. It provides a channel for government departments in developing countries most affected by global IP rules, such as health and environment, to influence how these rules are implemented nationally and how their country articulates its positions concerning them at the international level. However, the mere existence of such inter-governmental coordination does not in itself guarantee that a particular country will pursue more development-oriented IP policies. The pursuit of such policies is contingent on many others factors such as political will and the general outlook of trade and economic policies. Brazil is a case in point. While its policy concerning the use of flexibilities in TRIPS agreements to protect public health, was a policy decision at the highest level of government, this policy was sustained in its concrete implementation and follow up in the relevant international fora (such as WTO, WHO etc) by a an appropriate institutional structure of coordination and effective participation in international deliberations.

Ultimately, there is no “one size fits all” approach in relation to enhancing coordination across government in the formulation of national IP policies or in the participation in international IP policy making. Each country has to define the institutional arrangements and decision-making processes, which are most suitable to its needs, administrative practices and bureaucratic set up.

III.3 The Role of IP Administrations in Developing Countries

The need for more effective inter-governmental coordination mechanisms in developing countries is heightened by the inherent limitations bearing on IP offices from developing countries which have hitherto dominated policy making.

The work of IP offices in developing countries is mainly focused on technical matters concerning the administration of patents and trademarks registration systems or copyright related issues. Unlike IP offices in developed countries, most offices in developing countries do not possess sufficient material resources or human resources with the necessary analytical skills and expertise to follow

⁹⁵ See, *supra*, note 29, p.45.

⁹⁶ Nnadozie *et al* (ed.) (2003), p.56.

closely the dynamics at work in international IP standard-setting or to grasp the complex policy issues arising in its context.

In addition, most IP administrations in developing countries are heavily dependent on external technical assistance. This technical assistance has been criticized for its tendency to promote a narrow vision of IP protection that reflects more the perspective of IP right holders than the larger public interest.⁹⁷

As a result of the two factors mentioned above, representatives from IP administrations from developing property countries have a tendency either to be passive in international norm-setting discussions or to focus on the technical aspects of the issues under examination regardless of their wider development and public policy implications.

Reflecting on the weakness of developing countries participation in WIPO's standard-setting activities, it has been observed that:

This has much to do with the fact that developing countries send representatives from IP offices who, while having a technical knowledge of patent and trademark administration, have no knowledge of IP as a tool for regulatory and development policy.⁹⁸

However, limited resources and dependency on foreign technical assistance are not alone sufficient factors to explain the positions taken by representatives of IP offices from developing countries in international fora. Strong intellectual and professional affinities exist between representatives of IP offices, whether from developed or developing countries, as a result of their adherence to the same community or functional trans-governmental network i.e. the "IP community". Being part of this "IP community" appears to transcend differences in the levels of development and national interests. However, the current functioning of this community, is, in general, to the detriment of developing countries, as it is structured by the hegemonic discourse on IP produced by IP offices in developed countries; a discourse that promotes the absolute benefits of IP without acknowledging its potential costs, in particular for developing countries.⁹⁹ This "IP community" deserves to be thoroughly studied in its own terms (recruitment, value system etc) as it is often perceived as being isolated from wider public policy concerns.¹⁰⁰ This type of criticism is often made towards transgovernmental networks. From this perspective, the functioning of the "IP community" raises wider questions about the role of such networks in the regulation of international trade and economic relations in the era of globalization.¹⁰¹

One should, however, be careful with sweeping generalizations, as the phenomenon described above tends to vary according to countries, the issues under examination and the official representing the IP office. It appears, for instance, that some representatives from IP offices from developing countries have developed more critical opinions, in relation to the discourse referred to above, in areas such as the relationship between IP and genetic resources and traditional knowledge, particularly given the public outcry in many developing countries concerning the misappropriation of genetic resources and traditional knowledge. It is also worth noting, for example, that it is a representative from a national IP

⁹⁷ Commission on Intellectual Property Rights *supra*, note 37, pp.160-161.

⁹⁸ Drahos, *supra*, note 1, p.785.

⁹⁹ For an interesting account about how discourses provide parameters within which people act and shape the way actors influence the world around them, see Keeley and Scoones (2000).

¹⁰⁰ Drahos, *supra*, note 1, p.786. Drahos suggests that NGOs should devote more attention to influencing this policy community ("the time has come for some NGOs to shift from the romance of campaigns to the dullness of occupying seats on the many committees that work on international standards, including IP").

¹⁰¹ For two differing view-points in this debate, see Philip Alston, "the Myopia of the Handmaidens: International Lawyers and Globalization", *EJIL* (1997) pp.435-448 and Anne-Marie Slaughter, "Governing the Global Economy through Government Networks", pp.177-205 in Byers. M (ed). *The Role of Law in International Politics. Essays in International Law and International Relations*, Oxford University Press, 2000.

administration from a developing country, Chile, who introduced a proposal to the SCCR at WIPO for the harmonization, at the international level, of limitations and exceptions to copyright, such as for public libraries, handicapped people and distance education. This proposal was widely welcomed and supported by many developing countries.¹⁰²

Furthermore, there have been interesting attempts, in some developing countries, to establish IP offices that do not focus narrowly on the administration of IP rights and are embedded in the wider economic and social policies. Indecopi, Peru's National Institute for the Defence of Competition and Protection of Intellectual Property is a prime example of such efforts. Established by decree law 25868 of 1992, Indecopi opened in March 1993. The originality of Indecopi resides in the fact that its mandate includes not just the protection of IP but also several other important related key policy areas, such as the promotion of competition and the protection of consumers. Thus Indecopi views its role as "as one of market promotion, a more comprehensive concept than market regulation or enforcement."¹⁰³ Indecopi consolidates within a single institution areas that in many countries are dealt with by different government branches and agencies, thus promoting a "common direction, a consistent approach" geared towards facilitating market competition. Protecting intellectual protection while maintaining a healthy competitive environment makes the originality of Indecopi's institutional set up and should, in theory, foster a greater coherence between IP policies and policies relating to the promotion of competition which can provide important checks to the abuses of IP rights.

Indecopi has been hailed by some as "a model for Peru and much of the world."¹⁰⁴ Nevertheless, as noted in the context of coordination, institutional arrangements, whatever their merits, are not by themselves sufficient to the pursuit of more pro-development IP policies. For instance, a commentator, highlighting Indecopi's achievements in its first years of existence praised it for "creating a robust IP culture among which successes was that it made Peru the only country to have signed all international IP conventions."¹⁰⁵ This is not necessarily an indicator of pro-development oriented IP policies.

The conclusion to draw from the inherent limitations bearing on the role of IP offices from developing countries is that, while their technical input is useful and important, they should not be left with the sole overall responsibility for articulating the positions of developing countries or defining their interests in international IP standard-setting.

Coordinated participation by developing countries should come as early as possible in the standard-setting process, particularly at WIPO, when specific proposals for decisions or draft legal instruments are put forward. At later stages of discussions or at the decision-making stage, for instance in the context of a Diplomatic Conference, it may be too late for developing countries to affect the outcome significantly.

Given that international IP rule-making affects key public policy areas in developing countries relating to the protection of public health, the environment, agriculture, and education, developing countries should also envisage broadening their representation at the WTO and WIPO so as to include representatives from government departments and agencies dealing with these areas.¹⁰⁶ The only developing country to have done so at WIPO is Brazil, which included a representative from its Ministry of Health in its delegation to the 10th session of the SCP in May 2004.¹⁰⁷ Officials from the Brazilian Ministry of Health have also been active in deliberations relating to IP matters at the WHO. It is also worth recalling that the Brazilian Minister of Health participated in the 4th Ministerial Conference of

¹⁰² The Chilean proposal was presented at the 12th Session of the SCCR and is available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_12/sccr_12_3.doc.

¹⁰³ Boza (ed) (1998), p.24.

¹⁰⁴ George Wachtenheim, "Who needs institutions?", in Boza (ed.) *ibid*, p.85.

¹⁰⁵ J.Welby Leaman, "Coke bottles, candy bars and combis: building an institution", in Boza, *supra* note 103, p.124 and p.130.

¹⁰⁶ This has also been suggested by Drahos, *supra*, note 1, p.786.

¹⁰⁷ See list of participants in the Report of the Session, WIPO-document SCP/10/11.

the WTO in 2001 at which the Doha Declaration on TRIPS and Public Health was adopted. This was the first time that a health minister from a developing country had participated in a trade negotiation.¹⁰⁸

III.4 The Role of Permanent Missions of Developing Countries in Geneva

In recent years, permanent missions of developing countries in Geneva have become more involved in international IP policy-making.¹⁰⁹ They are well positioned to ensure a greater coordination in the positions adopted by developing countries as they are entrusted with representing the interests of all government departments and agencies in international deliberations and are often, accredited to several of the international organizations where international IP discussions take place. For many developing countries, “permanent missions are crucial in providing a continuous presence and help to protect their national interests at the relevant fora, especially those that are based in Geneva, such as the WTO and WIPO.”¹¹⁰ The lack of consistency and continuity in the participation of capital based officials in international deliberations, particularly due to lack of funding, places an additional responsibility on permanent missions of developing countries in Geneva.

However, the effectiveness of these permanent missions is also constrained by lack of adequate material and human resources to ensure an active and sustained participation in international deliberations. This has been particularly identified as a constraint by small missions of LDCs in Geneva where a very limited number of officials are entrusted with the follow-up of a wide spectrum of diplomatic activities.¹¹¹

Yet even in permanent missions where adequate human and material resources may exist, their capacity to act effectively to ensure a greater coordination and coherence in the positions adopted by developing countries also faces a number of structural and organizational constraints. While many developing countries have one permanent mission accredited to all international organizations in Geneva, including the WTO, some developing countries have separate trade missions to the WTO.¹¹² As a consequence, these countries have different delegates following the TRIPS Council and WIPO. This situation calls for a continuous and sustained effort of consultation and coordination on the part of these two missions to develop a comprehensive strategy to address developments in both fora, given their overlapping nature, particularly in work related to substantive harmonization of patent law, genetic resources and traditional knowledge as well as technical assistance and enforcement.

It is also worth noting that even those developing countries, which have only one mission in Geneva accredited to all international organizations, often assign different negotiators to follow TRIPS Council and WIPO. This stems from a general perception that WIPO is primarily a UN specialized agency, and thus should be to be dealt with by the political section of the mission (along with other Geneva based specialized agencies such as the WHO or the ILO), while TRIPS was primarily perceived as a trade related issue to be addressed by the trade section of the mission in the context of the WTO. Under this arrangement, the participation of Geneva based representatives of developing countries in the deliberations of WIPO was, for a long time, essentially confined to procedural, budgetary and administrative aspects of its work relating to its status as a UN specialized agency or to the follow-

¹⁰⁸ Jose Viana. “IP Rights, the World Trade Organization and Public Health: The Brazilian Perspective,” *Connecticut Journal of International Law* 17, pp.311-317.

¹⁰⁹ Commission on Intellectual Property Rights, *supra*, note 37, p.164.

¹¹⁰ See Nnadozie *et al* (ed.), *supra* note 96 (ed), *supra*, note 96, p.56.

¹¹¹ A survey realized in 2000 showed that twenty-four developing countries had no permanent representation in Geneva and that the average size of developed country delegations in Geneva was 7.38, whereas developing country delegations averaged 3.51. See Michalopoulos (1999).

¹¹² Such as India, Malaysia, Indonesia, Nigeria, Pakistan and Thailand.

up of technical assistance provided by WIPO. Mostly capital based delegates from national IP offices represented developing countries in WIPO's standard-setting discussions.

This institutional divide regarding the participation in TRIPS Council and WIPO-related activity by many permanent missions of developing countries in Geneva is increasingly challenged by the awareness of the inter-relationship between both. Recognizing the need to ensure a greater coordination and coherence between their positions at the WTO and WIPO, a number of permanent missions of developing countries have made a deliberate decision to assign the follow up of the work of the TRIPS Council and WIPO to the same delegate(s).¹¹³ This is a tendency that should be encouraged.

The increase in the number of international fora where IP is now being addressed raises additional challenges to the institutional capabilities of the permanent missions of developing countries in Geneva. To face these challenges, a key recommendation for developing countries, who have one single mission accredited to all international organizations in Geneva, would be to establish a focal point for IP matters mandated to deal not only with the WTO/TRIPS Council and WIPO but also with IP related issues which would arise in the context of the work of other Geneva based international organizations, such as the WHO, ITU and UNCTAD.

One should not, however over-estimate the role of permanent missions in ensuring greater coordination of the positions adopted by developing countries in international deliberations if this is not supported by the appropriate institutional arrangements and decision making processes at the capital level.

The multiplication of bilateral and regional free trade agreements with TRIPS-plus clauses provides a case in point. These agreements are often negotiated by capital based officials from trade departments and IP offices. It would be important for countries negotiating such agreements to seek the input of their Geneva based missions, particularly on how best to preserve the flexibilities available to them under international IP agreements in the context of negotiating these regional and bilateral free trade agreements.

III.5 The Role of Technical Assistance

Until recently, the bulk of technical assistance in the field of IP has mainly been directed towards a limited group of beneficiaries in developing countries (mostly IP administrations and certain business groups) with little involvement of other government department and agencies which are affected by IP policies or other stakeholders such as civil society organizations. It has thus contributed towards maintaining IP as a separate regulatory area in isolation from other areas relating to important public policy objectives for developing countries

However, it is increasingly recognized that technical assistance has an important role to play in supporting the efforts of developing countries in promoting a more coordinated approach to IP policy making in the pursuit of development oriented policies. Capacity building can also make a valuable contribution to countries with particularly limited resources and expertise, with a view to enhancing their ability to follow and interact with substantive discussions on IP that occur simultaneously in different fora.¹¹⁴ The need to expand the scope of beneficiaries of capacity building activities in relation to IP has also been highlighted, particularly in relation to issues such as IP and public health.¹¹⁵

¹¹³ This is now the case, in particular, for the following developing countries: Argentina, Brazil, Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Madagascar, Morocco, Paraguay, Peru, Uruguay and Venezuela.

¹¹⁴ Pengelly (2004), p.2

¹¹⁵ For instance, WHO has undertaken technical cooperation activities on IP involving health officials. The invitation to participate in WTO workshops, on TRIPS and Public Health and the implementation of 30 August 2003

It is important to note, in this connection, that in their submission to the IIM at WIPO, the Group of Friends of Development underlined both comprehensive and coherent assistance programmes and Integrated approach among the suggested principles and guidelines that should guide the provision of technical assistance by WIPO.¹¹⁶ Again, in directing technical assistance towards supporting a more coordinated and integrated approach to IP policies in developing countries, lessons can be drawn from the experiences relating to the role technical assistance in relation to other cross-cutting issues such as trade and the environment.¹¹⁷

It is also important to highlight that, non-traditional donors and providers of technical assistance in the field of IP, comprising intergovernmental institutions, civil society organisations and NGOs,¹¹⁸ have been playing an active role in providing capacity building to developing countries to enhance their participation in international IP standard-setting and to strengthen coordination between them. For instance, the South Centre has been regularly convening, since 2002, coordination meetings in Geneva which bring together both WTO and WIPO delegates from developing countries as well as, where possible, capital based officials. In addition, the South Centre and CIEL prepare, since first quarter 2004, an IP Quarterly Update which is intended to facilitate a broader perspective of international IP negotiations by providing a summary of relevant development in multilateral, plurilateral and bilateral fora. The Update is based on the premise that “developing countries face complex challenges in the evolving scenario of IP policy-making” a situation which requires them to “develop a global view of international IP standard setting and to take the larger context into consideration during any negotiation or discussion.”¹¹⁹ Also, the Third World Network convened in October 2004, a meeting, the first of its kind, between a number of developing countries delegates at the CBD, WIPO and the WTO in order to enhance coordination between negotiators from developing countries in these three fora.

As it has been shown in this section, improving coordination across government and coherence in developing countries in relation to international IP standard-setting requires the fostering of inter-governmental coordination mechanisms and a reassessment of the role of some of the main actors involved from IP administrations to the permanent missions of developing countries in Geneva. Although this is not an easy task, its long term benefits are significant in terms of enabling developing countries to articulate and defend more effectively their interests in international fora and processes with a view to integrating development related concerns and priorities in existing and new global IP rules. Technical assistance should be supportive of efforts of developing countries in this regard.

Decision, is often extended to officials from developing countries from government departments in the areas of trade, IP and health.

¹¹⁶ See WIPO-document IIM/1/4, para. 63 and 64.

¹¹⁷ See for instance, Pengelly and Waite, *supra* note 80.

¹¹⁸ Such as South Centre, the International Centre for Trade and Sustainable Development (ICTSD), the Center for International Environment Law (CIEL), the United Nations Quaker Office to the United Nations (QUONO).

¹¹⁹ South Centre and CIEL, *South Centre and CIEL IP Quarterly Update: First Quarter 2005* (available at <http://www.southcentre.org/info/scielipquarterly/index.htm> or at <http://www.ciel.org/Publications/pubiqu.html>).

IV. ENHANCING COORDINATION BETWEEN DEVELOPING COUNTRIES IN INTERNATIONAL IP STANDARD-SETTING

Coordination between developing countries refers to the pursuit by several developing countries of a common position with a view to influencing international standard-setting in a way which takes into account their interests and priorities. The limited bargaining power of developing countries “makes coalitions an especially crucial instrument for their effective diplomacy in international negotiations.”¹²⁰ This is confirmed by the fact that all of the achievements by developing countries, in international IP related deliberations, have been the result of a close coordination between them. Coordination between developing countries has many benefits such as the sharing of a number of resources including representatives, research and lobbying skills. It also enhances the ability of members of this coalition to counter external pressures “as the most important benefit of joint bargaining is the pooling of bargaining resources to allow greater negotiation weight to the weak.”¹²¹

It is important to note that the rationale underpinning collective action by states in international fora is a complex issue, which has attracted significant, cross-disciplinary research, and goes beyond the scope of this paper. However, most analyses point out to the fact that effective coalitions are not easy to construct or sustain and their sustainability is contingent on a number of external and internal factors.¹²²

In this regard, coordination between developing countries in international IP standard-setting tends to be volatile and varies from one forum to another as can be seen in box 3. Coordination between countries in one forum does not necessarily translate in another forum when the same issue is addressed. While several developing countries members of the Group of Like-Minded Megadiverse countries at the CBD are supportive of introducing a mandatory disclosure requirement in patent applications, these same countries do not join other members of this group which are proponents of the same measure at the TRIPS Council. Similarly, while certain developing countries have been actively involved in the deliberations of the TRIPS Council on TRIPS and public health, they have often not been similarly vocal in WIPO particularly in relation to negotiations such as those of the draft SPLT that could potentially erode the current flexibilities they enjoy under TRIPS.¹²³ This situation, which is often - but not always - the result of a lack of internal coordination in these countries impacts negatively on the possibilities coordination between developing countries in international fora dealing with IP issues.

It is worthwhile noting that groupings of developing countries, such as the G77, often make references in their high level statements to IP issues and particularly the TRIPS Agreement.¹²⁴ These statements when updated should take into account that the challenges faced by developing countries extend now to dealing with TRIPS-plus obligations at the multilateral, regional and bilateral level. For instance, the New Delhi Plan of Action which was adopted by the First meeting of the Trilateral Commission of the India-Brazil-South Africa (IBSA) Dialogue Forum, in march 2004, made a refer-

¹²⁰ Narlikar, (2003), p.10.

¹²¹ *Ibid*, p.14.

¹²² Narlikar, *supra* note 120, pp.11-33.

¹²³ For example, it is worth noting that, with the exception of Iran, there were no Asian developing countries among the developing countries, which launched the initiative to establish a development agenda for WIPO, at the 40th session of the WIPO Assemblies.

¹²⁴ For example, a reference was made to the importance of the review of TRIPS being more responsive to the needs of the South in the Declaration of the first South Summit, Havana, Cuba, 10-14 April, 2000, para.20 (available at: http://www.g.org/Docs/Declaration_G77Summit.htm).

ence to the fact that “bilateral/multilateral trade agreements, which are TRIPS-plus should be opposed and that the three countries should take the lead in sensitizing other developing countries in this regard.”¹²⁵ The three countries also agreed that the “national statutory framework of the three countries should reflect all the flexibilities allowed for by the WTO TRIPS Agreement, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health, as well as the further decisions on para.6 of the said declaration” and that they should “make efforts to urge other countries, particularly developing and least developed countries, to consider similar steps to reflect all of the above mentioned flexibilities in their national legislations.”¹²⁶

Taking into consideration the rationale underpinning coordination between developing countries mentioned above, the purpose of this last section is to assess coordination between developing countries at the WTO/TRIPS Council, WIPO and CBD, particularly cross-regional coordination, and to examine how it could be enhanced.

Box 3.
Examples of coordination involving developing countries in international for a dealing with IP issues

WTO			WIPO
TRIPS & Public Health IP/C/W/296	TRIPS & CBD, Review of 27.3(b)	Non Violation Complaints IP/C/W/385	<i>"Groups of Friends of Development"</i>
The African Group Barbados Brazil Dominican Republic Ecuador Honduras India Indonesia Jamaica Pakistan Paraguay The Philippines Peru Sri Lanka Thailand Venezuela	The African Group (IP/C/W/404) Bolivia Brazil Colombia Cuba Dominican Republic Ecuador India Thailand Venezuela (IP/C/W/442)	Argentina Bolivia Brazil Colombia Cuba Ecuador Egypt India Kenya Malaysia Pakistan Peru Sri Lanka Venezuela	Argentina Bolivia Brazil Cuba Dominican Republic Ecuador Egypt Iran Kenya Peru Sierra Leone South Africa Tanzania Venezuela
			CBD
			<i>"Group of Like-Minded Megadiverse Countries"</i>
			Bolivia Brazil China Colombia Costa Rica Ecuador India Indonesia Kenya Madagascar Malaysia Mexico Peru The Philippines South Africa Venezuela

¹²⁵ New Delhi Agenda for Cooperation and Plan of Action, First meeting of the Trilateral Commission of the India-Brazil-South Africa (IBSA) Dialogue Forum, March 2004 (available at [http:// www.indianembassy.org.br/port/relations/Forum ForCo-operation.htm](http://www.indianembassy.org.br/port/relations/Forum%20ForCo-operation.htm)).

¹²⁶ *Ibid.*

IV.1 Coordination between Developing Countries at the WTO/TRIPS Council

Cross-regional coordination between developing countries is a predominant feature of the dynamics of the TRIPS council. Developing country coordination was key in achieving the Doha Declaration on TRIPS and Public Health. The lead paper¹²⁷ presented to the 20 June 2001 TRIPS Council meeting devoted to the medicines issue was co-sponsored by a group of developing countries reflecting a wide geographic diversity.¹²⁸

Cross-regional coordination continues to be reflected in the numerous proposals presented by developing countries to the Council on issues from TRIPS and public health, to non-violation complaints and the relationship between TRIPS and CBD.¹²⁹ This coordination, at the TRIPS Council, is issue oriented and does not extend to issues, such as expanding the scope of protection of geographical indications to products other than wine and spirits, where there are divides among negotiating coalitions which include both developed and developing countries.

It has been suggested to create a Developing Country Quad, in the context of TRIPS negotiations given that “the loose group structures employed by developing countries do not maximize the capacities of developing countries nor do they provide the kind of leadership that is needed during the course of multilateral trade negotiations.”¹³⁰ In practice, however, it seems that developing countries have preferred to maintain an informal, pragmatic and issue oriented coordination in the TRIPS setting as a reasonably effective strategy for advancing to a certain extent their interests.

It is important to underline that there also seems to have been a certain weakening of developing country coordination in the aftermath of the Doha Declaration on TRIPS and Public Health particularly during the negotiations on paragraph 6 of the Declaration and the deliberations of the TRIPS Council in relation to the items on the review of Article 27 3 (b), the relationship between the TRIPS agreement and the CBD and the protection of traditional knowledge and folklore.¹³¹ This shows that developing country coordination at the TRIPS Council is not a given and needs to be actively sustained especially in the perspective of the WTO Hong Kong Ministerial Conference.

IV.2 Coordination between Developing Countries at WIPO

If cross-regional coordination between developing countries is a usual practice at the WTO/TRIPS Council, it remained, until recently, an exceptional practice in the context of WIPO. Until the fall of communism and the breakdown of the Soviet Union, there were three groups in WIPO: Group A (de-

¹²⁷ WTO-Document IP/C/W/296.

¹²⁸ The African Group, Barbados, Brazil, the Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, the Philippines, Peru, Sri Lanka, Thailand and Venezuela.

¹²⁹ For example, the latest submission from developing countries to the TRIPS Council on the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge – WTO-document IP/C/W/442 – came from countries in Asia and Latin America (Bolivia, Brazil, Colombia, Cuba, Dominican Republic, Ecuador, India, Peru and Thailand). The latest communication from developing countries on non-violation complaints – WTO-document IP/C/W/385 – also comprised countries with different regional affiliations such as Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka and Venezuela.

¹³⁰ Drahos, *supra*, note 1, p.784.

¹³¹ For instance, since the presentation by the African Group of its latest proposal on the review of Article 27.3 (b) and the protection of traditional knowledge in June 2003, no member of the African Group has co-sponsored the proposals presented by a group of developing countries on the relationship between the TRIPS agreement and the CBD.

veloping countries), Group B (western countries) and Group D (socialist countries).¹³² They have been replaced by the following regional groups: Group B, the African Group, the Group of Latin American and Caribbean countries (GRULAC), the Asian Group, the Group of Central European and Baltic States, the Group of Eastern European and Central Asian Countries and China. These regional groups play an important role in the substantive and procedural aspects of WIPO's work, in particular through regional coordinators, who act as a channel of communication between the member States and the Secretariat of WIPO (also known as the "International Bureau").

Regional groups can be a useful means for dealing with some procedural aspects of the work of an international organization, and a UN specialized agency, in particular in matters relating to the allocation of seats in bodies with a limited membership (such as the Program and Budget Committee), as well as the allocation of the chairmanships of the various bodies or the election of its Director General. There might also be useful in organizing the delivery of some technical assistance activities on a regional basis, as it is done at WIPO, given the cultural and linguistic similarities within each geographic region.¹³³

However, regional groups make, in general, little sense when it comes to international IP rule-making. Adopting common positions by countries in international IP standard-setting is, essentially, a result of the obligations that these countries have undertaken at the domestic and international level and of a shared understanding of the role of IP protection in their development process, and not a function of their geographic location. At present, however, the primacy of these regional groups in standard-setting, at WIPO is reinforced, by the practice of organizing regional consultations,¹³⁴ especially in preparation of diplomatic conferences which will adopt new legal instrument in the field of IP.¹³⁵

As a result, regional groups represent an important constraint on the capacity of developing countries to coordinate effectively on a cross-regional basis in norm-setting activities at WIPO. This factor often tends to be overlooked in analyses concerning the weakness of developing country participation and coordination at WIPO.¹³⁶

For instance, while the majority of both the Asian group and GRULAC at WIPO are made up of developing countries, both groups also include OECD members which do not necessarily share the same approach to intellectual protection as other developing countries member of these groups.¹³⁷ Furthermore, both groups include a number of developing countries that have concluded bilateral and regional free trade agreements, by virtue of which they have accepted TRIPS-plus obligations.¹³⁸ This situation makes it problematic to reach common positions on issues of substance within these groups. In practice, it often enables a small number of countries, or even one country, to block positions, which would be favoured by the majority of developing countries making up the membership of these

¹³² Nevzat Yosmaoglu, *Organisation Mondiale de la Propriete Intellectuelle et Dialogue Nord-Sud*, These presentee a l'Universite de Geneve pour l'obtention du Grade de Docteur es Sciences Politiques, These No 529, HEI, 1994.

¹³³ The International Bureau of WIPO has four departments in charge of the delivery of technical assistance to developing countries: the Economic Development Bureau for Africa, the Economic Development Bureau for Latin America and the Caribbean, the Economic Development Bureau for Arab Countries and the Economic Development Bureau for Asia and the Pacific.

¹³⁴ These regional consultations are mostly held in each region, and attended by representatives from IP offices of developing countries.

¹³⁵ This particularly the case in the area of copyright. Such regional consultations preceded, for example, the Diplomatic Conference of Audio-Visual Performances which was held at WIPO, in December 2000 and are currently organized in the perspective of a possible diplomatic conference on the protection of broadcasting organizations.

¹³⁶ This factor is, for instance, overlooked in Drahos, *supra*, note 1.

¹³⁷ The Republic of Korea and Mexico. In fact, the Republic of Korea has been seeking membership of Group B for a number of years now.

¹³⁸ This is the case of Singapore and Jordan in the Asian Group and of Mexico, Chile and Central American Countries in GRULAC.

groups. For this reason, it would be inconceivable to have either the Asian Group or GRULAC play any role in the substantive deliberations of the TRIPS Council for instance, and indeed, this has not been the case.

The African Group represents a notable exception in this situation, given that it is a regional group which takes positions on substantive issues in many international fora. At the WTO, in the context of the TRIPS Council, the African Group has presented numerous proposals relating to TRIPS and public health¹³⁹, the review of Article 27.3 (b) and the protection of traditional knowledge.¹⁴⁰ At WIPO, the African Group has not, in recent years, displayed the same degree of activity as in the TRIPS Council, particularly in the standard-setting bodies of the organization. However, this situation seems to be evolving with the increasing involvement of developing countries in WIPO's activities. At the Sixth session of the IGC (March 2004), the African Group presented a proposal on "possible objectives, principles and elements of an or instruments on the protection of traditional knowledge, genetic resources and folklore"¹⁴¹ which played an important role in structuring the subsequent discussions of the Committee at its Seventh session. Furthermore, the African Group came out in support of the initiative for the establishment of a development agenda for WIPO, which was tabled, by a number of developing countries, including some African countries, at the 40th session of the WIPO Assemblies (27 September- 5 October 2004).

The resilience of the regional group system at WIPO when it comes to substantive issues is not easy to explain given the constraints highlighted above. Its origin might be found in a desire within WIPO to avoid the pattern of North/South polarization, which characterized its deliberations during the early and mid 1980s. At that time, developing countries, acting through the Group of 77, were demanding the revision of some of the patent rules of the Paris Convention on Industrial Property. This debate is perceived by many as having played a role in the forum shifting strategy by developed countries towards including IP on the agenda of the Uruguay Round of GATT negotiations.¹⁴²

Until recently, there was no formal or informal grouping of developing countries which operated in WIPO, on a cross-regional basis, despite the fact that many significant issues debated in the organization, such as those relating to the harmonization of substantive patent law, are characterized by significant divergences between developed and developing countries and that developed countries themselves do not shy away from taking common positions on these issues through their own cross regional group called Group B.¹⁴³ This situation singled out WIPO, among other major UN agencies and multi-lateral organizations, particularly those involved in trade and development issues, where cross-regional coordination between developing countries takes place either through formal groups, such as the G-77, or through informal and issue oriented groups, such as at the WTO.

The tabling of a cross-regional proposal by a group of like-minded developing countries at the 40th session of the WIPO Assemblies (27 September- 5 October 2004), on the establishment of a Development Agenda for WIPO, represents a significant departure from the rigid mould of regional groupings that characterized the participation of developing countries in WIPO's standard-setting activities. It represents a significant step in establishing a nucleus of cross-regional coordination between developing countries in the substantive deliberations of WIPO. The cross-regional character of this initiative certainly contributed to the momentum it achieved, and ultimately, to the positive decision reached on it by the WIPO General Assembly.

¹³⁹ The most recent communication of the African Group on TRIPS and public health is entitled "Legal arguments to Support the African Group Proposal on the Implementation of paragraph 11 of 30 August 2003 decision" relating to paragraph 6 of the Doha Declaration on TRIPS and Public Health (Document IP/C/W/440).

¹⁴⁰ The most recent communication of the African Group on the review of Article 27.3 (b) and the protection of traditional knowledge is contained in document IP/C/W/404.

¹⁴¹ This proposal is contained in document WIPO/GRTKF/IC/6/12.

¹⁴² Sell (1998), pp.130-140.

¹⁴³ This was the case at the 40th session of the WIPO Assemblies (27/9/2004-5/10/2004) when Canada, on behalf of Group B, expressed its support to the proposal presented by the United States and Japan and supported by the European Union, on the future work of the SCP. See WIPO-document, WO/GA/31/15, para.123.

Developing countries, at WIPO, should reconsider the involvement regional groups in a systematic manner in the work of the organization at all times and on all issues whether of substance or procedure. It is interesting to note, in this regard, that the recommendation of the eleventh session of the Standing Committee on Copyright and Related Rights (June 2004), in relation to the possibility of convening a diplomatic conference on the protection of broadcasting organizations, envisaged the organization by the International Bureau of regional consultation meetings but only “where appropriate and at the request of the relevant regional groups.”¹⁴⁴ This represents a departure of the previous practice of convening regional consultation meetings before a diplomatic conference, without necessarily a formal request from the countries members of the regional group.

Cross-regional coordination between developing countries at WIPO, in matters relating to standard-setting, should be further institutionalised. The fact that the group of developing countries which launched the initiative on the establishment of a Development Agenda for WIPO, has chosen to call itself the “friends of development” seem to reflect an evolution in this direction.

Enhancing cross regional coordination between developing countries should not, however, be considered as a goal in itself. It should be pursued in a pragmatic manner as a means of advancing the common objectives and interests of developing countries in regard of a particular issue. In this connection, the integration of the development dimension in all of the activities of WIPO appears a prime example of a common concern to a great number of developing countries, independently of their regional affiliations, which would lend itself to such an enhanced coordination. This might also be the case in the context of the negotiations on the substantive harmonization of patent law.

That said, it is also important to be mindful of the limitations of coordination between developing countries in international IP standard-setting, particularly as some IP issues, such as geographical indications, will divide rather than unite them.

IV.3 Coordination between Developing Countries at the CBD

Unlike the WTO and WIPO, the CBD is not a forum, which is involved directly in IP standard-setting. Nevertheless, controversy surrounding IP in relation to access to genetic resources and fair and equitable benefit sharing arising from their use, has been a constant factor in the deliberations of the CBD since its inception. The latest example occurred during the Third Meeting of the Ad-hoc Open-ended Working Group on Access and Benefit Sharing of the CBD (14-18 February 2005). At the opening session of the meeting, the representative of UNEP mentioned that there “were real contradictions in essential points between TRIPS and CBD that had to be resolved and that IPRs applied to life forms under TRIPS ran counter and did not support the objectives of the Convention.”¹⁴⁵ During the adoption of the report of the meeting, the representative of the Netherlands, on behalf of the European Union, stressed that he did not share the views expressed by the representative of UNEP during the opening session. The statement of the Netherlands was supported by Australia, Japan, Switzerland, and New Zealand.¹⁴⁶ The United States associated itself with the views expressed by other developed countries.¹⁴⁷ Ethiopia, on behalf of the African Group, and Brazil expressed their support to the statement according to which there were contradictions between TRIPS and CBD.¹⁴⁸ The representative of Ethiopia mentioned that the two agreements “would be mutually supportive only when TRIPS was

¹⁴⁴ WIPO-Document SCCR/11/4, para.146. A,4.

¹⁴⁵ Third Meeting of the Ad-hoc Open-ended Working Group on Access and Benefit Sharing of the CBD (14-18 February 2005), document UNEP/CBD/WG-ABS/3/7, para.12, available at www.biodiv.org/doc/meetings/abs/abswg-03/information/abswg-03-inf-07-3en.pdf.

¹⁴⁶ *Ibid.*, para.176 and para.177.

¹⁴⁷ *Supra* note 145, para.180.

¹⁴⁸ *Supra* note 145, para.178 and para.179.

amended to taken into account the proprietary rights of indigenous and local communities throughout the world.”¹⁴⁹

Although the Executive Director of UNEP clarified subsequently that the speech made by the UNEP staff member did not represent or reflect his position and UNEP,¹⁵⁰ the reactions triggered by the speech are indicative of several dynamics. First, they brought back the TRIPS-CBD relationship to the core of CBD deliberations at that a time when a number of developed countries have attempted over the years to detract attention from this relationship by building momentum in the CBD process to direct the issue of IP in relation to genetic resources to other fora than the WTO, as it has already been underlined in section I of this paper. Second, the reactions to the speech also raise questions concerning coordination between developing countries in relation to IP issues at the CBD. For instance, although the position according to which that there are important contradictions between TRIPS and CBD is held by many developing countries, in the context of the TRIPS Council for example, only Ethiopia and Brazil took the floor to defend it in view of the statements by developed countries. Why was this case?

The CBD is a forum where there is, in general, an active participation of developing countries as well as an effective coordination between them. The African Group and, more recently, the Group of Like-minded Megadiverse countries play a central role in the negotiations on a number of issues. Over the years, developing countries have acquired an important capital of expertise and experience in CBD negotiations. Nevertheless, recent developments at the CBD, and particularly at COP-VII, have shown that coordination between developing countries in relation to IP issues and the relationship with other fora in addressing these issues, appears as a significant weakness in the overall participation of developing countries in the CBD process¹⁵¹ and in particular in comparison with their coordination and engagement in the deliberations on a future international regime on access and benefit sharing launched at COP-VII (decision VII-19).

Enhanced cross-regional coordination between developing countries at the CBD should involve the African Group as well as other developing countries, particularly, the Group of Like-minded Megadiverse countries or at least those members of the Group of Like-minded Megadiverse countries which have a common position on the relationship between IP, access to genetic resources and benefit sharing both at the CBD and the WTO/TRIPS Council.¹⁵² In this connection, it is worthwhile noting that the Cancun Declaration creating this Group, in 2002, contained vague references to IP. For instance, it only “encouraged” the current system of IPRs to take into account the traditional knowledge related to biological diversity when evaluating requests for patents and other related rights, in contrast, to the positions of many countries of the Group at the WTO/TRIPS Council which “required” the system of IPRs to do so.¹⁵³ The New Delhi Ministerial Declaration, adopted in January 2005, contained stronger language on IP. In referring to the elements of an international regime on access and benefit sharing, it mentions “mandatory disclosure of the country of origin of biological material and associated traditional knowledge in the IPR application, along with an undertaking that the prevalent laws and practices of the country of origin have been respected, mandatory specific consequences in the event of failure to disclose the country of origin in the country of application.”¹⁵⁴

¹⁴⁹ *Supra* note 145, para.178.

¹⁵⁰ *Supra* note 145, para.11.

¹⁵¹ For example, during discussions on item 7 on the Agenda of the Third Meeting of the Ad-hoc Open-ended Working Group on Access and Benefit Sharing of the CBD, on measures to support compliance with prior informed consent and mutually agreed terms, only six developing countries made statements after the introduction (Brazil, Ethiopia, Liberia, Malaysia, the Philippines and Thailand) and were members of the group of friends of the Chair convened by the Co-Chair to address outstanding issues (Brazil, Colombia, Egypt, Ethiopia, Liberia and Malaysia). See, *supra*, note 145, para. 135 and para.140.

¹⁵² This is, currently, not the case of some countries of the Group.

¹⁵³ Para.n, Cancun Declaration of Like-Minded Megadiverse Countries, 18 February 2002.

¹⁵⁴ New Delhi Declaration of Like-Minded Megadiverse Countries on Access and Benefit Sharing, 21 January, 2005.

It remains of critical importance for developing countries to enhance their cross-regional coordination in relation to IP issues at future CBD meetings¹⁵⁵ so as to ensure that developments at the CBD do not undermine the particular perspective of the CBD in addressing these issues nor the positions and proposals made by developing countries in other fora, particularly the WTO/TRIPS Council. On the contrary, they should be supportive of such proposals and add to the momentum they are gaining. Developing countries must develop a comprehensive view on developments at the WTO/TRIPS Council, the CBD and WIPO as well as other fora, taking into consideration the distinctive mandates of each forum. This comprehensive view should be based on the premise that no measure, in whichever forum, should detract attention from the main proposals of developing countries to amend TRIPS¹⁵⁶ as the most effective means of combating misappropriation of genetic resources and traditional knowledge (particularly through the introduction of a mandatory disclosure requirement and compliance with prior informed consent and equitable benefit-sharing).

Beyond WTO, WIPO and the CBD, enhancing the effectiveness of coordination between developing countries in international IP rule-making requires establishing linkages and synergies between developing country negotiators at WIPO and WTO, and developing country negotiators in other international fora where IP matters are examined, such as CBD, ITU, UNESCO and WHO. This in turn would help to ensure that outcomes reached in these fora and norms produced are both consistent and supportive of the positions adopted by developing countries in IP standard-setting.

IV.4 The Impact of Bilateral and Regional FTAs on Coordination between Developing Countries in International IP Standard-setting

The proliferation of regional and bilateral free trade agreements between industrialized countries and developing countries, containing TRIPS-plus obligations for the developing countries party to them, is an important development in the context of international IP standard-setting. Much has now been written on the impact of such agreements on the ability for the developing countries concerned to use the flexibilities available to them under the TRIPS agreement, in particular in relation to the protection of public health and non-violation complaints.¹⁵⁷

Less attention has focused on the impact of these agreements on the cross-regional or even regional coordination between developing countries either at the WTO or at WIPO. Taking into consideration what has been previously mentioned that coordination between developing countries in international IP standard-setting is a function of their international obligations, one could expect these agreements to weaken the coordination between developing countries in IP standard-setting activities.

At the WTO cross-regional proposals between developing countries might see their support erode and regional groups which have tended, in the past in WIPO, to adopt common positions might also find it increasingly difficult to do so.¹⁵⁸ However, one should also be cautious not to prejudge the effects of bilateral and regional free trade agreements on coordination between developing countries at the international level. In some cases, developing countries might choose the multilateral framework

¹⁵⁵ Particularly, COP-VIII in 2008 and the next meetings of the Ad hoc Open-ended Working Group on Access and Benefit Sharing and of the Ad hoc Open-ended Working Group on Article (j), which will be held in Spain in march 2006.

¹⁵⁶ See, *supra*, note 129 and note 140.

¹⁵⁷ See, for instance, Abbott, *supra*, note 23.

¹⁵⁸ This could be particularly the case of GRULAC at WIPO. While GRULAC was originally the main proponents of the creation of the IGC in 2001, recent sessions of the IGC have seen no significant substantive statements made by GRULAC, while important substantive statements have been made mainly by Brazil and the Andean Countries.

to reassert their positions, during the negotiations of such agreements or after. It is interesting to note, in this regard, that several of the developing countries which co-sponsored the initiative on the establishment of a development agenda for WIPO are currently engaged in the negotiation of bilateral and regional free trade agreements with developed countries.¹⁵⁹ Similarly, it is significant that the proposal which was tabled on exceptions and limitations at the twelfth session of the SCCR, at WIPO, (November 2004), came from a country, Chile, which recently concluded a bilateral free trade agreement with the United States.

¹⁵⁹ E.g., South Africa.

V. CONCLUSION AND RECOMMENDATIONS

The importance of international IP standard-setting will continue to increase with more globalization of IP rules that reflect changing economic and technological conditions. Multiple negotiations under way in a wide range of fora make it more problematic for developing countries to identify their national IP interest and to develop coherent and effective policies and negotiating strategies on IP at the multilateral, regional and bilateral level.

Without enhanced coordination, developing countries will remain victims in vicious circle where new IP rules are negotiated which do not integrate their concerns and where their achievements on a particular issue in one forum may be lost or undermined in another one. Their efforts to preserve their “policy space” and to promote a more balanced and development friendly global IP system will remain ineffective particularly taking into consideration the many other weaknesses characterizing their international involvement in IP issues (such as their limited resources and expertise). While a significant amount of literature has been generated in past years on how to integrate IP and development policy, the ability of developing countries to benefit from it and feed it into their own policy making process will remain limited if there are no adequate institutional structures to engage with it.

Consequently, developing country need to identify coordination as a policy priority in itself and should seek to establish or reinforce the appropriate institutional arrangements, which result in a greater coordination between relevant government departments and agencies with a view to pursuing more development-oriented IP policies. The experiences of countries, which have displayed a high degree of coordination and coherence in their pursuit of their IP policies, and in their participation in international IP standard-setting, can be useful in this regard.

Greater coordination at the national level will also positively impact on enhancing coordination between developing countries in international IP standard-setting. Ultimately, the effective participation by developing countries in international IP standard-setting will ensure legitimacy of the standards reached and their relevance to all countries, thus encouraging their wider acceptance.















To contribute to this goal, a number of recommendations can be highlighted for consideration by developing countries:

- The proliferation of fora and processes dealing with IP requires developing countries to develop a comprehensive approach to developments in the different fora involved in international IP standard-setting.
- Developing countries should establish effective and inclusive inter-governmental coordination mechanisms in relation to participation in international IP standard-setting, where all relevant ministries and government departments would participate, thus contributing to the institutionalisation of the policy making process.
- Technical assistance should be supportive of the efforts of developing countries in the creation of such mechanisms.
- Positions of developing countries in international IP standard-setting ~~IP~~ should be the result of coordination across government.

- Developing countries should examine the possibility of enhancing the role of their ministries of foreign affairs in ensuring the overall coherence of their positions in different fora and processes dealing with IP issues.
- Developing countries should work towards embedding their IP administrations in their wider development policies.
- Developing countries should broaden their representation at WTO and WIPO meetings so as to include representatives from government departments and agencies dealing with key areas affected by international IP standard-setting such as public health, the environment, agriculture, and education.
- Synergies should be established between developing country negotiators at WIPO and WTO, and developing country negotiators in other international fora where IP matters are examined, such as CBD, FAO, ITU, UNESCO, UNCTAD and WHO.
- Developing Countries with more than one mission in Geneva should ensure that there is appropriate coordination between negotiators dealing with the WTO/TRIPS Council and with WIPO.
- Developing countries which have one mission accredited to all international organizations in Geneva, should establish a focal point for IP matters, not only to follow WTO/TRIPS Council and WIPO, but also IP related issues which would arise in the context of the work of other Geneva based international organizations such as WHO.
- Developing Countries should seek the input of their permanent missions in Geneva in the context of negotiations on regional and bilateral free trade agreements
- Developing countries should reconsider the role of regional groups in relation to standard setting-activities at WIPO so that they do not represent a constraint on their efforts to promote cross-regional coordination on important substantive issues in the work of the organization.
- Developing countries should enhance their coordination on IP issues at the CBD so as to ensure that developments at the CBD are supportive of their proposals in other fora and do not undermine them.

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