

Denver Journal of International Law & Policy

Volume 40
Number 1 *40th Anniversary Edition*

Article 17

April 2020

Reflections on Development, Developing Countries and the Progressive Development of International Trade and Intellectual Property Law

Edward Kwakwa

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Edward Kwakwa, Reflections on Development, Developing Countries and the Progressive Development of International Trade and Intellectual Property Law, 40 Denv. J. Int'l L. & Pol'y 221 (2011-2012).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

**REFLECTIONS ON “DEVELOPMENT,”
“DEVELOPING COUNTRIES” AND THE
“PROGRESSIVE DEVELOPMENT” OF INTERNATIONAL TRADE
AND INTELLECTUAL PROPERTY LAW**

EDWARD KWAKWA*

I. INTRODUCTION

The concept of development is moving to centre stage in substantive discussions on intellectual property (IP) and international trade (trade) matters. As part of this trend, developing countries have, in recent years, become much more active participants in ongoing discussions and negotiations in the areas of trade and IP. In particular, there is a growing understanding by countries of the potential of trade and IP as a tool for development, and thus, the implications of trade and IP rules on the socio-economic development of countries. Partly as a result of this trend, the concept of development has also become a much debated topic in ongoing trade and IP discussions and norm-making.¹

This article looks at the trend of increasing developing country participation and the concomitant increase in attention to the concept of development in trade and IP discussions. It concludes that this trend is also having an impact on the progressive development of international trade and IP law.

The article is presented in three parts. Part II briefly describes the terms “development” and “developing countries,” and Part III discusses the extent to which the concept of development has permeated discussions and actual norm-making at the World Intellectual Property

* Legal Counsel, World Intellectual Property Organization (WIPO), Geneva. The views expressed here are my personal views and are not necessarily shared by WIPO or by the United Nations. This article is dedicated to Professor Ved Nanda, a dear friend and mentor.

1. See THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 1-3 (Neil Weinstock Netanel ed., 2008) [hereinafter THE DEVELOPMENT AGENDA]; WORLD TRADE ORG. SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 235-36 (1998); Bhagirath Lal Das, *Strengthening Developing Countries in the WTO*, THIRD WORLD NETWORK TRADE & DEVELOPMENT SERIES, 1999, at 1-2, 34-35.

Organization (WIPO) and the World Trade Organization (WTO),² while Part IV presents some final observations.

II. "DEVELOPMENT" AND "DEVELOPING COUNTRIES"

Webster's Dictionary defines development as "the act, process, or result of developing," or "the state of being developed."³ It is this broad sense in which the term is used in this article. The concept of development is receiving increased attention and recognition, and playing an enhanced role in international law. Discussion in this article will, however, be limited to its use and impact in the specific and limited context of discussions and activities at WIPO and WTO.

Development has been on the international relations agenda for decades. As Michael Cowen and Robert Shenton stated over a decade ago, development is one of "the central organizing concepts of our time."⁴

There are several examples of international organizations (IOs) that have traditionally dealt with development. These include: the Food and Agricultural Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD), the International Monetary Fund (IMF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the World Bank (IBRD), and the World Health Organization (WHO).⁵ More recently, development is playing a much bigger role.

2. WIPO is a Geneva-based Specialized Agency of the United Nations (UN) whose mandate is to promote the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of humankind. For a comprehensive account of the history, mission, structure, and activities of WIPO see WORLD INTELL. PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE 3-8 (2nd ed. 2004). The WTO is a permanent negotiating forum whose principal mandate is trade liberalization within a rules-based system. The five main functions of the WTO are provided in Article III of the WTO's constituent instrument. See Marrakesh Agreement Establishing the World Trade Organization art. 3, Apr. 15, 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

3. *Development*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/development> (last visited Feb. 14, 2012).

4. Michael Cowen & Robert Shenton, *The Invention of Development*, in POWER OF DEVELOPMENT 25 (Jonathan Crush ed., 1995).

5. *About FAO*, FOOD AND AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/about/en/> (last visited Feb. 18, 2012) ("FAO's mandate is to raise levels of nutrition, improve agricultural productivity, better the lives of rural populations and contribute to the growth of the world economy."); *About IFAD*, INT'L FUND FOR AGRIC. DEV., <http://www.ifad.org/governance/index.htm> (last visited Feb. 18, 2012) (stating that the fund was established "to finance agricultural development projects primarily for food production in the developing countries."); *About the IMF: Overview*, INT'L MONETARY FUND, <http://www.imf.org/external/about/overview.htm> (last visited Feb. 18, 2012) ("The IMF works to foster global growth and economic stability. It provides policy advice and

In the United Nations, for example, the Millennium Development Goals (MDGs), which were adopted in 2000, have become the yardstick against which progress in any other area is measured, and several other UN system organizations closely monitor, and strive to help attain the MDGs.⁶

While development has had more of a history, and is easier to understand in the context of organizations such as the United Nations and the World Bank, it is a much newer phenomenon in the context of organizations such as WIPO and the WTO. Also noteworthy is the fact that development now permeates the activities of other IP institutions that do not have development within their objectives or mandates. A prime example of this is manifested in the statement of the President of the European Patent Organisation (EPO) on the rationale behind international cooperation in the international patent system.⁷

financing to members in economic difficulties and also works with developing nations to help them achieve macroeconomic stability and reduce poverty.”); *Background*, INT’L BANK FOR RECONSTRUCTION AND DEV., <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21130269~menuPK:3168298~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html> (last visited Feb. 18, 2012) (“IBRD is part of the World Bank (IBRD/IDA) that works with middle-income and creditworthy poorer countries to promote sustainable, equitable and job-creating growth, reduce poverty and address issues of regional and global importance.”); *Introducing UNESCO: What We Are*, UNITED NATIONS EDUC., SCI. CULTURAL ORG., <http://www.unesco.org/new/en/unesco/about-us/who-we-are/introducing-unesco/> (last visited Feb. 18, 2012) (“UNESCO’s mission is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information.”); *UNIDO in Brief*, UNITED NATIONS INDUS. DEV. ORG., <http://www.unido.org/index.php?id=7840> (last visited Feb. 18, 2012) (“Its mandate is to promote and accelerate sustainable industrial development in developing countries and economics in transition, and work towards improving living conditions in the world’s poorest countries by drawing on its combined global resources and expertise.”); *The WHO Agenda*, WORLD HEALTH ORG., <http://www.who.int/about/agenda/en/index.html> (last visited Feb. 12, 2012) (discussing how its commitment to “activities aimed at health development” gives “priority to health outcomes in poor, disadvantaged or vulnerable groups”, and its goal in attaining the “health-related Millennium Development Goals”).

6. See *MDG Strategies*, UNITED NATIONS DEV. PROGRAMME, http://www.beta.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_mdg_strategies.html (last visited Feb. 18, 2012); *Millennium Development Goals: About the Goals*, UNITED NATIONS CHILDREN’S FUND, http://www.unicef.org/mdg/index_aboutthegoals.htm (last visited Feb. 18, 2012); *Millennium Development Goals*, THE WORLD BANK, <http://data.worldbank.org/data-catalog/millennium-development-indicators> (last visited Feb. 18, 2012); see also United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

7. The European Patent Office (EPO) is an IO that was established in 1977 to strengthen cooperation between the states of Europe in respect of the protection of inventions. A few years ago, however, in a landmark document that proposed the fundamental features of a new cooperation policy between the EPO and its member states, the President of the European Patent Office (one of the two main organs of the EPO) stated in clear terms that cooperation, “seen from a broad perspective, aims to improve the contribution of the patent system to the innovation capacity and economic

The concept of development has recently been at the forefront in intellectual property and trade discussions. In WIPO, for example, the Member States established what is referred to as the "Development Agenda" at their 2004 annual meetings.⁸ As part of this agenda, in 2007, the General Assembly of WIPO adopted 45 (out of over 100) recommendations aimed at integrating the development dimension in all WIPO's activities. It established a Committee on Development and Intellectual Property whose task, among others, was to work on development-related issues at WIPO.⁹ The Development Agenda provides the following, among other things: (1) WIPO technical assistance must be "development-oriented . . . taking into account the priorities and special needs of developing countries . . . as well as the different levels of development of Member States," (2) WIPO must "further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate," and (3) "WIPO's legislative assistance shall be, inter alia, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries. . . ."¹⁰

The Development Agenda was streamlined through WIPO's revised Program and Budget for the 2008-2009 biennium, and has since been provided for in all subsequent Program and Budgets.¹¹ Against this background, it is instructive to note that the concept of development itself does not appear anywhere in WIPO's mandate.

development of the member states . . . " See Eur. Patent Office [EPO], *Cooperation Policy within the European Patent Network (EPN)*, at 2, EPO Doc. CA/124/06 (July 8, 2006), available at [http://documents.epo.org/projects/babylon/eponet.nsf/0/873CBA351C69871FC12572430044D703/\\$File/CA_124_06_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/873CBA351C69871FC12572430044D703/$File/CA_124_06_en.pdf).

8. World Intell. Prop. Org. [WIPO], *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO Doc. WO/GA/31/11 (Aug. 27, 2004); *WIPO Development Agenda: Background (2004-2007)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-development/en/agenda/background.html> (last visited Feb. 18, 2012).

9. This part draws heavily on an earlier editorial on a related topic. See generally Edward Kwakwa, *Mainstreaming "Development" in International Organizations*, 6 INT'L ORG. L. REV. 1 (2009). Although the Development Agenda in WIPO is relatively new, there is already a significant amount of literature on it. See, e.g., Jeremy De Beer, *Defining WIPO's Development Agenda*, in IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA 1-23 (Jeremy De Beer ed., 2009); THE DEVELOPMENT AGENDA, *supra* note 1; CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA (2007).

10. *The 45 Adopted Recommendations under the WIPO Development Agenda*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited Feb. 18, 2012).

11. World Intell. Prop. Org., *Revised Program and Budget for the 2008/09 Biennium*, at 26 (Dec. 12, 2008), available at http://www.wipo.int/export/sites/www/about-wipo/en/budget/pdf/rev_prog_budget_08_09.pdf.

Development has had an equally prominent role in the WTO. As Asif Qureshi points out, the Doha Round negotiations under the auspices of the WTO “had been orchestrated as a ‘development round,’ and its agenda was intended to integrate development into the very ‘architecture’ of the international trading system.”¹² By launching the Doha Development Agenda in 2001, the WTO Members “placed development issues and the interests of developing countries at the heart of the WTO’s work.”¹³ Indeed, paragraph 19 of the WTO’s Doha Ministerial Declaration mandates WTO’s TRIPS Council to “take fully into account the development dimension.”¹⁴

The concept of development plays a key role in other aspects of WTO’s activities. The legal status or the binding nature of various concepts at the heart of development, such as principles of less-than-full reciprocity, and special and differential treatment, have been extensively debated.¹⁵

As relates to the concept of “developing countries,” it is important to start with certain caveats. It should be pointed out at the outset that the concept of “developing countries” is not an exact or clearly defined one in international law, and is even less so in the multilateral trade or IP context. The term “developing countries” is used with reckless abandon in discussions in multilateral fora. Too often, the term is unaccompanied by any explanation of its precise scope or meaning. While any number of plausible definitions of the term “developing countries” is conceivable, in this article, the reference is to all countries except those that are referred to as countries in transition to a market economy, and those that are generally perceived to belong to the group of industrialized countries.¹⁶

12. Asif H. Qureshi, *International Trade for Development: The WTO as a Development Institution?*, 43 J. WORLD TRADE 173, 173 (2009). On the general positioning of developing countries within the WTO system, see generally DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM (Joel P. Trachtman & Chantal Thomas eds., 2009).

13. *Trade Development*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/devel_e.htm (last visited Feb. 14, 2012).

14. See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 19, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

15. See, e.g., Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions Under WTO Agreements*, in WTO LAW AND DEVELOPING COUNTRIES 12 (George A. Bermann & Petros C. Mavroidis eds., 2007) (discussing the legal status of special and differential provisions under the WTO Agreements).

16. The term, for purposes of this article, therefore excludes all industrialized countries, as well as all the countries in transition to a market economy, most of which were part of the former Soviet bloc. The term however includes such economically advanced countries as Singapore, China, and the Republic of Korea.

The concept of “developing countries” also includes the so-called “least-developed” countries (LDCs).¹⁷ While this may be a somewhat arbitrary definition, I am unaware of the existence of a more scientific or precise definition. More importantly, the proposed definition serves adequately the import of this article.

The developing countries reflect a diverse range of interests and sometimes differ considerably in their respective positions on various subjects. While there are areas of significant commonality, their concerns and interests naturally differ from developing country to developing country. It is also a truism that some arguments and issues apply more to certain developing countries than to others. A developing country such as Ghana may have a completely different set of priorities than, say, Brazil. Similarly, a net food-importing developing country's interests will not necessarily be coterminous with those of a developing net food-exporting country; nor will a developing oil exporting country pursue the same policies and interests as a developing oil importing country.

There are certain defined groups or bodies that cut across developed and developing country interests. The Cairns Group has among its nineteen members, sixteen developing countries.¹⁸ The

17. The fifty countries currently on the list of LDCs are: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen, and Zambia. See U.N. DEPT OF ECON. & SOC. AFFAIRS, STATISTICS DIVISION, *WORLD STATISTICS POCKETBOOK 2010: LEAST DEVELOPED COUNTRIES*, at vii, U.N. Sales No.E.11.XVII.4 (2011), available at <http://www.un.org/News/Press/docs/2011/Jan/110101.htm>. The most recent country to join the United Nations, South Sudan, will no doubt be added to the LDC list. The category of LDCs was officially established in 1971 by the UN General Assembly with the objective of attracting special international support for this poorest and weakest segment of the international community. The list of LDCs is reviewed every three years by the Economic and Social Council of the United Nations (ECOSOC). In general, the criteria used to determine whether a country falls within the category of LDCs include: (i) the Gross Domestic Product (GDP) per capita, (ii) a composite index (the Augmented Physical Quality of Life Index) based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrollment, and adult literacy; and (iii) a composite index (the Economic Diversification Index) based on the share of manufacturing in GDP, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index. See *UN Recognition of the Least Developed Countries*, UNITED NATIONS CONF. ON TRADE AND DEV., <http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1> (last visited Feb. 14, 2012).

18. The Cairns Group is a group of nineteen agricultural exporting countries, accounting for over 25 percent of the world's agricultural exports. It is comprised of

Organization for Economic Cooperation and Development (OECD), while traditionally comprised of industrialized countries, now includes developing countries such as Chile, Mexico and Republic of Korea.¹⁹ It also includes some countries in transition and/or central European and Baltic countries, such as the Czech Republic, Estonia, Poland, Slovakia and Slovenia.²⁰ Also noteworthy is the fact that most of the world’s poor live in certain middle-income countries, although those countries may no longer be perceived as typical developing countries.²¹

III. THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY LAW

The Developing Countries in the WTO

Historically, the developing countries have not been as active in the WTO as their developed country counterparts have been.²² The reasons include lack of adequate participation and representation at WTO meetings, and financial constraints (which affect their human, institutional and infrastructural capacity).²³ Given the extreme importance of the multilateral trading system and the impact of decisions made at WTO, the developing countries need to participate

Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, and Uruguay. *An Introduction*, THE CAIRNS GROUP, <http:// Cairnsgroup.org/Pages/Introduction.aspx> (last visited Feb. 18, 2012).

19. *Members and Partners*, ORG. FOR ECON. COOPERATION AND DEV., http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Feb. 14, 2012).

20. *Id.*

21. Andy Sumner & Amanda Glassman, *Aid Cuts to Middle-Income Countries Worsen Global Poverty and Ill-Health*, GUARDIAN POVERTY MATTERS BLOG (Jan. 2, 2012), <http://www.guardian.co.uk/global-development/poverty-matters/2012/jan/02/aid-cuts-middle-income-countries> (arguing that the global distribution of malnutrition may point to middle-income countries, as do multidimensional measures of poverty and global disease and death figures).

22. *See* T.N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM THE GATT TO THE URUGUAY ROUND AND THE FUTURE 3* (1998) (discussing developing countries and their lack of effective participation and influence in multilateral trade negotiations until the Tokyo Round).

23. Committee for Development Policy, United Nations, Econ. & Soc. Council, *Survey on the International Support Measures Related to WTO Provisions and Preferential Market Access for LDC: Responses by Least Developed Countries 1-2, 4* (Apr. 2011), http://webapps01.un.org/ldcportal/c/document_library/get_file?uuid=024b355f-d56c-47d1-a5b9-2ec92f06a6ac&groupId=10136; *Transparency, Participation and Legitimacy of the WTO*, THIRD WORLD NETWORK, <http://www.twinside.org.sg/title/legit-cn.htm> (last visited Feb. 18, 2012).

much more effectively in the WTO. The developing countries could benefit a lot more by using WTO as a forum to promote their agenda.²⁴

The WTO is one of very few international organizations whose constituent instrument specifically provides for decision-making by consensus.²⁵ This effectively gives each of the WTO's Members a veto power,²⁶ which implies that the developing countries may be much more powerful at WTO than they are in the UN General Assembly or Security Council. The process of taking decisions by consensus is in the interest of developing countries because through consensus, each individual WTO Member is able to retain a right of veto, thus making all WTO Members equal in decision-making.²⁷ Even if there were a vote, it is by no means certain that developing countries would always vote as a block, given their diverse interests. The point remains that the veto power that each of the WTO Members has is, in effect, analogous to that wielded by the five veto powers on the Security Council.²⁸ In my view, this alone provides a compelling reason why the developing countries should be more engaged in the WTO.

The WTO brings various benefits to developing countries. For example, the rule-based nature of the multilateral trading system arguably creates certainty or fosters predictability. It is also easier and more beneficial for developing countries to negotiate in a multilateral forum such as the WTO, and in the context of the whole gamut of international trade, than on a bilateral basis, often in the context of more narrow or specific aspects of trade. In the June 2011 issue of *Foreign Affairs*, Susan Schwab, former U.S. Trade Representative, suggested that, given the apparent failure of the Doha Round negotiations, WTO Members should proceed on a plurilateral basis.²⁹ The problem with plurilateralism, apart from not being representative enough, is that it encourages selectivity and exclusivity where like-minded countries negotiate and agree on rules that best suit their

24. There is no dearth of literature on the relationship between developing countries and the multilateral trading system. See, e.g., ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987); SRINIVASAN, *supra* note 22; THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin & L. Alan Winters eds., 1996); Celso L. N. Amorim, *The WTO From the Perspective of a Developing Country*, 24 *FORDHAM INT'L L. J.* 95 (2000).

25. *Policy Brief 00-2: Decision-Making in the WTO*, PETERSON INST. FOR INT'L ECON. (Mar. 2000), <http://www.iie.com/publications/pb/pb.cfm?ResearchID=63>.

26. *Id.*

27. *The WTO...Why it Matters: A Guide for Officials, Legislators, Civil Society and All Those Interested in International Trade and Global Governance*, WORLD TRADE ORG. 21, 66 (Oct. 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/wto_matters_e.pdf [hereinafter *The WTO...Why it Matters*].

28. See U.N. Charter arts. 23, 27; *The WTO...Why it Matters*, *supra* note 27.

29. Susan C. Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, *FOREIGN AFF.* 104-05, 115-16 (2011).

interests and goals. The danger is that those rules could subsequently find their way into bilateral agreements between developed and developing countries, through negotiations in which the developing countries will, in all likelihood, have less leverage than they would have had in the multilateral setting. A rule-based multilateral trading system also reduces the chances of unilateralism or mitigates the effects of such unilateralism. In theory, the multilateral trade rules within the WTO framework, while providing developing countries with export market access, should also protect them from the arbitrary protection/subsidies of other powerful countries. Integration into the world trading system should therefore be seen as the key to higher growth and poverty reduction in the developing countries.

The success of the industrialized countries, and their satisfaction with the world trading system, is not at issue. This is already a generally accepted fact. But the real test of the WTO will be not the success or the happiness of the developed countries with the multilateral trading system, but rather the extent to which WTO is able to integrate the developing countries into the multilateral trading system.

Whereas it is widely believed that the developing countries did not achieve significant trade benefits in the Uruguay Round, it may be fair to argue that they had several of their concerns addressed in Doha;³⁰ for example, in the area of IP rules pertaining to more affordable medicines to combat epidemics, such as HIV-AIDS and tuberculosis. It is instructive to recall that the only amendment there has been to any WTO Agreement since the adoption of the Uruguay Round texts in 1994 is the amendment in respect of Article 31(f) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).³¹ This amendment seeks to make permanent a decision on patents and public health originally adopted in 2003 that was driven by concerns for the particular health needs of developing countries.³²

30. The ongoing Doha Round was launched in November 2001. It is known as the Doha Development Round, a decision that was taken "to overcome the reluctance of developing countries, who were increasingly unhappy about the outcomes of the previous Uruguay Round, to engage in a new negotiating round" UN-OHRLLS Newsroom Doha: The Non-"Development" Round, UNITED NATIONS OFF. HIGH REPRESENTATIVE FOR LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES (Jan. 6, 2012), http://www.unohrlls.org/en/newsroom/current/?type=2&article_id=120&print=1.

31. Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT'L L. 421, 430 (2008).

32. For an explanation of the decision by WTO Members to amend the TRIPs Agreement Article 31 provision (on compulsory licensing), see generally Press Release, World Trade Organization, *Decision Removes Final Patent Obstacle to Cheap Drug Imports* (Aug. 30, 2003), available at http://www.wto.org/english/news_e/pres03_e/pr350_e.htm.

Another reason why the developing countries should be more engaged in the WTO is the benefits they get by virtue of their status and membership as developing countries. There are several provisions in the WTO Agreements that speak to the special position of the developing countries.³³ A significant amount of WTO's work entails trying to assist the developing countries to more fully integrate into the multilateral trading system. This effort is based on the tacit assumption and, indeed, on the explicit assertion that the trade system is good for the developing countries. For example, the special and differential treatment provisions are known to be an integral part of the multilateral trading system. Their general aim is to ensure that the developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development."³⁴ But a more effective regime and implementation of the special and differential treatment provisions could greatly inure to the benefit of the developing countries, as cogently argued by Edwini Kessie.³⁵

Also noteworthy is the fact that developing countries obtain technical assistance from the WTO Secretariat.³⁶ Part of this assistance entails the provision of legislative advice, including interpretation and implementation of obligations under the multilateral

33. See *Work on Special and Differential Provisions*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Feb.19, 2012) (describing the various special and differential treatment provisions provided to developing countries in order to treat them more favorably than other WTO Members).

34. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

35. These special and differential treatment provisions have not operated satisfactorily to date, and it is arguable that they have not brought developing countries the widely anticipated benefits. Worse yet, as demonstrated by Edwini Kessie, the provisions are largely of a hortatory and legally non-binding nature. See Edwini Kessie, *Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements*, 3 J. WORLD INTELL. PROP. 955, 974 (2000). See also Kessie, *supra* note 15 (showing, among other things, how the special and differential treatment provisions could be made more beneficial (in their implementation) to developing countries).

36. According to the WTO, it budgets annually about CHF 30 million for technical assistance activities. *Financing of TRTA*, WORLD TRADE ORG., http://http://www.wto.org/english/tratop_e/devel_e/teccop_e/financing_trta_e.htm (last visited Feb. 10, 2012). The WTO's mandate in respect of technical assistance is provided for in various WTO Agreements and decisions, and further clarified and enhanced in the 2001 Doha Ministerial Declaration. It has sometimes been suggested that WTO's trade-related technical assistance is often aimed at ensuring that developing countries comply with their obligations under the WTO rules, rather than at helping them to determine what their interests are and how best to adopt trade and economic policy conducive for their own special needs.

trading system.³⁷ This ultimately contributes to advancing the corpus of international trade law.

In terms of the progressive development of trade law, the developing countries are engaged in ongoing efforts aimed at infusing trade agreements, policies and practices with the development dimension. Two examples will suffice here. The first concerns part of the Doha mandate issues relating to creating a multilateral register for wines and spirits, and extending the higher (Article 23 of TRIPs) level of protection beyond wines and spirits.³⁸ “The TRIPs Agreement requires a review of Article 27.3(b) which deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties.”³⁹ This was further broadened by Paragraph 19 of the 2001 Doha Declaration, which requested the WTO’s TRIPs Council to also review the relationship between the TRIPs Agreement and the UN Convention on Biological Diversity, the protection of traditional knowledge and traditional cultural expressions (or folklore).⁴⁰

The developing countries in WTO have managed to put development-related issues at the forefront of most major trade initiatives, and are actively engaged in discussions aimed at progressively developing international trade law in respect of such matters as the scope of protection for geographical indications, and issues relating to patentability, biological diversity and traditional knowledge.

The Developing Countries in WIPO

Whereas WTO has 153 Members as of today, WIPO has 185 Member States.⁴¹ There are many more developing country members of

37. World Trade Organization, *Aid-For-Trade Case Story: WTO’s Institute for Training and Technical Cooperation (ITTC)* 1, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/dataoecd/29/35/48413638.pdf> (last visited Feb. 19, 2012).

38. *Background and the Current Situation*, WORLD TRADE ORG. (Nov. 2008), http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm#protection.

39. *Article 27.3b, Traditional Knowledge, Biodiversity*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm (last visited Feb. 11, 2012).

40. *The Doha Declaration Explained*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited Feb. 11, 2012).

41. *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 11, 2012); *Member States*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/members/en/> (last visited Feb. 11, 2012). Having deposited its instrument of accession to the WIPO Convention on Dec. 2, 2011, Vanuatu will become the 185th Member State of WIPO on Mar. 2, 2012. WTO’s 153 Members are also likely to have increased by the time this article is published. In particular, Vanuatu was authorized by the WTO General Council to ratify its accession package by Dec. 31, 2011, and thus become the WTO’s 154th Member thirty days after depositing an instrument of ratification to the WTO Agreement. Likewise, the Ministerial Session of WTO from Dec. 15 to 17, 2011 authorized Samoa to accept its accession package by June 15, 2012 and thus become a WTO Member thirty days after ratifying its accession package; and

WIPO than there are of the WTO. The arguments provided earlier to demonstrate the need for the developing countries to be more engaged in WTO, apply *a fortiori* to the need for them to engage in WIPO.⁴²

Historically, IP has been more known, discussed and protected in the developed countries than has been the case in developing countries. This is also a trend that is now changing. For starters, all the recent adherents to the WIPO Convention happen to be developing countries.⁴³ Recent discussions in WIPO have seen more assertive developing country positions than was the case in the first three decades of the Organization's existence. A few examples will be given here; in 2004, the Development Agenda was introduced in WIPO largely as a result of the efforts by Argentina and Brazil.⁴⁴ There has since been established an informal group of countries known as the "Development Agenda Group," which takes positions and makes statements on behalf of its Members on almost every issue that is being debated in various fora in

Montenegro has been given up to Mar. 31, 2012 to do so, while the Russian Federation is authorized to ratify the terms of its entry within 220 days from Dec. 16, 2011, after which it will become a fully fledged Member of WTO thirty days after it notifies the ratification to the WTO. See *Accessions News Archive*, WORLD TRADE ORG., http://wto.org/english/news_e/archive_e/acc_arc_e.htm (last visited Feb. 19, 2012).

42. In respect of technical assistance, WIPO's assistance to Member States is only in the field of IP, not in the broader WTO trade field. WIPO provides its developing country Member States with legislative advice in connection with its cooperation for economic development program, including advice on how best to exploit the flexibility under international treaties in implementing their obligations. For information relating to WIPO's advice on flexibilities under the TRIPs Agreement, see generally *Advice On Flexibilities Under The TRIPs Agreement*, WORLD INTELL. PROP. ORG., www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html (last visited Feb. 19, 2012).

43. Looking back at accessions to the WIPO Convention since 2000, it is significant that all but one of the fourteen countries that joined WIPO between 2000 and January 2012 are developing countries. They are, in alphabetical order, and with the year they joined in brackets: Afghanistan (2005); Antigua and Barbuda (2000); Belize (2000); Comoros (2005); Djibouti (2002); Dominican Republic (2000); Iran (Islamic Republic of) (2002); Maldives (2004); Montenegro (2006); Myanmar (2001); Seychelles (2000); Syrian Arab Republic (2004); Tonga (2001); and Vanuatu (2012). See *Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=1 (last visited Feb. 13, 2012). The only country on the list that does not fall within our definition of developing countries is Montenegro. And as is well known, Montenegro's declaration of continued application of (or accession to) the WIPO (and other conventions) was necessitated by the break-up of Serbia and Montenegro, and the confirmation of Serbia as the continuing State as from June 6, 2006. *Treaties and Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1951C (last visited Feb. 19, 2012).

44. On the establishment of the Development Agenda in WIPO, and an elaboration of its various clusters, see generally Jeremy De Beer, *supra* note 9; *WIPO Development Agenda*, WORLD INTELL. PROP. ORG., http://www.wipo.int/freepublications/en/general/11015/wipo_pub_11015.pdf (last visited Feb. 13, 2012).

WIPO.⁴⁵ The effect has been to ensure that issues pertaining to development are built into all discussions and made part of any substantive texts that are adopted. This will no doubt be replicated at future diplomatic conferences convened under the auspices of WIPO to adopt treaties in any area of IP.

Another example of more assertive developing country positions can be found in WIPO Member State discussions relating to the draft substantive patent law treaty (“SPLT”). In 2000, the Member States of WIPO, through the Standing Committee on Patents (“SCP”), started discussions on a treaty aimed at harmonizing substantive patent law.⁴⁶ At several points in the discussions between 2000 and 2004, there was unanimous agreement on the need to include draft provisions on a number of issues of direct relevance to the grant of patents.⁴⁷ Of particular significance were issues relating to the definition of prior art, novelty, inventive step or non-obviousness, and industrial applicability or utility.⁴⁸ In subsequent meetings, however, some developing countries asserted the need to include other issues that were directly relevant to development and developing countries.⁴⁹ At the June 2005 session of the SCP, Brazil submitted a statement on behalf of a group of developing country Member States known as “Friends of Development.”⁵⁰ The statement suggested that the discussions include not only the earlier agreed issues mentioned above, but also provisions on the transfer of technology, anti-competitive practices, and the

45. For a sample statement from DAG Member India, see WIPO Gen. Assembly Report of the Fortieth (20th Ordinary) Session, ¶ 88, Sept. 26-Oct. 5, 2011, WIPO Doc. WO/GA/40/19 (2011) [*hereinafter* WIPO Assembly Report] (stressing that the DAG “attached great importance to the efforts to develop an effective normative framework for harmonizing exceptions and limitations to copyright in specific sectors.” The DAG viewed exceptions, exclusions and limitations as an “intrinsic and essential part of the IPRs framework that brought much needed balance between private interests and larger public interest in the context of national public policies and development goals.”); *id.* ¶ 143 (explaining that the DAG “attached great importance to the work of the IGC, as the protection of GRs, TK and TCEs was a national priority for its members.”); *id.* ¶ 58 (stating that “the real essence of the [Development Agenda] lay in bringing about a conceptual transformation in how Members viewed IP and how they sought to use it for the betterment of mankind everywhere through appropriate norm-setting, protection, enforcement and technical assistance.”).

46. *Draft Substantive Patent Law Treaty*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/patent-law/en/harmonization.htm> (last visited Feb. 13, 2012).

47. *Id.*

48. *Id.*

49. *Id.*

50. The “Friends of Development” Group no longer exists, but has been replaced by the “Development Agenda Group.” *New WIPO Development Agenda Group Seeks Transformation of UN Agency*, INTEL. PROP. WATCH (Apr. 26, 2010), <http://www.ip-watch.org/2010/04/26/new-wipo-development-agenda-group-seeks-transformation-of-un-agency/>.

safeguarding of public interest flexibility, among others.⁵¹ All attempts to make progress on the negotiations in respect of the SPLT have not resulted in any agreement on the modalities and scope of the future work of the SCP.⁵² This development in respect of the SPLT is a good example of the new influence of the developing countries in effectively having a say in issues and outcomes aimed at progressively developing IP law.

To give yet another example, there exists a WIPO Committee known as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC has been in existence since 2000, and has been debating issues relating to how best to protect traditional knowledge, traditional cultural expressions (or folklore) and genetic resources.⁵³ For the first time last year, the IGC agreed to recommend to the WIPO General Assembly, and that Assembly agreed that the IGC should, in the 2012-2013 biennium, "expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs."⁵⁴ The IGC is thus in the process of deliberating on a proposed Treaty to protect these three non-traditional areas under IP law.⁵⁵ It is widely expected that the Member States of WIPO may be at the point where they will convene a diplomatic conference in the next few years with the express aim of adopting a treaty on traditional knowledge, traditional cultural expressions and genetic resources. This point has been reached as a result of the very active and indeed predominant participation of developing countries in the relevant WIPO processes.⁵⁶

51. *Draft Substantive Patent Law Treaty*, *supra* note 46.

52. *Id.*

53. For a primer on traditional knowledge, traditional cultural expressions and genetic resources, see *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/tk/en> (last visited Feb. 19, 2012).

54. WIPO Secretariat, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, ¶ 16(a), WIPO Doc. WO/GA/40/7 (Aug. 12, 2011). The General Assembly also decided that the IGC should "submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012 will take stock of and consider the text(s) and progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process." See *id.* ¶ 16(d).

55. *Id.*

56. See, *eg.*, WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., *Traditional Knowledge and Folklore, Recommendations of the Second Session of Like Minded Countries Meeting on the Protection of Genetic Resources, Traditional Knowledge and Folklore*, July 18-22, 2011, WIPO Doc. WIPO/GRTKF/IC/19/8 (2011), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_19/wipo_grtkf_ic_19_8.pdf (submission by Algeria, Angola, Bangladesh, Colombia, Egypt, India, Indonesia, Malaysia, Myanmar,

IV. CONCLUSION

We have recalled that the developing countries now form the majority of WIPO and WTO's membership. To be sure, over 75 percent of WIPO Member States and WTO Members are developing countries.⁵⁷

This preponderance of developing country members in WIPO and WTO is a recent development which has been accelerated by the attainment of independence of several developing countries in the last few decades.

Whereas developing countries did not have much of a role in the formation and the initial discussions that took place in both organizations, they have now become major players as well as stakeholders in the multilateral IP and trade discussions. There is also a deeper understanding of the potential of IP and trade as tools for development, and thus their implications on the socio-economic development of countries.⁵⁸

There is little doubt that developing countries will continue to swell the ranks of the WTO and WIPO. There is even less doubt that the concept of development will correspondingly play a major role in discussions and negotiations at both institutions.

In terms of developments in substantive IP and trade law, predictions are more difficult.⁵⁹ I have no doubt, however, that within the next decade, the Member States of WIPO will have adopted a Treaty in the area of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. This will be a landmark development and a paradigm shift in the IP law regime, given the

Namibia, Pakistan, Peru, South Africa, Tanzania, Thailand and Zimbabwe, adopting “a joint recommendation to advance the work of WIPO to establish an international legal instrument (or instruments) for the effective protection of genetic resources, traditional knowledge and folklore.”).

57. For the respective lists of WTO Members and WIPO Member States, see *Members and Observers*, *supra* note 41; *Members States*, *supra* note 41.

58. Indeed, WIPO has recently included on its website a theme on the importance of IP for the economic development of nations. *Intellectual Property for Development*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-development/en> (last visited Feb. 13, 2012). The WTO Agreements also recognize the link between trade and development. See *Trade and Development*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/devel_e.htm (last visited Feb. 13, 2012). It may well be that the growing interest among developing country members of WTO is partly attributable to the fact that WTO discussions, unlike discussions in its predecessor organization GATT, now include a wider range of issues (namely services and IP), thus having greater impact on economic development. *But see* STEFAN DE VYLDER, *THE LEAST DEVELOPED COUNTRIES AND WORLD TRADE* 92 (2d ed. 2007) (arguing that many WTO issues “are considerably more difficult, and more politically controversial, than previous GATT agreements” largely because “[a] new regime was constructed which affects developing countries to a much greater degree and which is much more mandatory in nature than was previously the case.”).

59. As the famous Yogi Berra quip goes, predictions are hard to make, especially when they are about the future!

general reluctance to date to include traditional knowledge, traditional cultural expressions and genetic resources within the ambit of IP that needs protection.⁶⁰ Similarly, it is possible that the Member States of WIPO will have adopted a treaty that aims to progressively develop international patent law by including provisions not only on commonly accepted terms such as grace period, prior art and inventive step, but also development-related concepts such as transfer of technology, prior informed consent and benefit sharing. Substantive discussions at WTO will also likely continue to reflect development-related concerns. In particular, it is doubtful that any new amendment to any of the WTO Agreements will be adopted if the particular amendment does not meet the consent or perceived interests of developing countries. IP and trade law will continue to be progressively developed along lines that increasingly take into account the development dimension as well as the interests and concerns of the developing countries.

These are only predictions that have a bearing on the subject of development, developing countries and the progressive development of international law in the trade and IP areas. But there will certainly be several other developments in the general areas of trade and IP. Those other developments and predictions need a more extensive elaboration and much more space than I have in this limited article.

60. In this regard, it is instructive to note that in August 2010, the African Regional Intellectual Property Organization (ARIPO) and its Member States adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. According to the ARIPO website, when the Protocol enters into force, it

will empower the custodians and holders of traditional knowledge and expressions of folklore to utilize their knowledge for socio-economic development and wealth creation. The implementation of the Protocol will curtail the ongoing misappropriation, bio-piracy and prevent illicit claim of traditional knowledge-based inventions and patent applications and enable the ARIPO Office to register traditional knowledge and expressions of folklore that are trans-boundary and multicultural in nature, the so-called regional traditional knowledge and expressions of folklore. The Protocol will furthermore provide a framework for national legislative developments on the protection of the resources.

ARIPO and Its Member States Adopt a New Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, AFRICAN REGIONAL INTELL. PROP. ORG. (Sept. 13, 2010), http://www.aripo.org/index.php?option=com_content&view=article&id=108:adoptionoftkprotocol&catid=1:latest-news&Itemid=18.