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WORLD INTELLECTUAL PROPERTY ORGANIZATION

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**PROPOSAL BY ARGENTINA AND BRAZIL FOR THE ESTABLISHMENT OF A
DEVELOPMENT AGENDA FOR WIPO**

Document prepared by the Secretariat

- 1 In a communication dated August 26, 2004, the Secretariat received a formal proposal from Argentina and Brazil relating to the establishment of a new development agenda within WIPO, requesting that the proposal be distributed and added to the agenda of this session of the WIPO General Assembly, pursuant to Rule 5(4) of the WIPO General Rules of Procedure.
- 2 The said proposal is annexed to this document.

3 The General Assembly is invited to comment on the proposal contained in the Annex to this document and to decide on the course of action to be taken.

[Annex follows]

ANNEX

I DEVELOPMENT, THE MOST IMPORTANT CHALLENGE FACING THE INTERNATIONAL COMMUNITY

At the dawn of a new Millennium, development undoubtedly remains one of the most daunting challenges facing the international community. The importance of facing up to this challenge has been widely acknowledged in many international fora at the highest level. The United Nations adopted the Millennium Development Goals, which established a firm commitment by the international community to address the significant problems that affect developing countries and LDCs. The Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society, and most recently the Sao Paulo Consensus adopted at UNCTAD XI, have all placed development at the heart of their concerns and actions. This has also been the case in the context of the current Doha round of multilateral trade negotiations of the World Trade Organization (the “Doha Development Agenda”), which was launched at the WTO’s 4th Ministerial Conference, in November 2001.

II THE DEVELOPMENT DIMENSION AND INTELLECTUAL PROPERTY PROTECTION

Technological innovation, science and creative activity in general are rightly recognized as important sources of material progress and welfare. However, despite the important scientific and technological advances and promises of the 20th and early 21st centuries, in many areas a significant “knowledge gap” as well as a “digital divide” continue to separate the wealthy nations from the poor.

In this context, the impact of intellectual property has been widely debated in past years. Intellectual property protection is intended as an instrument to promote technological innovation, as well as the transfer and dissemination of technology. Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development.

The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country's level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection.

In this regard, the adoption of the Doha Declaration on the TRIPS Agreement and Public Health at the 4th Ministerial Conference of the WTO represented an important milestone. It recognized that the TRIPS Agreement, as an international instrument for the protection of intellectual property, should operate in a manner that is supportive of and does not run counter to the public health objectives of all countries.

The need to integrate the "development dimension" into policy making on intellectual property protection has received increased recognition at the international level. Also in the framework of the WTO, paragraph 19 of the WTO's Doha Ministerial Declaration, in setting a mandate for the TRIPS Council in the context of the Doha Development Agenda, refers explicitly to the need to take fully into account the development dimension.

III INTEGRATING THE DEVELOPMENT DIMENSION INTO WIPO'S ACTIVITIES

As a member of the United Nations system, it is incumbent upon the World Intellectual Property Organization (WIPO) to be fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals. Development concerns should be fully incorporated into all WIPO activities. WIPO's role, therefore, is not to be limited to the promotion of intellectual property protection.

WIPO is accordingly already mandated to take into account the broader development-related commitments and resolutions of the UN system as a whole. However, one could also consider the possibility of amending the WIPO Convention (1967) to ensure that the "development dimension" is unequivocally determined to constitute an essential element of the Organization's work program. We therefore call upon WIPO General Assembly to take immediate action in providing for the incorporation of a "Development Agenda" in the Organization's work program.

IV THE DEVELOPMENT DIMENSION AND INTELLECTUAL PROPERTY NORM-SETTING: SAFEGUARDING PUBLIC INTEREST FLEXIBILITIES

WIPO is currently engaged in norm-setting activities in various technical Committees. Some of these activities would have developing countries and LDCs agree to IP protection standards that largely exceed existing obligations under the WTO's TRIPS Agreement, while these countries are still struggling with the costly process of implementing TRIPS itself.

The current discussions on a draft Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents (SCP) are of particular concern. The proposed Treaty would considerably raise patent protection standards, creating new obligations that developing countries will hardly be able to implement. In the course of discussions, developing countries have proposed amendments to improve the draft SPLT by making it more responsive to public interest concerns and the specific development needs of developing countries.

A consideration of the development dimension of intellectual property must be quickly brought to bear on discussions in the SCP. If discussions on the SPLT are to proceed, these should be based on the draft treaty as a whole, including all of the amendments that have been tabled by developing countries. Moreover, Members should strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States. Provisions on "objectives and principles", reflecting the content of Articles 7 and 8 of the TRIPS Agreement, should be included in the SPLT and other treaties under discussion in WIPO.

While access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy, adding new layers of intellectual property protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the 'Creative Commons'. The ongoing controversy surrounding the use of technological protection measures in the digital environment is also of great concern.

The provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States.

In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software.

Finally, the potential development implications of several of the provisions of the proposed Treaty on the Protection of Broadcasting Organizations that the Standing

Committee on Copyright and Related Rights is currently discussing should be examined taking into consideration the interests of consumers and of the public at large.

V THE DEVELOPMENT DIMENSION AND THE TRANSFER OF TECHNOLOGY

The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet, many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.

Even in developing countries that may have a degree of absorptive technological capacity, higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing. In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.

In this regard, a new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure an effective transfer of technology to developing countries, similarly to what has already been done in other fora such as the WTO and the UNCTAD. Among these measures, we note with particular interest the idea of establishing an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries. Such a regime could take the form of a Treaty on Access to Knowledge and Technology. It is also important that clear provisions on transfer of technology be included in the treaties currently under negotiation in WIPO.

VI THE DEVELOPMENT DIMENSION AND INTELLECTUAL PROPERTY ENFORCEMENT

Intellectual property enforcement should also be approached in the context of broader societal interests and development-related concerns, in accordance with Article 7 of TRIPS. The rights of countries to implement their international obligations in accordance with their own legal systems and practice, as clearly foreseen by Article 1.1 of TRIPS, should be safeguarded.

In setting up the Advisory Committee on Enforcement (ACE) in 2002, the WIPO General Assembly clearly rejected a “TRIPS-plus” approach to enforcement matters, by deliberately deciding to exclude all norm-setting activities from the Committee’s mandate. In undertaking any future work under its mandate, the ACE should be guided by a balanced

approach to intellectual property enforcement. The ACE cannot approach the issue of enforcement exclusively from the perspective of right holders, nor have its discussions focus narrowly on curbing the infringement of IP rights. Such discussions are important, but the ACE must also give consideration to how best to ensure the enforcement of all TRIPS-related provisions, including those that would impute obligations to right holders as well.

Particular attention should be paid to the need to ensure that enforcement procedures are fair and equitable and do not lend themselves to abusive practices by right holders that may unduly restrain legitimate competition. In this regard, we note that Article 8 of TRIPS states that corrective measures may be necessary to curb practices that may adversely affect trade and the international transfer of technology. One should also bear in mind the related provision of Article 40 of TRIPS, which addresses anti-competitive practices in contractual licenses. All of these provisions of the TRIPS Agreement should be adequately brought into WIPO's framework.

VII PROMOTING "DEVELOPMENT ORIENTED" TECHNICAL COOPERATION AND ASSISTANCE

WIPO is the main multilateral provider of technical assistance in the field of intellectual property. By virtue of the 1995 agreement with the WTO, it plays an important role in providing developing countries with technical assistance to implement the TRIPS agreement. As a United Nations specialized agency, WIPO has an obligation to ensure that its technical cooperation activities are geared towards implementing all relevant UN development objectives, which are not limited to economic development alone. These activities should also be fully consistent with the requirements of UN operational activities in this field - they must be, in particular, neutral, impartial and demand-driven.

Programs for technical cooperation in IP related matters should be considerably expanded and qualitatively improved. This is important to ensure that in all countries the costs of IP protection do not outweigh the benefits thereof. In this regard, national regimes set up to implement international obligations should be administratively sustainable and not overburden scarce national resources that may be more productively employed in other areas. Moreover, technical cooperation should contribute to ensuring that the social costs of IP protection are kept at a minimum.

WIPO's legislative assistance should ensure that national laws on intellectual property are tailored to meet each country's level of development and are fully responsive to the specific needs and problems of individual societies. It also must be directed towards assisting developing countries to make full use of the flexibilities in existing intellectual property agreements, in particular to promote important public policy objectives.

VIII A MEMBER-DRIVEN ORGANIZATION OPEN TO ADDRESSING THE CONCERNS OF ALL STAKEHOLDERS, IN PARTICULAR CIVIL SOCIETY

A balanced system of intellectual property protection should service the interests of all sectors of society. Given the broad public policy implications of intellectual property, it is crucial to involve a commensurately broad range of stakeholders in the discussions on intellectual property, both at the national and international levels, including in all norm-setting activity.

Currently, in WIPO, the term NGO is used to describe both public interest NGOs and user organizations. This creates confusion and does not seem consistent with existing UN practice, as implemented in most of the UN specialized agencies. It is thus necessary, in WIPO, to take appropriate measures to distinguish between user organizations representing the interests of IP right holders and NGOs representing the public interest.

Subsequently, WIPO should foster the active participation of public interest non-governmental organizations in its subsidiary bodies to ensure that in IP norm-setting a proper balance is struck between the producers and users of technological knowledge, in a manner that fully services the public interest.

IX CONCLUSION

A vision that promotes the absolute benefits of intellectual property protection without acknowledging public policy concerns undermines the very credibility of the IP system. Integrating the development dimension into the IP system and WIPO's activities, on the other hand, will strengthen the credibility of the IP system and encourage its wider acceptance as an important tool for the promotion of innovation, creativity and development.

[Appendix follows]

APPENDIX

ISSUES AND MEASURES TO BE CONSIDERED

Without prejudice to further initiatives, the following proposals, *inter alia*, could be considered by the General Assembly for the implementation of the suggested “WIPO Development Agenda”.

(1) Adoption of a high-level declaration on intellectual property and development

The Declaration could be adopted by the General Assembly itself or by a specially convened international conference on intellectual property and development. The Declaration should address the development concerns that have been raised by WIPO Member States and the international community at large.

(2) Amendments to the WIPO Convention

In order to ensure that development concerns are fully brought into WIPO activities, the Member States may consider the possibility of amending the Convention Establishing the World Intellectual Property Organization (1967). The amendment would explicitly incorporate the development dimension into WIPO’s objectives and functions. Since Article 4 (“Functions”) of the WIPO Convention relates its Article 3 (“Objectives”), paragraph (i) of Article 3 of the WIPO Convention could be amended to read as follows:

“(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, *fully taking into account the development needs of its Member States, particularly developing countries and least-developed countries*”.

(3) Treaties under negotiation

Treaties under negotiation in WIPO, such as the SPLT, should include provisions on the transfer of technology, on anticompetitive practices as well as on the safeguarding of public interest flexibilities. Moreover, those treaties should include specific clauses on principles and objectives. The language provided in Articles 7 and 8 of the TRIPS Agreement is an adequate starting point, taking into account, however, that WIPO treaties do not expressly deal with “trade-related issues”.

(4) Technical cooperation

We urge the Program and Budget Committee, in its next sessions, to establish consistent pluriannual programs and plans for cooperation between WIPO and developing countries aiming at strengthening national intellectual property offices, so that they may effectively become an acting element in national development policy. Those programs should be guided, moreover, by the principles and objectives set out in Section VIII above.

(5) Intellectual property and transfer of technology

We propose the creation of a Standing Committee on Intellectual Property and the Transfer of Technology, for the consideration of measures to ensure an effective transfer of technology to developing countries and LDCs.

(6) Joint WIPO-WTO-UNCTAD international seminar on intellectual property and development

WIPO could jointly organize an international seminar with the WTO and UNCTAD on intellectual property and development, with the active participation of all relevant stakeholders, including public interest NGOs, civil society and academia.

(7) Participation of civil society

WIPO must take the appropriate measures to ensure the wide participation of civil society in WIPO's activities, changing WIPO's terminology with regard to NGOs.

(8) Working Group on the Development Agenda

Without prejudice to the previous proposals, a Working Group on the Development Agenda could be established to further discuss the implementation of the Development Agenda and work programmes for the Organization on this matter, reporting to the 41st Series of Meetings of the Assemblies of the Member States of WIPO.

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APPENDIX

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