NEW TREATY DEVELOPMENT AND HARMONIZATION OF INTELLECTUAL PROPERTY LAW

The prolonged negotiation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) might have suggested that international efforts in regulating intellectual property would abate for some time. Instead, however, two significant treaties in the area of copyright were negotiated in 1996, not long after the obligatory implementation of the TRIPS Agreement in developed countries. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), deal with a new and very much unsettled frontier in copyright law, namely the application of copyright in the digital economy. In addition to these treaties, WIPO has recently commenced work in advancing a Patent Law Treaty to facilitate greater harmonization in the area of patents.[1]

It is important to keep in mind that the momentum to harmonize intellectual property rights is likely to continue well into the foreseeable future. First, there are numerous *perceived* gains from harmonization. These include efficiency gains from the standardization of rules; the economy of scales uniformity offers such as the relative ease of administering/enforcing the rights from country to country; consistency in interpretation of terms and the development of a common culture oriented towards similar levels of intellectual property protection. Second, harmonization is considerably easier since countries now share a substantive common baseline established by the TRIPs Agreement. Further, it should be noted that one of WIPO=s fundamental activities *is* to initiate new negotiations in areas where it believes member countries will benefit from harmonized rules. Thus, as a regulatory matter, it is likely that harmonization will continue to play a central role in international intellectual property development.

However, harmonization also has very definite costs for developing countries. Historically, countries joined the harmonization process only when their own levels of development and domestic priorities were in alignment with the objectives of the harmonizing treaty. A review of the initial membership of the two primary intellectual property treaties, the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, is paradigmatic of this method of progressive enlargement in membership. As members increase and the subject matter becomes more complex due to changes in the market place (whether related to labor costs or technological developments) there is typically a corresponding increase in the scope of the treaty. As a result, additional rights are negotiated by members to deal with these new challenges and to give creators opportunities to exploit their works in new media and in new markets.

The integration of developing countries into the international intellectual property system has historically taken place through the harmonization process. Despite a few exceptions designed to address the interests of developing countries, the evidence is clear that harmonization generally tends to tilt the balance of interests in favor of owners of intellectual property and, de facto, developed countries. Harmonization means that developing countries negotiate new standards and rules without necessarily having had the benefit of experience in that area. In general, harmonization exerts an upward force on national laws and policies; as stated earlier, intellectual property harmonization has consistently (if gradually) resulted in stronger and more expansive rights for owners. Correspondingly, the scope of limitations or exceptions tends to be narrower. The standardized approach of harmonization makes it difficult for developing countries to tailor domestic laws to address local problems regarding the structure of domestic intellectual

[1] Some work has also been done on a proposed new treaty protecting performers (actors, musicians, etc.) against the unauthorized use of their performances in audiovisual media. A Trademark Law Treaty was also negotiated in 1994. There is still some question about the future of these two initiatives. Clearly, however, they indicate the momentum towards more and more treaties and increasing harmonization in all the substantive IP subject areas.

property laws. Where developing countries are concerned, harmonization has been a means of introducing higher standards of intellectual property into the domestic economy. There is an abundance of literature that suggests that such higher standards attract foreign direct investment and encourage technology transfer. However, the empirical evidence is far less supportive of these propositions.

In addition to the increased difficulty of shaping national intellectual property policy for development objectives harmonization also has direct effects on local inventors. Higher standards mean that domestic innovators and investors assume *higher risks* in the creative process than the level of development indicates should be the case. This observation is particularly important when one considers that in developed countries, young industries and new technologies generally enjoy *lower* intellectual property standards in order to encourage innovators to engage in optimal levels of creativity. Patent standards as applied to the biotechnology industry in the developed countries are a prominent example of this practice. All this suggests that harmonization has, in general, facilitated greater gains for creators in developing countries at the expense of those in developing countries, with no significant corresponding increase in welfare for the developing world. The chart below summarizes some costs and benefits of harmonization.

Harmonization Chart

Examples of Some Benefits	Examples of Some Costs
• Uniform standards which increase market confidence (i.e. investors willing to introduce new products in the marketplace)	Less flexibility to tailor domestic IP policy to needs of local investors and domestic peculiarities.
• Facilitates easier development of new global rights	Less discretion over nature and scope of IP rights. Forced acceleration of development in non-IP areas such as education policy, industrial policy, and public health policy.
• Centralized institutions responsible for monitoring, collecting and preserving information. More efficient use of resources by pooling efforts of different domestic offices.	Adverse effect on the development of a domestic IP culture and policy. Employment effects on local practitioners, judges, and other professionals.
• Uniform Fees/Single application with relevance in multiple jurisdictions.	Loss of income from domestic applications. Less likely that domestic innovators can afford the fees no matter how low.

Given the fact that harmonization will continue to dominate the international regulation of intellectual property rights, several questions must be evaluated for development purposes.

- How does harmonization aid or detract from development objectives?
- How can harmonization efforts be structured to ensure that development objectives are clearly incorporated into the main text of the agreement?
- What mechanisms exist in international law to allow developing countries to strategically implement the harmonized terms of a treaty?
- How does the digital environment alter the fundamental assumptions that inhere in the classical justifications for intellectual property?
- How can/should developing countries engage in the harmonization process? At what stage in the process should they engage?
- What role does/can regional harmonization play in efforts to implement intellectual property rights in a manner consistent with development objectives?

- What are some ways that developing countries might more fully benefit from and participate in the harmonization process?

To effectively think about these issues, it is helpful to distinguish between types of international intellectual property treaties and how these categories affect development priorities and efforts.

I. Distinguishing Types of International Treaties

A. Substantive Treaties

These are treaties that purport to harmonize substantive doctrines of intellectual property protection. Examples of such treaties include the Berne Convention, the Paris Convention and to a lesser extent, the TRIPs Agreement. The proposed Patent Law treaty also falls into this category.

B. Administrative Treaties

These are treaties that coordinate the practices and activities related to the administration of intellectual property rights. Examples of these include the Madrid Agreement concerning the International Registration of Marks, the Hague Agreement concerning the International Deposit of Industrial Designs and the Patent Cooperation Treaty. They are treaties that establish taxonomies for intellectual property to facilitate the organization of information regarding different kinds of intellectual property.

In general, administrative treaties have the potential to facilitate development goals in a more direct manner than substantive treaties. For example, administrative treaties provide a rich source of information for developing countries; they can constitute avenues to participate in the generation of data, and may be a source to identify owners of intellectual property. One immediate concern may be that such classification can be artificial and problematic for certain kinds of creative works in developing countries, e.g. traditional knowledge products which are not easily amenable to rigid categorization.

There has been a tendency to treat these two types of treaties in a uniform fashion. However, each category functions quite differently and has different effects on development strategies.

II. Points of Action

Six central points should be noted as important elements of a framework/agenda for developing countries in the area of harmonization:

- An important undertaking is to identify how the major treaties under each category interact with development goals of member states generally, and in specific industries targeted for purposes of exploiting comparative advantage.

- There are over 50 treaties that affect international intellectual property regulation. The time has come to begin a synthesis of these treaties to help developing countries identify development losses due to multiple memberships in overlapping, conflicting or superfluous agreements. Streamlining these treaties will also allow for more effective planning, allocation and use of scarce resources.

- What is the effect of information technology on the administration and coordination of treaty obligations? How can the economies of scale made possible by information technology be translated in the intellectual property context to assist in (1) gains for developing countries with regard to access issues and; (2) reducing costs of participation

in negotiation, drafting and coordination between the various regional and international intellectual property offices?

- An understanding of the relationship, *as a matter of international law*, between various treaties affecting intellectual property rights. For example, between the CBD and TRIPs, TRIPs and the WCT/WPPT, and between these and future treaties.

- The *structure* of international intellectual property treaties must be considered very strategically. Where, in the treaty, should development objectives be integrated? Questions about the operational and legal force of the TRIPs preamble, where most of the development objectives of TRIPs were placed, and the fact that at least several WTO dispute panels have had the opportunity, but have not referred to the development oriented objectives of TRIPS, suggest that the placement of such clauses is indeed a matter that should be carefully revised for future negotiations. There is also the recent practice of negotiating "Agreed Statements" to complement the treaty. What is the legal effect of these Agreed Statements? Is the practice of making exceptions for developing countries still a viable model for a world economy with open markets? Should such welfare enhancing limitations be construed as "developing country exceptions" or more broadly as consumer exceptions?

- The recent CIPR report indicates how there has been little use of developing country exceptions in existing treaties. Some developing countries have stronger intellectual property rights than some developed countries! It is important to understand what social, economic and political/institutional pressures may be creating this situation and how to reverse it as a matter of law.

- In other areas of international harmonization, there has been success with the use of "soft law" agreements. These are agreements that focus on normative principles that guide the behavior of member states, as opposed to explicitly stated obligations. It will be increasingly important to explore such agreements in areas such as standard setting, exceptions to proprietary rights, technical cooperation and new subjects of treaty negotiations.

III. Context, Considerations and Problem Spotting

In addition to the need for a more precise identification of existing treaties and corresponding development goals, there remain some important points of focus for future consideration, reform and other action.

A. Regional Harmonization and Regional Institutions: Appraising Strategic Roles and Benefits.

Although there are several regional intellectual property institutions for developing countries, the evidence about the pro-development role/benefit of these institutions is, at best, mixed. Regional institutions have historically served primarily as outposts for foreign intellectual property owners seeking regional recognition/protection of their creative works.

Some things to consider, particularly in light of the recent CIPR report confirming, again, low levels of creative activity in developing countries.

- What are the existing regional offices and what are their roles?

- Can these institutions be restructured in a way that utilizes them as development agents for the region?
- How can these institutions serve the needs of local innovators?
- Can they constitute alternative sources of model laws in different areas?

B. Involvement in Negotiations of the New Treaties

The relatively successful experience of developing countries during negotiation of the WIPO digital treaties demonstrates the importance of developing country involvement in the early stages of negotiations. These negotiations were helped by the alliance built between developing countries and public interest groups from developed countries. As a result, the WIPO digital treaties were a more balanced reflection of interests than might otherwise have been the case.

Developing countries should be involved in the negotiations of new treaties; first with other developing countries to identify common grounds of interest and/or concern, and then in the broader negotiating forum. Early introduction of issues of concern for development objectives should be an integral part of the discussions, particularly in WIPO led treaty initiatives.

C. Integration of Treaty Language in National Laws

It is increasingly becoming the case that developing countries have adopted a practice of incorporating, verbatim, treaty language into domestic laws. This practice may have some adverse consequences for development purposes, particularly since treaty language often reflects a particular understanding of the treaty and this tends to be viewed in a strong protectionist light. It is important to evaluate which countries have done this, and to suggest ways of incorporating treaty norms into domestic laws in ways that are sensitive to development concerns.

D. Relationship between Old Treaties and New Treaties

The legal relationship between TRIPs and the WIPO treaties, or TRIPs and CBD obligations is complex and unsettled. Often, developing countries do not know how to comply with their obligations in a consistent and complementary fashion. There needs to be a thorough review of the legal relationship between new and old treaties and how this relationship may affect development concerns. Further, evidence of state practice has important ramifications for how a treaty-based obligation may be based against them. Developing countries need to understand what constitutes "state practice." Regional state practices may also be developed to strengthen a pro-development construction of treaty obligations.

E. The Problem of "Piggy-Backing"

Increasingly, treaties are being subsumed/incorporated in new negotiations. For example, membership in the WTO is a de facto membership in the Berne Convention and the Paris Convention; membership in regional organizations like OAPI requires membership in the PCT, and so on. The result is that membership in a new treaty often entails joining several other treaties. For developing countries that are already lagging behind in many respects, this means their economies must absorb *all at once* what developed countries absorbed over many years, sometimes over centuries. How can this problem be resolved? What kind of strategies can be used to avoid this "mouthful" of obligations all at one time?

F. Use of Information Technology

The primary issue here is to understand how information technology can be used to enhance the knowledge base in developing countries, particularly in the administration of intellectual property rights. Information technology can be an exceptional value in upgrading human resource capacity through distance education, expanding databases of information pertaining to intellectual property in developed countries, protection and use of information technology in administering local intellectual property offices, enhancing quality and quantity of interaction between developing countries and Geneva-based trade offices and building institutional alliances with public sector organizations involved with intellectual property issues in developed countries.

G. Preemptive/Advance Identification of Issues

Developing countries are typically caught unawares or unprepared when issues for new treaty negotiations are submitted. As a strategic matter, it is important for developing countries to think ahead about issues that developed country priorities/interests may later suggest as the appropriate subject of multilateral negotiations. To this end, it will be helpful to identify what domestic structures are on the ground in key developing countries that might be used as focal points for identifying possible issues that may be introduced in a multilateral context. An immediate starting point is the new Patent Law Treaty.

H. New Treaty Initiatives

Patent Law Treaty: Identify key provisions and the implications for specific development concerns. Begin developing recommendations to deal with these specific concerns. Establish maximum parameters and build consensus around them with a strong coalition of developing and some developed countries.

I. Subject Matter of Possible Future Treaties

- ✓ Databases
- ✓ Traditional Knowledge
- ✓ Competition and Intellectual Property Rights

Concluding Observations:

Not every development concern can be addressed for each intellectual property treaty that exists. An integral part of development strategy in the immediate future is to identify global-specific, region-specific and some country-specific development needs. Strategies should concentrate heavily on areas where these three converge. A working list of these areas of convergence and relevant sectors implicated should be developed for preparations to negotiate common positions between developing countries. There should also be some consideration given for creating alliances with some developed countries in areas where those countries mat share similar concerns. This was a strategy that worked very well during the TRIPs negotiations as well as during the WCT/WPPT negotiations.