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WIPO's Development Agenda and the push for development-oriented capacitybuilding on intellectual property: How poor governance, weak management, and inconsistent demand hindered progress

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GEG Working Paper 105
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WIPO's Development Agenda and the Push for Development-oriented Capacitybuilding on Intellectual Property: How Poor Governance, Weak Management, and Inconsistent Demand Hindered Progress

Carolyn Deere Birkbeck



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Carolyn Deere Birkbeck

Abstract

In 2004, developing countries and civil society groups called for a new Development Agenda at the World Intellectual Property Organization (WIPO). After three years of debate, they secured the adoption by WIPO Member States of the 2007 WIPO Development Agenda, comprising 45 recommendations for making development considerations an integral part of the organization's work, including in the area of capacity-building for developing countries. To date, however, there has been no scholarly analysis of trends in WIPO's assistance to developing countries.

This paper argues that progress toward more development-oriented assistance in the decade following the call for a WIPO Development Agenda was disappointing. It proposes that greater movement toward more development-oriented WIPO assistance in the period from 2004 to 2015 was impeded by three intersecting factors: WIPO's weak governance system; poor management on the part of the WIPO Secretariat; and inconsistent demand for development-oriented assistance by recipient countries. In so doing, this paper acknowledges that the global politics of intellectual property (IP) protection and power asymmetries were background conditions that imposed real constraints on the scope for improvement, but argues that better governance and management of WIPO along with more consistent, strategic demand from intended beneficiaries could nonetheless have facilitated progress toward stronger-development orientation.

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Introduction

In 2004, developing countries called for a Development Agenda at the World Intellectual Property Organization (WIPO).¹ Their campaign built on long-standing developing country complaints that WIPO's work favours the richest countries and the commercial interests of intellectual property (IP) right-holders. Developing countries highlighted WIPO's 'development cooperation' – comprising capacity-building, legal assistance, and training — as a key problem area. Along with civil society groups, they argued that WIPO did not, for instance, properly advise them of the 'flexibilities' available when implementing international norms (such as the WTO's Agreement on Trade-Related Intellectual Property Rights [TRIPS]) nor adequately assist them to tailor national IP systems to local development needs.

At the 2007 annual Assemblies of WIPO Member States, developing countries secured the adoption of a 'WIPO Development Agenda' (hereafter the DA) comprising 45 recommendations for making development considerations an integral part of WIPO's work. The DA's overarching recommendation with respect to capacity-building states that: "WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific" (Recommendation 1).

Over a decade after the initial campaign for a WIPO Development Agenda was launched, how much improvement in the development-orientation of WIPO's assistance has occurred? By early 2015, although the WIPO Secretariat reported considerable progress, many developing countries still expressed strong dissatisfaction with WIPO's assistance.²

The evidence presented in this paper show that despite some important areas of progress, WIPO's development cooperation activities in 2015 fell well short of the vision invoked in the original 2004 call for a WIPO Development Agenda and of the spirit of key DA Recommendations adopted in 2007, most notably Recommendation

¹ For scholarly review of the origins and evolution of the WIPO Development Agenda, see Yu, P. (2009) 'Historical and Political Context,' in *The Development Agenda: Global Intellectual Property and Developing Countries*, edited by N. Netanel, Oxford: Oxford University Press; De Beer, J. (2009) *Implementing WIPO's Development Agenda*, Waterloo, ON: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre; Musungu, S. (2010) "The Development Agenda and the Changing Face of the World Intellectual Property Organization," *IQSensato Studies 2*, IQSensato: Geneva. Also see footnote 16.

² For the reports of the May 2014 CDIP session, see WIPO (2014) *Summary by the Chair*, CDIP/13/SUMMARY, WIPO: Geneva. The Secretariat's draft report was produced in September as WIPO (2014), *Draft Report: Prepared by the Secretariat*, 19-23 May 2014, CDIP/13/13 PROV., WIPO: Geneva. Also see WIPO (2014) *Draft Report: WIPO General Assembly, 46th Session, 22 to 30 September, 2014*, WO/GA/46/12 Prov., WIPO: Geneva.

1.³ Even if one accepts that the quest for stronger development-orientation in WIPO's capacity building was destined to be an iterative 'work-in-progress' over a number of years, this paper argues that fundamental preconditions for improvement remained unaddressed. Further, efforts to address such shortcomings still sparked controversy and provoked resistance from many of WIPO's developed country Member States. Debates on technical assistance also spurred recurring stalemates across a widening cross-section of the organization's activities — from the bi-annual Program and Budget process to the work of WIPO's intergovernmental committees on patents, copyright, enforcement, and standards.⁴

To date, there has been no detailed scholarly analysis of trends in WIPO's development cooperation portfolio. This paper is the first investigation of why, ten years after the original call for the WIPO Development Agenda, progress on more development-oriented assistance was disappointing.⁵

A number of plausible explanations warrant consideration. First, did WIPO's powerful, developed country Member States deliberately block a meaningful reorientation of its assistance in favour of development priorities? Did they simply not care whether assistance had development impact or that resources were used effectively? Second, did IP right-holders have such serious sway at WIPO that they were able to derail efforts to improve development-orientation in favour of a status quo they deemed more suited to advancing their private interests? Third, were shortcomings in development cooperation symptomatic of a broader organizational malaise or dysfunction at WIPO: was the institution, for instance, incapable of getting anything done due to mismanagement, governance failings, or disputes among Member States? Fourth, was stronger development-orientation simply very hard to achieve from a technical and managerial standpoint, such that expectations were too high for a shift within one decade? Fifth, were enduring developing country criticisms of WIPO's assistance merely the political posturing of diplomats disconnected from the needs in their countries and ill-informed of how WIPO's capacity-building activities were evolving on the ground? Or did it reflect divergent views on what development-orientation meant and would entail?

Although each of these possibilities provide pieces of the explanation, none are sufficient by themselves. This paper argues that progress toward more development-oriented WIPO assistance from 2004 to 2015 was thwarted by the intersection of weaknesses in WIPO's governance system and in the Secretariat's management of the organization's development portfolio, as well as inconsistent demand for

³ See WIPO (2004) *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11, WIPO: Geneva. The co-sponsors of the original Development Agenda proposal were Argentina, Brazil, Bolivia, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela.

⁴ Debate on technical assistance has arisen, for instance, in meetings of the PCT Working Group, and also in the course of negotiations for a revised Trademark Law Treaty.

⁵ This paper does not seek to explore the development-orientation of WIPO's other activities, such as norm-setting, or their alignment with DA Recommendations, nor is it intended as a review of the implementation of the entirety of the DA Recommendations, which address many other topics.

development-oriented assistance by recipient countries. It draws on WIPO documents, scholarly analysis and stakeholder commentary, and the author's own interviews and informal discussions with senior WIPO officials, mid-level staff, Member State delegates from 2011–15.

On governance, four shortcomings that thwarted progress on greater development-orientation are identified: underlying disputes among members about the organization's mandate and purpose; the structure of WIPO's financing (where income is largely generated through fees paid to WIPO by private industry in exchange for treaty-related services); weaknesses in processes and mechanisms for Member State oversight and strategic guidance of WIPO's development cooperation; and lack of transparency, exemplified by closed bilateral negotiations on extra-budgetary resources for development activities. On management, the paper identifies five areas of weakness, namely: measurement and monitoring allocation of resources; transparency of data regarding resource-allocation within programmes; evaluation of development impacts and lessons learned; planning processes at the country and programme level; and the Secretariat's leadership, bureaucratic politics and institutional culture. The paper underlines that national and regional IP offices were WIPO's primary interlocutors in developing countries for the majority of its development cooperation and had strong ties to the Secretariat, but many had limited institutional capacity to ensure that WIPO's assistance served development priorities – or lacked an interest in so doing.

In making these arguments, this paper acknowledges that the global politics of IP protection were important background conditions, highlighting competing views on the relationship between development and IP protection; power asymmetries in global IP relations; and the climate of pressure on developing countries to boost IP standards and enforcement. Together, these factors imposed real constraints on the prospects of a complete overhaul and re-orientation of WIPO's assistance to developing countries. Yet, despite the difficulties of rising above such political challenges, there was still room for manoeuvre and for stronger progress. Although some positive steps and actions were taken, better governance and management at WIPO, combined with more consistent and effective development-oriented demand from intended beneficiaries, could have produced stronger development-orientation in the organization's assistance.

Importantly, in reviewing progress on development-orientation of WIPO's capacity building, this paper does not limit itself to an analysis of how successfully the adopted DA recommendations were implemented. Rather, it takes its starting point as the original aspirations for greater development-orientation articulated by the Friends of Development in 2004. In so doing, it recognises that the broad aspirations and high ambition of the DA advocates reflected the perspective of only part of WIPO's membership – a group of developing countries. It also acknowledges that while the *demandeurs* offered many specific, practical proposals, they viewed the DA partly as a strategic, rhetorical tool that could help them reframe recurring battles on issues from capacity building to IP norm-setting and to serve as a bargaining chip. By

contrast, the recommendations that comprise the WIPO Development Agenda adopted in 2007 reflect three years of negotiations among Member States and a mixed bag of compromises, ranging from specific one-off projects and studies to ambitious, sometimes vague, statements of principle that would demand significant institutional transformations at WIPO to put into effect. Although the proposals of the Friends of Development and the subsequent WIPO DA adopted by Member States have quite distinct characters, this paper identifies common threads between them, drawing on these to devise metrics for assessing progress on development orientation.

The paper proceeds in five parts. Part 1 proposes a framework for assessing improvements in the development orientation of WIPO's assistance to developing countries. Part 2 explores where and how WIPO's development cooperation changed from 2004 to early 2015, acknowledging where some progress toward development-orientation was made, but underlining evidence of fundamental shortcomings. Part 3 shows how governance and management shortfalls compounded the already difficult task of improving development-orientation of WIPO's assistance in a highly politicized context. Part 4 argues that the potential for greater development orientation and impact of WIPO's development activities was also limited by lack of effective development-oriented demand from the governments of recipient countries. Part 5 concludes.

1. Assessing Change: A Framework

This section proposes a framework and metrics for assessing progress in the development-orientation of WIPO's development cooperation. To provide context, it begins with a brief history of WIPO's assistance to developing countries in the years preceding the DA and the political impetus for developing country and civil society calls for change.

1.1 The History of WIPO's Assistance to Developing Countries and Calls for Change

The WIPO Secretariat has provided technical and legal advice to developing countries on the ratification and implementation of WIPO treaties for over forty years.⁶ Indeed, assistance to developing countries was one of the seven functions envisaged for WIPO in its founding 1967 WIPO Convention.⁷

From the 1970s to the mid-1980s, WIPO's Regular Budget financed around 20–25% of the organization's assistance to developing countries. The range of activities financed through WIPO's Regular Budget was limited: the primary focus was fellowships for training. The organisation also provided legal advice to countries on national legislation and the implementation of WIPO treaties, as well as some support the infrastructure of national IP offices. From the 1980s to the mid-1990s, over half of WIPO's technical assistance related to the execution of projects under the financial control of the United Nations Development Programme (UNDP), which was WIPO's most significant partner within the UN family at that time. The remainder of WIPO's assistance was financed through trust funds established through extra-budgetary contributions by some Member States.⁸

From 1995, the Secretariat faced increasing demands from WIPO's developing country members for assistance with the implementation of international IP treaties. Specifically, developing countries faced a year 2000 deadline for the implementation of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁹ which for the first time made compliance with an international IP treaty subject to a binding dispute settlement mechanism. The Agreement had been a lightning rod for North-South debate through the Uruguay Round of GATT negotiations from which it emerged. Although developing countries opposed much of the agreement's content and questioned the inclusion of IP issues in the GATT

⁶ Bogsch, A. (1992) *The First Twenty Five Years of the World Intellectual Property Organization from 1967 to 1992*, WIPO Document 881 (E), Geneva: World Intellectual Property Organization (WIPO).

⁷ See the *Convention Establishing the World Intellectual Property Organization* (WIPO Convention), available from www.wipo.int/treaties/en/convention/trtdocs_wo029.html (last viewed 1 September 2014).

⁸ In the early 1980s, for instance, France, Germany, and the United States provided resources through Trust Funds and WIPO received cash or in-kind contributions from Austria, Brazil, Canada, East Germany, the Soviet Union, Sweden, Spain, and the European Patent Office (EPO), as well as voluntary contributions for specific projects from Australia, Switzerland, and the United Kingdom.

⁹ LDCs were originally granted an extension until 2006, a timeframe that was subsequently extended until 2013, then 2021, and in the case of patents for pharmaceutical products until 2033.

negotiations, they were ultimately overpowered. Among the few concessions they received was the promise of technical assistance to implement the Agreement. Encouraged by WIPO's Director-General Kamal Idris, WIPO's membership agreed to devote more of the organization's Regular Budget to assist developing countries. The allocation of a growing amount and portion of WIPO's resources to such assistance was made possible through rising revenues due to increased use of WIPO services related to its Patent Cooperation and Hague treaties.¹⁰ In 1995, WIPO and the World Trade Organization (WTO) forged a cooperation agreement, according to which WIPO would provide technical assistance to developing countries for TRIPS implementation.¹¹ For most of the subsequent decade, most of WIPO's aid for developing countries took the form of legal assistance (e.g., advice on IP law reforms), technical and infrastructural support to enhance the operations of national and regional IP institutions, and staff training.

WIPO subsequently developed the largest and broadest portfolio of IP-related capacity-building activities among international organizations. Nonetheless, many developing countries simultaneously received some IP-related assistance from a number of other sources – including other international organizations (e.g., UNCTAD, UNDP, the WTO, and the WHO) as well as developed country government agencies, corporations, private consulting firms, NGOs and academics. The U.S. government was the largest bilateral provider (its efforts involved over fifteen U.S. government agencies), and the EU, Japan, and Korea also offered considerable financial and in-kind assistance. Such donors typically provided assistance on specific issues of interest to them (e.g., health-related IP issues in the case of WHO and IP enforcement in the case of developed country and industry providers). Cooperation at the technical level among national and regional IP offices, regulatory agencies, and networks of government officials was also a powerful component of overall assistance to developing countries.¹² (The deference of many developing countries to developed country IP offices for the substantive examination of patent applications is, for instance, one well-documented example of how technical cooperation enabled the diffusion of developed country practices regarding the implementation and interpretation of IP rules and policies.¹³)

¹⁰ WIPO (2003) *World Intellectual Property Organization: 1992-2007*, WIPO: Geneva.

¹¹ The agreement aimed to establish a 'mutually supportive relationship' and 'appropriate arrangements for cooperation,' including in regard to notification of, access to and translation of national IP laws; implementation of procedures for the protection of national emblems; and technical cooperation. See WIPO-WTO (1996) *Agreement Between the World Intellectual Property Organization and the World Trade Organization*, Publication 223(E), Geneva: World Intellectual Property Organization (WIPO). The two organisations subsequently forged several initiatives on technical cooperation, including a 1998 effort to help developing countries meet their 1 January 2000 deadline for implementing the WTO's TRIPS Agreement, a 2001 programme to assist LDCs to implement TRIPS, and a 2005 agreement to intensify cooperation for LDCs upon the extension of their transition period for TRIPS implementation until 1 July 2013.

¹² In addition, the day-to-day private practices of IP right-holders, and stakeholders in the non-profit sector (e.g., NGOs and civil society), such as self-regulation efforts, partnerships, legal practices, initiatives, and advocacy form the landscape in which capacity-building occurs and to which it contributes. Further, beyond national IP laws, a range of institutions, regulations, court decisions, and administrative actions impact the outcomes of IP laws and policies on the ground.

¹³ Peter Drahos argues persuasively that through technical cooperation, networks of legal and technical experts from the most powerful developed country IP offices have played a key role in influencing the

Importantly, most developing countries relied substantially on support from external actors not only to comply with relevant international agreements, but also to engage in corresponding international debates and to build the institutional capacity needed to devise, administer, and enforce appropriate national IP laws and policies. Further, at the time TRIPS was signed, many developing countries lacked modern IP laws (and some had none in place at all) and had weak institutions in this area.¹⁴

Institutional and technical weaknesses on IP law and policy within developing country governments, combined with limited stakeholder engagement, public expertise, and policy debate on IP issues created a context in which the power and influence of external assistance was often very high.¹⁵

As developing countries embarked on legislative changes to meet their deadlines for TRIPS implementation, the agreement remained a focal point for North-South debate on international IP rules and their impacts on development. Governments and civil society groups campaigned to defend and clarify the rights of developing countries to use the 'flexibilities' in TRIPS, and scrutiny of the orientation of IP-related foreign assistance grew over time. Alongside their campaign for the 2001 Doha Declaration on TRIPS and Public Health, for instance, critics highlighted that most legal advice to developing countries failed to convey the ways governments could use TRIPS flexibilities to tailor their IP systems according to national needs.¹⁶ Between 1999 and 2006, IP-related capacity-building activities provoked growing debate in some developing country governments, sparked in particular by civil society concerns about how IP reforms could impact access to medicines.¹⁷ They argued that external

practices and IP standards adopted by developing country IP offices. This may occur through explicit agreements for work-sharing and technical cooperation, sharing of guidelines on matters such as patentability, subcontracting of IP examination to other national offices, deference to decisions made in more technically proficient countries, and consultation of legal opinions/decisions in other jurisdictions, as well as training/technical advice/exchanges of experts, and the impact of peer groups. See Drahos, P. (2010) *The Global Governance of Knowledge: Patent Offices and their Clients*, Cambridge University Press: Cambridge.

¹⁴ Leesti, M. and Pengelly, T. (2002) *Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement*, Study Paper No. 9, Commission on Intellectual Property Rights: London. Also see Pengelly, T. (2003) *Technical Assistance on IPRs for developing countries: some strategic issues and recommendations for future priorities*, paper prepared for the Second Bellagio Series of Dialogues, Bellagio, 18-21 September 2003.

¹⁵ For the political significance of capacity-building as a factor in the broader struggle over IP rules and their implementation, see Deere, C. (2008) *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford: Oxford University Press.

¹⁶ The issue rose to prominence with articles by renowned developing country experts and NGOs around the year 2000, and gained credibility with the 2002 report of the UK government's Commission on Intellectual Property Rights (CIPR). See CIPR (2002) *Integrating Intellectual Property Rights and Development Policy*, London: Commission on Intellectual Property Rights (CIPR). Also see DFID/DTI (2003) *The UK Government Response to the Report of the Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy"*, London: UK Department for International Development (DFID) and UK Department of Trade and Industry (DTI). Also see footnote 17.

¹⁷ Subsequent scholarly and policy studies that raise concerns about the effectiveness and orientation of WIPO's technical assistance and capacity-building for developing countries, include: Pengelly, T. (2005) *Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies*, ICTSD Programme on IPRs and Sustainable Development Issue Paper No. 11, ICTSD: Geneva; Kostecki, M. (2006) "Intellectual Property and Economic Development: What Technical Assistance to Redress the Balance in Favour of Developing

assistance on IP reforms – from WIPO as well as from bilateral donors and private sector sponsored initiatives (such as consulting firms, chambers of commerce, and think tanks) – too often reflected the priorities of developed countries keen to ‘export’ their legal regimes and policy preferences,¹⁸ and of IP right-holders working to advance their own private interests.¹⁹ Indeed, some private sector providers candidly described their assistance as lobbying exercises.²⁰ Amidst the scramble to influence IP reforms, civil society groups aided by legal experts offered an alternative source of advice on legal options they proposed would better address development needs and goals²¹ and offered tools to developing countries to help them assess national IP policy priorities and technical assistance needs.²² There was also growing interest among some developing country stakeholders in how to make use of the IP system,

Nations?,” *IPRs and Sustainable Development Series, Issue Paper 14*, Geneva: International Centre for Trade and Sustainable Development (ICTSD); May, C. (2004) ‘Capacity Building and the (Re)production of Intellectual Property Rights,’ *Third World Quarterly*, 25:5, pp. 821–37; May, C. (2006c) *The World Intellectual Property Organization: Resurgence and the Development Agenda*, Oxford: Routledge; and Deere, C. (2009) *The Implementation Game*, op cit. On IP-related capacity building more broadly, see Yu, Peter (2012) “Intellectual Property Training and Education for Development”, *Legal Studies and Research Paper Series*, Research Paper No. 12-31, Drake University; and de Beer, J and C. Ogyamanam (2010) *IP Training and Education: A Development Perspective*, Geneva: ICTSD.

¹⁸ For scholarly analyses of bilateral IP assistance, see Matthews, D. and Munoz-Tellez, V. (2006) ‘Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective’, *Journal of World IP* 9(6), pp. 629-653, and Roffe, P., Vivas, D. and Veá, C. (2007) *Maintaining Policy Space for Development: A Case Study on IP Technical Assistance in FTAs*, ICTSD Programme on IPRs and Sustainable Development Series Issue Paper No. 19, ICTSD and DFID: Geneva and London.

¹⁹ For an NGO perspective from 2003, see Balasubramaniam, K. (2003) “WIPO Patent Agenda II: Technical Assistance and Access to Medicines: Consumer Perspectives,”, *Conference on the WIPO Work Programme and How to Involve Consumers*, Organised by the Transatlantic Consumer Dialogue (TACD), Consumers International World Congress, Lisbon, Portugal, 13-17 October 2003’ MSF. (2003) *Doha Derailed – Technical ‘Assistance’: A Case of Malpractice?* Médecins Sans Frontières: Paris, and Kuanpoth, J. (2005) ‘Intellectual Property-Related Technical Assistance, Cooperation and Capacity Building: The Thailand Experience,’ paper presented at the policy dialogue on *IP-related Technical Cooperation for Developing Countries*, Geneva: sponsored by the International Centre for Trade and Sustainable Development (ICTSD), 12–13 June.

²⁰ For examples, see the website of the U.S Chamber of Commerce’s Global IP Centre, available at: <http://www.theglobalipcenter.com>. The Centre states, for instance, that it has conducted a series of programs, in partnership with country-based Missions in Geneva, to champion the value of strong IP protection and enforcement to economic development, particularly in developing countries. Similarly, the US PTO describes the objectives of its IP Attaché Program in developing countries to include: to encourage effective IP protection and enforcement by U.S. trading partners for the benefit of U.S. stakeholders; advocating U.S. government IP policy, interests and initiatives; improving IPR protection and enforcement by conducting training activities with host governments; and helping to secure high quality IP provisions in international agreements and host country laws, and working to monitor the implementation of these provisions. See <http://www.uspto.gov/learning-and-resources/ip-policy/intellectual-property-ip-attach-program>. For a summary of the European Patent Office’s assistance to developing countries at this time, see European Patent Office (2003) *Worldwide Cooperation: The European Patent Office and its programme for International Cooperation*, EPO: Munich.

²¹ See, for instance, Musungu, S. (2003) *Designing Development-oriented Intellectual Property Technical Assistance Programmes*, paper prepared for the Second Bellagio Series of Dialogues, Bellagio, 18-21 September 2003; Vivas-Eugui, D. and C. Bellmann (2004) “Towards development oriented technical assistance in Intellectual property policymaking”, Paper prepared for “Reflections on IPR Technical Assistance to Developing Countries and Transition Economies”, workshop 15-17 September 2004, Burnham Beeches, UK; and Correa, C. (2003) ‘Formulating Effective Pro-development National Intellectual Property Policies,’ in *Trading in Knowledge, Development Perspectives on TRIPS, Trade and Sustainability*, London: Earthscan, 209–18.

²² Leesti, M. and Pengelly, T. (2007) *Assessing Technical Assistance Needs for Implementing the TRIPS Agreement in LDCs: A Diagnostic Toolkit*, ICTSD: Geneva.

which in turn was seized upon by IP advocates hopeful that an emphasis on ‘making IP work for development’ or ‘IP for development’ would assuage some developing country concerns and foster greater compliance with international IP norms. Meanwhile, some developed country governments acknowledged the need for a more nuanced approach, moving beyond assertions that stronger IP protection would produce development gains. Spurred by the finding of its 2002 independent Commission on Intellectual Property Rights and Development (CIPR) report,²³ the UK government convened several meetings to reflect on new approaches to IP capacity building and coordination among donors on IP-related assistance to developing countries. Although the UK government did not endorse or pursue all of the CIPR’s recommendations, the UK’s Development for International Development (DFID) subsequently supported the creation of the Intellectual Property Rights Technical Assistance (IPRTA) Forum in 2006 to facilitate communication and coordination among donors and recipients (although this failed to establish itself as an influential initiative).²⁴ Shifting government priorities progressively muted the UK’s role as a moderate and moderating voice on issues of IP and development in the diplomatic arena, although DFID continued to financially support several NGOs such as ICTSD for their work on IP and development.

As international debates on IP policy raged, developing country IP offices turned to WIPO as a source of authority and “neutral” expertise on IP laws and of resources for building institutional capacity and improving staff expertise. Although held in high regard by most IP offices, some developing country government agencies (such as Ministries of Foreign Affairs and Ministries of Health) and civil society groups were more cautious about WIPO. Moving beyond the satisfaction expressed by IP offices that had been the major beneficiaries of WIPO’s support, and amidst growing concern about the lack of transparency of WIPO’s development activities and bias in their content, such stakeholders warned against assumptions that WIPO’s assistance embodied the neutrality and development-orientation anticipated of UN agencies.²⁵ Several larger developing countries, such as Brazil and India, while not significantly reliant on WIPO’s assistance for their own domestic IP reforms, expressed concern that the WIPO Secretariat’s legislative advice failed to advise countries properly of TRIPS flexibilities and the options available to them. They feared that pressure from WIPO, among other donors, would lead to precedents that reflected a narrow interpretation of the rights and safeguards in TRIPS.

²³ See CIPR (2002) *Integrating Intellectual Property Rights and Development Policy*, London: Commission on Intellectual Property Rights (CIPR). Also see DFID/DTI (2003) *The UK Government Response to the Report of the Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy,”* London: UK Department for International Development (DFID) and UK Department of Trade and Industry (DTI).

²⁴ The creation of the IPRTA followed a workshop also convened by DFID to promote debate amongst a cross-sector of donors, providers and developing countries in 2004. A summary of the workshop was later published as follows: Saana Consulting (2004) *Reflecting on IP Technical Assistance for Developing Countries and Transition Economies*, Report of a Workshop Held at Burnham Beeches, 15 – 17 September 2004, and sponsored by the UK Department for International Development, Saana Consulting: Helsinki, Finland.

²⁵ Several complaints along this line were made at WIPO’s Permanent Committee on IP and Development (PCIPD), a committee that had preceded the CDIP.

In 1999, to assuage such concerns and underscore its support to developing countries,²⁶ the WIPO Secretariat released a document listing all of the assistance it had provided in the previous few years. The move did little, however, to allay concerns: the document listed the titles of activities ‘delivered’ by year and country under several broad categories, but offered no information about their purpose, expected results, content or development-orientation. Moreover, the Secretariat continued to publish outreach materials that clearly underscored a strong institutional culture in favour of strengthening IP protection and enforcement²⁷ – a perspective that was clearly endorsed and promoted by developed country governments, IP right-holders (and industry associations financed by them) and networks of IP professionals.²⁸

In the subsequent years, developing countries became increasingly frustrated by persistent pressures upon them in multiple international fora - at WIPO, the WTO, and in bilateral negotiations – to limit their use of TRIPS flexibilities and to further strengthen international and national IP rules beyond the TRIPS’ minimum standards. At WIPO, for instance, developed countries proposed to negotiate new TRIPS-‘plus’ rules for substantive patent harmonization and IP enforcement, both of which developing countries opposed.

Although cognisant of the powerful forces in favour of strengthened IP protection, trade and IP negotiators from a number of developing countries hoped that a collective call for a more ‘development-oriented’ WIPO could serve as a strategic tool to help them push back against the proliferating pressures from developed countries and IP right holders. WIPO’s assistance was deemed an especially important target for reform due to the organization’s outsized influence on IP professionals in developing countries and their perceptions of what kind of IP reforms were necessary.²⁹ The prospects of a campaign for greater development-orientation in external IP assistance were also thought to be greater at WIPO, where one could appeal to the importance of UN “development” values, than among bilateral or corporate providers of IP assistance.

²⁶ See WIPO (1999) *Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from 1 January 1996 to 31 March 1999*. Available at: http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_3.pdf. A second iteration of this report was produced in 2001, see WIPO (2001) *WIPO’s Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from 1 January 1996 to December 31 2000*, WIPO: Geneva.

²⁷ Idris, K. (2003) *Intellectual Property: A Power Tool for Economic Growth*, WIPO: Geneva. Also see WIPO (2003) *Medium Term Plan for WIPO Program Activities: Vision and Strategic Direction of WIPO*, WIPO: Geneva.

²⁸ See, for instance, a publication by the International Intellectual Property Institute, a U.S. think tank led by a former head of the U.S. PTO and financed through contributions from the U.S. government and IP right-holders to conduct capacity building activities in developing countries and research, and which also partnered with WIPO on activities in developing countries. See Lehman, B. (2000) *World Intellectual Property Organization: Dawn of a New Century*, International Intellectual Property Institute: Washington.

²⁹ For analysis of the socialization of IP professionals through training, see Morin, J., Daley K., Gold, R. (2011) “Having Faith in IP: Empirical Evidence of IP Conversions”, *The WIPO Journal*, Vol.3, 93–102.

In 2004, a group of twelve developing countries, led by Brazil and Argentina, proposed a WIPO Development Agenda.³⁰ Together, the ‘Friends of Development’ concluded their submission to WIPO with eight demands, which included calls for WIPO to: address development in all aspects of its work; work toward fairer international IP rules and norm-setting; increase attention to promoting technology transfer; improve civil society involvement in WIPO’s work; ensure greater development-orientation in WIPO’s capacity-building; and establish a Working Group to discuss the implementation of the proposed Development Agenda. At the 2004 WIPO General Assembly, Member States agreed to establish an Intersessional Intergovernmental Meeting (IIM) to discuss the Development Agenda proposals. The IIM met three times and in late 2005 became the Provisional Committee on the Development Agenda (PCDA). In 2005, the Group of Friends of Development submitted a further proposal that focused on four areas: a) reviewing the mandate and governance of WIPO; b) promoting pro-development norm-setting at WIPO; c) establishing principles and guidelines for WIPO’s technical assistance work and evaluation (discussed further in section 1.2. below); and d) establishing guidelines for future work on technology transfer and related competition policies.³¹ A number of other delegations and regional groups submitted proposals. The PCDA met twice and considered some 111 proposals throughout 2006 and 2007, ultimately recommending the adoption of a reduced number of proposals and the creation of a new WIPO Committee on development and IP.³²

Against this backdrop, and in the context of organizational crisis that accompanied deliberations on the DA, numerous scholars have underscored the importance of understanding the DA’s adoption at the 2007 WIPO Assemblies as a negotiated outcome born of strategic compromise after three years of debate rather than as a statement of political consensus.³³ At the 2007 WIPO annual Assemblies, Member States were so divided they were unable to agree upon the organization’s Program and Budget for the next biennium, developing countries were determined to bury the push for substantive patent harmonization, and there were growing allegations of misconduct and mismanagement on the part of WIPO’s Director General. While developed countries were leading a campaign to remove him, a besieged Idris backed the DA in an effort to secure developing country support. An optimistic

³⁰ See WIPO (2004) *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11, WIPO: Geneva.

³¹ See WIPO (2005) *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/1*, IIM/1/4, Annex, WIPO: Geneva.

³² For detailed summaries of discussion and debate at these meetings, see the relevant WIPO reports as well as the reporting by Intellectual Property Watch. For a developing country perspective on the debates, see the quarterly IP Negotiations Monitor, published by the South Centre, as well as meeting reports by the Third World Network and its news service SUNS. Also see Khor, M. and S. Shashikant (2009) *Negotiating a ‘Development Agenda’ for WIPO*, Third World Network: Kuala Lumpur.

³³ Roffe, P, and G. Veja (2008) ‘The WIPO Development Agenda in a Historical and Political Context,’ in *The Development Agenda: Global Intellectual Property and Developing Countries*, edited by N. Netanel, Oxford: Oxford University Press; Sell, S. (2011) “Everything Old is New Again: The Development Agenda Now and Then”, *The WIPO Journal*, Vol. 3., No. 1, pp. 17–23; May, C. (2006c) *The World Intellectual Property Organization: Resurgence and the Development Agenda*, Oxford: Routledge; Yu, P. (2009) “A Tale of Two Development Agendas, 35 *Ohio Northern University Law Review*, 35, pp. 465–529. Also see footnote 1.

reading is that the DA's adoption signalled recognition by Member States of the need to move beyond an agenda "essentially limited to promotion and protection of intellectual property rights, to embracing the need to assist developing countries in different aspects of this crucial area."³⁴ A more sober interpretation is that it emerged from distinct political circumstances: developed countries viewed the DA as a necessary, but unfortunate, concession while developing countries grasped the opportunity to push forward with the adoption of a DA – even if a considerably watered down version of their original vision.

The adoption of the WIPO Development Agenda,³⁵ with its 45 recommendations (of which 19 were noted for immediate implementation), thus reflected close negotiation and compromise, rather than a shared desire for a coherent or measurable agenda for action.³⁶ Further, the DA is a mixed bag of many different types of recommendations - some are very specific while others are broadly aspirational, vague or ambiguous – and they demand different levels of action, ranging from one-off studies to multi-year processes of institutional transformation.

In 2008, the WIPO General Assembly agreed to create a Committee on Development and IP (CDIP) to oversee the implementation of the DA Recommendations and undertake further work. In April/May 2009, WIPO Members agreed to a project-based approach to the implementation of the recommendations, with work to proceed through six clusters: Cluster A (Technical Assistance and Capacity-building), Cluster B (Norm-setting, Flexibilities, Public Policy, and the Public Domain), Cluster C (Technology Transfer, Information and Communications Technologies [ICT], and Access to Knowledge), Cluster D (Assessment, Evaluation, and Impact Studies), Cluster E (Institutional Matters including Mandate and Governance), and Cluster F (Other Issues).³⁷ Most DA Recommendations directly relevant to development cooperation feature in Cluster A, but others clusters also include relevant recommendations (see Annex 1 of this paper for examples).

1.2 The WIPO Development Agenda in the Area of Technical Assistance and Capacity-Building: What Would Success Have Looked Like?

What would success in terms of greater development-orientation of WIPO's capacity building looked like? Two useful starting points for devising metrics are: a) the expectations of developing country *demandeurs* as set out in their call for a

³⁴ See JIU (2014) *JIU Report 'Review of Management and Administration in the World Intellectual Property Organization (WIPO)*, JIU/REP/2014/2. UN Joint Inspection Unit: New York.

³⁵ See WIPO (2007) *General Report of the 2007 WIPO Assemblies*, A/43/16, WIPO: Geneva, para. 334.

³⁶ See WIPO, "The 45 Adopted Recommendations under the WIPO Development Agenda" at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last accessed 3 February 2015).

³⁷ See WIPO (2009) *Proposal from The People's Democratic Republic of Algeria, Brazil and the Islamic Republic of Pakistan*, Fourth Session of the CDIP, November 16-20, CDIP/4/9, WIPO: Geneva and WIPO (2009) *Proposal from Group B*, Fourth Session of the CDIP, November 16-20, 1009, CDIP/4/10, WIPO: Geneva.

Development Agenda; and b) the recommendations adopted by Member States in 2007.³⁸

In part VII of their 2004 Proposal for a WIPO DA, the Friends of Development called for 'Development-oriented' technical cooperation and assistance.³⁹ Although no specific definition of development-orientation was offered, the proposal provided a number of substantive examples of their intent. These included that WIPO's technical cooperation should be "geared towards implementing all relevant UN development objectives, which are not limited to economic development alone," and that these activities should "neutral, impartial and demand-driven." The Friends argued for the expansion and qualitative improvement in WIPO's technical cooperation programs to ensure that the social costs of IP protection are minimized and do not outweigh the benefits thereof, and to promote an integrated approach to IP policy that covers matters related to competition law and policy. They also argued that "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." Further, they specified that WIPO's legislative assistance should focus on tailoring IP laws to each country's level of development, respond to the specific needs and problems of individual societies, and assist developing countries to make full use of the flexibilities in international IP agreements, in particular to promote important public policy objectives."

When the Friends of Development elaborated their proposal in 2005, they called for increased resources for capacity-building in their countries; greater emphasis on tailoring assistance to development priorities and circumstances, as well as development impact; greater transparency of the opportunities for assistance, the country-specific allocation of resources and the purpose as well as content of activities; and the adoption of principles and guidelines for the design, delivery and evaluation of WIPO's assistance, including the use of development benchmarks and indicators to assess the results of technical assistance. To minimize the potential for bias in WIPO's assistance, they proposed the separation of WIPO's capacity-building functions and its rule-making functions.⁴⁰ The Friends of Development also proposed that assistance should be demand-driven "in the sense that it corresponds to the needs and global political objectives of developing and least developed countries,

³⁸ A summary of some such expectations can be found in TACD (2007) *Proceedings of the Reform of WIPO: Implementing the Development Agenda*, sponsored by the Transatlantic Consumer Dialogue (TACD), Geneva, 17 September 2007.

³⁹ See WO/GA/31/11 Annex, page 5.

⁴⁰ See footnote 31. The rationale on this point was to insulate WIPO's capacity-building activities from political pressures arising from WIPO treaty negotiations and other normative activities, as well as from developed country donors and IP right-holders. The Friends of Development proposed two options: a) merging WIPO's research, technical and capacity building functions into an independent arm that could remain part of the WIPO Secretariat but would have its own independent advisory panel, appointed by the General Assembly to evaluate performance, monitor adherence to proposed principles and guidelines and help set priorities for research and assistance; and b) a wholly independent entity, funded by WIPO, with a managing board drawn from international organisations with development and IP, including WIPO, UNCTAD, UNDP, UNESCO, UNIDO, WTO, WHO and the FAO, and potentially with representation from industry, consumer and public interest groups.

taking also into account the legitimate interests of various stakeholders and not only those of rightholders.” On transparency, the Friends argued for a publicly available roster of consultants, a code of conduct for Secretariat staff and consultants, and a Code of Ethics and processes to ensure the independence of consultants as well as database and dedicated webpage to improve information-sharing.

In 2007, WIPO Member States adopted a number of DA recommendations that relate to many of the Friends’ proposals, although with varying degrees of ambition and specificity (see Annex 1). The most central of the DA recommendations on capacity building was Recommendation 1 (cited in the introduction above), which provides an overall vision of the Agenda with respect to capacity-building, and emphasises the need to account for “the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development...” Recommendation 1 does not, however, define specific goals, outcomes, impacts on the ground or benchmarks against which progress on the development-orientation of WIPO’s assistance could be assessed. On the procedural front, several recommendations emphasise the need for more transparent, demand-driven assistance and stronger evaluation, but Recommendation 45 provides the fullest statement on what substantively development-orientation might involve. Proposing that IP enforcement should be approached in the context of broader societal interests and especially development-oriented concerns, it invokes Article 7 of the TRIPS Agreement, which states that:

“the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Other DA Recommendations offer further hints on the meaning of development-orientation, such as those that call on the Secretariat to: provide advice on understanding and use of TRIPS flexibilities; help countries deal with IP-related anti-competitive practise; promote fair balance between IP protection and the public interest; support a robust public domain; and conduct activities that would promote the transfer and dissemination of technology in developing countries. Several further recommendations focus on helping developing countries to make better use of the IP system as a key component of greater development-orientation. Examples include recommendations to make IP institutions more efficient; address the needs of SMEs in developing countries; and promote the exploitation of IP in LDCs; and strengthen capacity for protection of domestic creations, innovations and inventions. Finally, several recommendations emphasise the need for greater transparency of WIPO’s assistance as part and parcel of stronger development-orientation.

Although the aspirations of the Friends of Development and the negotiated Recommendations of the WIPO DA are distinct and of a different character, they are each vital sources for establishing a view on what greater development-orientation of WIPO’s assistance demands – procedurally and substantively - and how progress

might be assessed. Drawing upon both sources, this paper proposes that progress toward greater development-orientation could reasonably be said to have occurred where there is evidence of: 1) more demand-driven assistance as demonstrated by a greater alignment between the assistance provided and the priorities articulated by developing countries in country plans and national IP strategies; 2) greater budget allocations for development in terms of the overall amount and as a share of WIPO's total budget; 3) agreement among Member States on the purpose of WIPO's assistance to developing countries, including clear definitions of what counts as development assistance and metrics for evaluation; 4) greater transparency of the details of WIPO's assistance and the intended beneficiaries; 5) more development-oriented resource-allocation and content in the activities supported; and 6) better insulation of WIPO's assistance from political discussions and IP norm-setting also underway at WIPO. For each of these benchmarks, Part 2 of this paper explores the evidence of progress and enduring shortcomings.

2. Assessing Change: What Evidence of Progress and Enduring Shortcomings?

To what extent did WIPO's development cooperation change in the decade after the campaign for the DA was launched? By the end of 2014, were WIPO's resources better for development activities spent with stronger development-orientation and impact? Were activities more demand-driven and more responsive to the development needs and priorities articulated by beneficiary countries?

This section offers a summary of key areas where the WIPO Secretariat reported that improvements had been made, followed by an independent synopsis of shortcomings, failures, and structural problems that constrained further progress.

2.1 Evidence of Progress: Where did the Secretariat Argue that Improvements Had Been Made?

From 2007, the WIPO Secretariat's Program and Budget documents, annual self-assessments (in the form of Program and Performance Reports (PPRs)), and its reports to the CDIP regularly reported progress on its implementation of the DA recommendations.⁴¹ Following are several examples that the Secretariat identified as evidence of its progress in the area of development cooperation.

First, according to the WIPO Secretariat, the scale of financial and human resources that WIPO devoted to development cooperation activities grew, both in absolute terms and as a share of WIPO's overall budget. For the period 2008/09 to 2014/15, the WIPO Secretariat's total resources for development cooperation activities

⁴¹ See, for instance, WIPO (2014) *Director General's Report on the Implementation of the Development Agenda*, 3 March 2014, CDIP/13/2, WIPO: Geneva.

reached an estimated total of approximately CHF 596 million (see Table 1).⁴² Mostly funded through the organization's regular Program and Budget, the growing expenditure on development cooperation activities was financed through growth in WIPO's overall income (which arose from rising revenues from fees paid for the Secretariat's services related to the Patent Cooperation Treaty [PCT] and Hague Treaty systems). Whereas WIPO devoted around CHF 25 million or approximately 5% of its Regular Budget to development in 1996, the Secretariat estimated that it would allocate some CHF 144 million for the 2014/15 biennium, representing an estimated 21.4% of WIPO's Regular Budget for that period (although developing countries have suggested that these over-estimate the assistance to them, as discussed in section 2.2.3 below).⁴³ Some expansion of WIPO's activities also occurred through collaborations or in-kind support, notably in relation to training and the new public-private partnerships (PPPs) (see Part 2.2.4). Further, WIPO's resources for development activities in some countries and on certain issues expanded due to voluntary, extra-budgetary contributions from some Member States (in the form of Funds-in-Trust).

Table 1. Estimated Expenditure on WIPO's Cooperation for Development from 2008–2015

Sources	CHF millions
WIPO Regular Program and Budget 2008/09, 2010/11, 2012/13 and 2014/15	518.46
Supplementary Reserve Appropriation for the WIPO Development Agenda for 2010*	10.3
Extra-budgetary Funds in Trust for Development Assistance in other countries 2008/09, 2010/11, 2012/13, and 2014/15	63.48
Extra-budgetary National Funds in Trust 2008/09*	3.50
In-kind support**	Not quantified
TOTAL	595.74

* Notably, these funds were originally part of the regular WIPO budget, but because they could not be carried over into the next biennium, the resources were placed in the reserve funds in order to be carried over for use in the next fiscal period.

** Data on National Funds in Trust for TA were only available for the year 2008/09.

*** In addition, WIPO negotiated cooperative agreements with several other donors that supplement WIPO's resources (e.g., with the European Community for activities in Bangladesh and Pakistan).

Second, the WIPO Secretariat argued that it had improved development-orientation throughout the organization, underscoring organization-wide engagement in its development cooperation activities.⁴⁴ The Secretariat's estimates of the 'development share' of each WIPO Program in its 2014/15 Program and Budget indicated that all but a handful of WIPO's 31 Programs were involved in some aspects of its development cooperation activities.⁴⁵ (See Annex 2 for a breakdown of

⁴² WIPO (2009) *Program and Budget for the 2010/11 Biennium*, WIPO: Geneva.

⁴³ WIPO (2013) *Program and Budget for the 2014/15 Biennium*, WIPO: Geneva.

⁴⁴ See WIPO (2015) *Program Performance Report for 2014: presented by the Director General*, Assemblies of the Member State of WIPO, Fifty-Fifth Series of Meetings, October 5 to 14, 2015, WIPO: Geneva.

⁴⁵ In 2014, WIPO's organisational structure comprised seven Sectors (such as the Development Sector) of which the Brands and Designs Sector, Global Issues Sector, Culture and Creative Industries Sector,

the allocation of resources from WIPO's regular budget for development-related activities by Program.) The Secretariat reported that in addition to the Development Sector (which accounted for the greatest share of WIPO's budget allocated to development activities), all of WIPO's seven Sectors had become involved in the planning or implementation of some development cooperation activities or indirectly played a support role. It argued that the higher proportion of the development budget allocated to WIPO's substantive Sectors and the expanded engagement of their expert staff in the delivery of WIPO's assistance were key factors aiding improvements in the overall quality of its assistance. For instance, the substantive Sectors, such as the Culture and Creative Industries Sector, the Global Issues Sector and the Patents and Technology Sector, played a lead role in the implementation of a number of CDIP-approved DA projects. From 2008/09, the growing number of references to the DA and its recommendations in the Secretariat's draft Program and Budget documents — and the expanding description of development cooperation activities therein — suggested recognition by the Secretariat of their political importance.

Third, following Member State approval of spending on some aspects of the DA, the Secretariat formulated specific budget-lines for the DA and undertook a number of DA-related activities (which in turn were counted as part of the organization's overall spending on cooperation for development). Expenditures related to the WIPO Development Agenda fell in three categories: a) spending related to the work of the Development Agenda Coordination Division (i.e., Program 8, which includes the cost of running the CDIP meetings); b) spending of approximately CHF 22 million on the 33 CDIP-approved DA projects approved since 2009 (see Annex 3 for a list of these projects);⁴⁶ and c) spending associated with streamlining or 'mainstreaming' the 19 DA recommendations for immediate implementation across the organization's work. (Although the Director General provided descriptive reports of progress in this respect, no budgetary amount was given for the cost of this third item.)⁴⁷ The Secretariat also cited its implementation of the 33 approved DA projects as evidence of efforts to improve the development-orientation of WIPO's capacity-building

and the Innovation and Technology Sector are commonly referred to as the 'substantive' Sectors. Implementation of WIPO's activities was divided among 31 Programs. Over half of the Programs rely on the engagement and cooperation of more than one Sector for their implementation, and sometimes rely on several Sectors. The remaining Programs were each implemented by an individual Sector. Some Sectors, such as the Global Issues Sector, have responsibilities for expected results across many Programs. See WIPO (2013) *Program and Budget for the 2014/15 Biennium*, WIPO: Geneva.

⁴⁶ All of the 33 CDIP projects approved by the end of 2014 can be classified as development cooperation activities, including those that resulted in studies. The question of how much of the spending on DA projects was additional to the Secretariat's regular development spending was not entirely clear because the budgetary process for approval of Development Agenda projects, and its link to WIPO's regular budget, evolved over time.

⁴⁷ In 2014/15, the Secretariat noted that beyond the specific DA project costs, further resources were allocated to mainstreaming several DA projects implemented in the previous biennium into the work of relevant Programs at a total cost of 3.2 million CHF. See WIPO (2013) *WIPO Program and Budget for the 2014/15 Biennium*, WIPO: Geneva. Also see WIPO (2010) *Director General's Report on the Implementation of the Development Agenda*, 18 March CDIP/5/2. WIPO: Geneva, and WIPO (2014) *Director General's Report on the Implementation of the Development Agenda*, 3 March 2014, CDIP/13/2, WIPO: Geneva.

activities.⁴⁸ From 2007/08, the budget associated with the implementation of such DA projects did indeed grow, accounting for around 10% of WIPO's overall budget for development cooperation activities in 2014/15 biennium.⁴⁹

The Secretariat argued that the DA projects had also made a positive impact on awareness among some staff and Member States of development considerations, spurring shifts in wider Program planning and requests by Member States toward stronger development-orientation.⁵⁰ It reported that the scope and variety of its activities had expanded to include more attention to those of greater interest to developing countries — such as activities with a focus on innovation, technology transfer, and efforts of local inventors, creators and SMEs in developing countries to make use of the IP system — with associated shifts in the allocation of budget.⁵¹ Much of this diversification was due to specific DA projects and many governments requested participation in CDIP projects as pilot countries or case studies. Projects designed to support the creation of Technology and Innovation Support Centres (TISCs) and national IP academies were particularly popular, with the beneficiary IP offices expressing considerable satisfaction and many requested extension of the projects. There were also efforts to integrate stronger development perspectives in a number of the WIPO Academy's training activities.

Fourth, the Secretariat argued that improved internal management had enhanced the alignment of development cooperation activities with the DA recommendations, highlighting improved planning at the country level; realigned organizational structures to facilitate the achievement of the expected results; and boosted efforts to define and measure the expected results of development cooperation.⁵² The emphasis on expected results occurred as part of a push for stronger results-based management (RBM) across WIPO,⁵³ which in turn prompted by wider efforts at organizational change advanced through a Strategic Realignment Program (SRP)

⁴⁸ Of the 33 DA projects, four related to a second phase of an initial project and four were proposed as candidates for mainstreaming.

⁴⁹ WIPO (2010) *Budgetary Process applied to Projects proposed by the Committee on Development and Intellectual Property (CDIP) for the Implementation of the Development Agenda Recommendations*, prepared by the Secretariat, Program and Budget Committee, Fifteenth Session, Geneva, 1–3 September 2010, WO/PBC/15/6 Rev.

⁵⁰ Author interviews and informal discussions with senior WIPO officials and mid-level staff in Geneva, 2011–15.

⁵¹ See WIPO (2014) *Program Performance Report 2012/13*, WIPO: Geneva; WIPO (2015) *Program Performance Report 2014*, WIPO: Geneva; WIPO; WIPO (2015) *Report of the Director General to the WIPO Assemblies*, WIPO: Geneva; WIPO (2015) *Director General's Report on the Implementation of the Development Agenda*, WIPO: Geneva.

⁵² Although the Secretariat has prepared PPR since 1998, the absence of an effective RBM framework for improving and measuring performance for WIPO has been noted for several years. See, for instance, WIPO (2008) *Executive Summary: Internal Review on Program Performance Reporting Process*, Internal Audit and Oversight Division, Evaluation Section, 10 October. EV/01/2008. WIPO: Geneva.

⁵³ Among other elements, the RBM framework consisted of expected results, performance indicators, baselines and targets for each of WIPO's nine Strategic Goals and the strategies to achieve these as well as work plans; a monitoring and evaluation system; and tools for reporting on organisational performance (such as the annual PPR).

launched in October 2008.⁵⁴ From 2012/13 onwards, one outcome of the SRP was a revised presentation of WIPO's Program and Budget to include an overview of the budget according to nine Strategic Goals and a suite of cross-cutting expected results. Responding to the demand for greater transparency of how WIPO's resources for development were spent, the Secretariat also established a new benchmark for tracing development expenditure over time (assuming the expected results remain constant for several biennia). Of WIPO's 60 expected results, the Secretariat identified some 30 as having a development component and estimated their budget share.

2.2 Evidence of Shortcomings

Despite positive progress reports from the Secretariat and the above-cited evidence of improvements underway in the development-orientation of WIPO's assistance, the reality in early 2015 was more complex and less rosy than depicted by the Secretariat.

The task of presenting a clear assessment of changes in the overall scale, distribution, development-orientation, and impact of WIPO's development cooperation activities is complicated by poor definitions, absent impact evaluations, and weak empirical data on its expenditures on development activities (discussed further in Part 3.2 below). To illustrate the persistence of fundamental shortcomings, this section draws on evidence from a major 2011 External Review of WIPO's assistance⁵⁵ and details disagreements on the purpose of WIPO's assistance to developing countries and on the meaning of 'development-oriented' assistance; the inability of Members to agree on a definition for the purposes of measuring, benchmarking, and monitoring development cooperation; and divergent views among Member States on how much progress had been made.

2.2.1 Evidence from the 2011 Independent External Review and Beyond

In 2010, in line with DA Recommendation 41, the WIPO Secretariat commissioned two external consultants to review WIPO's technical assistance, with a special focus on the degree to which progress relative to DA Recommendation 1 had been achieved.⁵⁶ The resulting 2011 report of the independent "External Review of its Technical Assistance in the Area of Development Cooperation" (hereafter the

⁵⁴ In the Secretariat's words, the purpose of the SRP was to better align its Programs, organisational structure, internal processes, and resource allocation to "build a responsive and efficient Organization, equipped to achieve its strategic goals and to provide global leadership on intellectual property (IP) issues." Further, the SRP aims to "increase responsiveness to customers and stakeholders, deliver greater value for money, take stronger responsibility for its performance, and work in an ethical manner". Its objectives have been articulated in terms of four core-values: service orientation; "working as one"; accountability for results; and environmental, social, and governance responsibility.

⁵⁵ See Deere Birkbeck, C. and S. Roca (2011) *Independent External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/8/INF/1, WIPO: Geneva.

⁵⁶ Members included the Review as part of a project on RBM, see WIPO (2009) *Project on Enhancement of WIPO's Results-Based Management (RBM) Framework to Support the Monitoring and Evaluation of the Impact of the Organization's Activities on Development (Recommendations 33, 38 and 41)*, CDIP/4/8 Rev., WIPO: Geneva.

External Review) was a landmark in WIPO's history because it was the first ever comprehensive review (internal or external) of the suite of WIPO's capacity-building activities.⁵⁷ The report documented that, as of 2011, the organization remained a long way from achieving the Development Agenda's vision as articulated in Recommendation 1.

While underlining the empirical difficulties with assessing changes in WIPO's technical assistance, the External Review provided evidence of "significant problems in terms of the relevance and orientation of assistance as well as its impact, management, cost-efficiency and coordination."⁵⁸ It provided a critical assessment of each of these dimensions across the following six core streams of WIPO's development cooperation activities:

- development of national IP strategies, policies, and plans in developing countries;
- development of global, regional and national legislative, regulatory, and policy frameworks (including related research and engagement of developing countries in global dialogue and decision-making on IP issues);
- building of national IP administrations and infrastructure;
- support-systems for users of the IP system in developing countries, including public awareness-raising;
- promotion of innovation and creativity, and access to knowledge and technologies in developing countries; and
- training and human capacity-building in developing countries.

At the heart of the External Review's findings and recommendations was a critique of the way in which the Secretariat and Member States went about the business of planning, implementing, and evaluating WIPO's development cooperation activities. Following are several illustrative examples of shortcomings in development-orientation as identified by the External Review in 2011, each of which remained poorly addressed by early 2015.⁵⁹

First, the Secretariat had failed to implement a satisfactory methodology for assisting developing countries to assess their development needs and IP capabilities, and to devise appropriate national IP strategies. While acknowledging that WIPO was testing a new pilot methodology for IP strategies as part of a DA project, the 2011 Review found that an *ad hoc* approach to supporting national IP strategies prevailed. The Secretariat reported high demand from developing countries for help in the formation of their IP strategies, and it repeatedly emphasised its work on IP strategies as evidence of its commitment to implementing the DA. In reality, less than 10 of WIPO's 120+ developing country Member States had completed IP strategies

⁵⁷ The author of this paper was the lead author of the External Review. See Deere Birkbeck, C. and S. Roca (2011) *Independent External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/8/INF/1, WIPO: Geneva.

⁵⁸ *Ibid.*

⁵⁹ More detailed evidence to support each of the arguments made in the remainder of this section can be found in Deere Birkbeck and Roca (2011), *op. cit.*

using WIPO's new methodology by early 2015.⁶⁰ The point here is not that the work on IP strategies or a new methodology should have been rushed, but rather that the Secretariat overstated the progress achieved, implying that such efforts were far more advanced and integrated into its work program than was actually the case.

Second, progress in mainstreaming the DA Recommendations remained uneven at the implementation level, particularly in terms of Program work plans and the content of concrete development activities. While the Secretariat rightly described the DA projects as a positive force for greater development-orientation, particularly where they were mainstreamed through the organization's regular Program and Budget, the Review underscored that such DA projects accounted for only a small proportion of WIPO's overall budget for development cooperation activities, which remained the case in early 2015.

The Review's examination of WIPO's Program and Budget documents from 2008/09 to 2010/11 revealed an emphasis on assistance for improvements in IP administration, public awareness of the IP system, training administrators of the IP system, and the adoption of legislation across the full spectrum of IP issues, as well as for promoting understanding of and accession to WIPO treaties. In recipient countries, IP offices widely reported strong satisfaction with such activities, and demand for involvement in DA-approved projects to create TISCS and national IP academies. The Review highlighted, however, that WIPO's portfolio of activities was stronger at assisting developing countries in deriving broader benefits from the global IP system than it was in helping them with the other side of the same agenda — to lower the costs that developing countries and their stakeholders face in using the IP system.

Although the Secretariat rightly reported a gradual move toward activities to support the use of "IP for development", such as by SMEs, the Review found that there was poor assessment of the needs of the diverse range of SME stakeholders at the national level and a lack of strategic prioritization among different types of SMEs according to development priorities. The focus on "IP for development" continued, by default, to promote the use and usefulness of the system to existing and potential IP right-holders in developing countries. While this emphasis may be important for some countries, WIPO's activities devoted less attention to helping other national stakeholders address the challenges of ensuring a balanced and development-oriented IP legislative, regulatory, or policy framework. WIPO's support for the modernization of IP office infrastructure was stronger in the area of patents and trademarks than for areas that many countries indicated were of higher priority, such as copyright and creative industries, traditional knowledge, and industrial designs. With regard to activities to modernize IP institutions, a low proportion of activities was devoted to support for collaboration, information-sharing, and coordination among developing country IP institutions. Across a range of WIPO seminars and plans, the

⁶⁰ In 2014, WIPO published the new methodology online, see WIPO (2014) *Methodology for the Development of National Intellectual Property Strategies*, WIPO: Geneva.

Review identified an emphasis on the importance of accession to international treaties administered by WIPO, such as the 1996 WIPO Internet Treaties, while the development implications of proposed treaties, treaty accessions, or implementation options were not explored.⁶¹

The Review also concluded that WIPO's capacity-building portfolio gave poor attention to activities designed to help countries proactively tailor IP systems to address development needs. For instance, the Review found few examples of activities to: a) attract, absorb, learn from, and produce technologies and/or promote affordable access to knowledge that could contribute to local innovation processes; b) promote the coherence of IP policies and other areas of national public policy; c) make practical use of TRIPS flexibilities or *sui generis* legal/policy options that would improve access to foreign technologies and/or manage the degree of protection they received; d) legally support developing countries to protect their knowledge, creative products, or technologies in international markets, enforce their rights in other jurisdictions, and defend against misappropriation; e) establish and use mechanisms that could improve balance in national IP systems, such as those related to pre- and post-opposition to patents; and f) promote competition policy in the area of IP.

By early 2015, a number of CDIP-approved DA projects had produced widely appreciated studies on topics ranging from technology transfer, the impact of utility models, alternatives to the patent system that can support R&D efforts, and flexibilities in the IP system, as well as an online database of national experiences and measures related to flexibilities in the IP system. On the positive side, these studies had succeeded in putting a set of important development issues 'on the map' at WIPO. However, the CDIP did not often approve specific follow-up action to such studies, meaning that many of these remained isolated, one-off CDIP-driven activities without a clear strategy or plan for integrating them into the ongoing work program as defined through WIPO's Program and Budget process. Further, the Secretariat did not undertake efforts to promote such resources among developing country governments and stakeholders or to follow up with its own analytical work. Although the Secretariat's online database, for instance, provided access to information on flexibilities in the IP system, developing countries continued to complain that the Secretariat remained too reticent in helping countries to identify and take advantage of opportunities to adopt and adapt IP policies and laws appropriate to their needs and circumstances. Although the WIPO Secretariat did more frequently provide factual advice on the flexibilities available in international treaties, a loose network of public-interest NGOs, research centres, academics and think tanks were a more consistent source of advice on IP-related options and tailoring their IP systems, proactively providing technical workshops, policy dialogues

⁶¹ The Review observed that detailed evaluation of the development-orientation of WIPO's legislative advice was thwarted by the Secretariat's practice of keeping such advice confidential. Although individual WIPO Member States could have chosen to make the legislative advice public, only a handful of countries had informally shared relevant documents with stakeholders, making it difficult to determine the degree to which WIPO had incorporated development-oriented advice, such as on TRIPS flexibilities.

and publications on issues ranging from patents and food security to guidelines for patent examination.⁶² On specific issue areas, developing countries were also provided more development-oriented advice from other international organizations, such as UNCTAD and WHO.⁶³

Third, although the Secretariat fairly reported a growing number and diversity of government and non-government stakeholders as providers and beneficiaries of WIPO's assistance at the national level (including, for instance, universities, SMEs, indigenous communities and ministries of science and technology), the dominant beneficiaries remained national IP offices, the legal community, and organizations representing the interests of IP right-holders. Examples of civil society and NGO recipients of WIPO assistance were rare. While participation of civil society participants or public interest experts increased for conferences or topics that specifically focused on development issues, speakers across WIPO's broad array of global events and trainings remained predominantly from IP offices, IP right-holders, the IP legal community, and other industry-related stakeholders. The Review also noted that WIPO's activities were often subcontracted to consultants known to be funded by or to conduct work primarily for the benefit of developed country industry clients.⁶⁴ No examples were found of similar arrangements for the provision of WIPO assistance with developing country research institutes or civil society organizations (although some individual consultants that work with NGOs or developing country research institutes have been contracted for certain activities).

Notably, the Secretariat itself acknowledged in 2011 that significant challenges remained to translate its various plans, stated intentions, and expected results into stronger development-orientation on the ground. Further, the Secretariat concurred that several findings and recommendations of the 2011 External Review reflected real weaknesses and recognized that action to address them would be required action on a continual basis.⁶⁵

2.2.2 Disagreement on Purpose of WIPO's Assistance and Meaning of Development-Oriented IP Assistance

Recommendation 1 of the DA set out several key features that should characterize WIPO's development activities (e.g., transparency, demand-driven, development-oriented). However, aside from an appeal that assistance should 'take into account the priorities and special needs of developing countries ... as well as the different

⁶² The South Centre, the Quakers United Nations Office, ICTSD, Knowledge Ecology International and IFLA were particularly active in this respect. See, for instance, Correa, C. (2012) *TRIPS-related patent flexibilities and food security: Options for Developing Countries*, Quaker United Nations Office and ICTSD: Geneva.

⁶³ UNCTAD, for instance, partnered with ICTSD to produce a number of technical studies on topics related to IP and development as well as legal advice. WHO produced studies and organized workshops on health-related aspects of IP law and policy.

⁶⁴ A prominent example is the International IP Institute, based in Washington D.C., and led by a former head of the US Patent and Trademark Office (USPTO).

⁶⁵ WIPO (2011) *Management Response to the External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/9/14, WIPO: Geneva.

levels of development,” the Recommendation left the larger question of what is meant by ‘development-oriented’ open to interpretation. Other DA Recommendations nonetheless offer some insight, implying for instance that development-oriented assistance would “facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation” (DA Rec. 19) and enable “developing countries to fully understand and benefit from different provisions, pertaining to flexibilities provided by international agreements” (DA Rec. 25). The TOR for the 2011 External Review of WIPO’s development assistance offered further guidance on what development orientation might imply, stating that WIPO’s development activities aim at “contributing towards the reduction of the knowledge gap and the greater participation of the developing and least-developed countries (LDCs) in deriving benefits from the knowledge economy”.⁶⁶

As noted above, because the DA recommendations reflected compromises forged through highly politicised negotiations, their ambiguities and shortcomings are not surprising. It is notable, however, that the tensions that had precluded greater clarity in 2007 persisted in 2015 and continued to blight progress on development orientation. Developed and developing countries remained divided on the importance of development-oriented IP rules and policies. Moreover, there were still divergent views on the meaning of development-orientation and what this implied for the purpose and content of WIPO’s assistance. The persistence of such disagreement was exemplified by the ongoing debate among Member States and within the Secretariat on how to respond to the 2011 External Review and its recommendations (see discussion in Part 3.1.5).

2.2.3 Ongoing Debate on a Definition of What Should be Counted as Development Cooperation in WIPO’s Budget

In early 2015, there was no agreement among Member States, or within the WIPO Secretariat, on what should count as ‘development cooperation’ or development cooperation activities at WIPO. This shortcoming made the task of measuring WIPO’s development expenditure and assessing its impact on developing countries very difficult. It also constrained the ability of the Secretariat and Member States to monitor and assess trends in the composition of WIPO’s development cooperation activities, and to ensure progress in development-orientation over time.

Meanwhile, estimates of the development share of WIPO’s activities were based on a broad definition and vague methodology for calculating what counted as a development cooperation activity.⁶⁷ When referring to “resources allocated to development activities” 2010/11, neither the 2008/09 nor 2010/11 WIPO Program

⁶⁶ See Deere Birkbeck, C. and S. Roca (2011) *Independent External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/8/INF/1, WIPO: Geneva.

⁶⁷ As noted by a 2011 Internal Audit of WIPO Cooperation for Development Activities conducted by WIPO’s Internal Audit and Oversight Division (IAOD), the absence of a clear definition of development cooperation used over time means that it is not certain whether the actual budget share of development cooperation activities is in fact higher or lower than the available estimate.

and Budget report provided a concept or definition of development expenditure.⁶⁸ Instead, from 2008 to 2011, each WIPO Program was simply asked to estimate the amount of their Program's budget that was allocated to development activities. The definitions of what counted as a development activity varied by Program, as did the methodologies they used.

Subsequent efforts to clarify the definition of development expenditure were hotly, and inconclusively, debated by Member States. In the 2012/13 and the 2014/5 Program and Budget documents, the definition evolved as follows:

“Expenditure is qualified as development expenditure, only where the beneficiary is a developing country and the equivalent expenditure is not available for developed countries. These amounts exclude foregone revenues resulting from the fee reductions accorded under the international registration systems for applicants from developing countries. Consistent with past practice, countries with economies in transition are included for the purpose of the Program and Budget.”⁶⁹

The result of this broad definition was that any WIPO activity that supported developing country participation could be deemed a development cooperation activity, thereby risking an overstatement of the total amount of WIPO's assistance that had a development purpose. (The definition, for instance, enabled the inclusion of Secretariat activities to promote developing country accession to WIPO treaties, which some developing countries argued should not be counted as development cooperation on the grounds that such accessions did necessarily support the achievement of the development priorities of recipient countries.)

In 2013, as had been proposed in the 2011 External Review, developing countries insisted that the definition of “development expenditure” used in the 2012/13 budget was inadequate; at their urging, a process for formulating a new definition was launched in WIPO's Program and Budget Committee (PBC).⁷⁰ After numerous informal consultations among Member States, the Secretariat submitted a proposed

⁶⁸ See WIPO (2008) *Revised Program and Budget for the 2008/09 Biennium*, WIPO: Geneva, p. 27, and WIPO (2010) *Revised Program and Budget for the 2010/11 Biennium*, WIPO: Geneva, p. 24.

⁶⁹ See WIPO (2012) *Revised Program and Budget for the 2012/13 Biennium*, WIPO: Geneva, p. 23; and WIPO (2014) *Revised Program and Budget for the 2014/15 Biennium*, WIPO: Geneva, p. 26. The only difference between the definitions in the two reports is that the 2012/13 report uses “when”, whereas the 2014/15 report uses “where the beneficiary is a developing country”. Note that some Members, stakeholders and WIPO staff propose that fee reductions (such as the introduction of a fee reduction scheme for applicants from LDCs which came into force in January 2008, in the framework of the Hague Agreement) could be considered as part of WIPO's development assistance activities.

⁷⁰ See WIPO (2012) *Revised Program and Budget for the 2012/13 Biennium*, WIPO: Geneva, p. 26. “Following concerns expressed by several delegations during the 18th session of the PBC, this definition is considered as an interim definition for purposes of the 2012/13 biennium Program and Budget. This definition would be refined further, in informal consultations convened by the Chair of the PBC, with a view to evolving a more precise definition of ‘development expenditure’ in the context of the WIPO Program and Budget. The revised definition should be submitted to the 19th session of the PBC for consideration and recommendation for approval by the General Assembly. The revised definition would be used for the preparation of the Program and Budget for the next biennium 2014/15.”

new definition along with comments from Member States to the 2013 WIPO General Assemblies.⁷¹ The proposed definition read:

Expenditure is qualified as “development expenditure” when it is used to finance development-oriented assistance provided by WIPO to developing countries and the equivalent expenditure is not provided to developed countries. In addition, the development activities financed by WIPO should directly contribute to: enabling developing countries to derive benefits from the IP system, to reduce the costs of its use, and to better protect inventions and creations around the world; and, reducing the knowledge gap between developed and developing countries by facilitating developing country access to knowledge and supporting their engagement in innovating, producing, using and absorbing technologies, new forms of expressions and creativity.⁷²

WIPO Member States could still not agree, however, with developed countries arguing that the proposed definitions were too complicated to be practical. The Secretariat thus retained its existing definition for the preparation of the 2014/15 Program and Budget. In 2014, the WIPO External Auditor’s annual report drew attention to accountability and practical problems arising from the absence of a definition.⁷³ Nonetheless, at the 2014 WIPO Assemblies, Members were still unable to reach an agreement, thus leaving the Secretariat with the prospect of being without an appropriate definition to aid the preparation of the 2016/17 WIPO Program and Budget.⁷⁴ [Authors note: At the 2015 WIPO Assemblies, Member States did finally agree on an elaborated definition similar to that proposed in 2013].

2.2.4 Dissatisfaction with Progress from Developing Country Member States

The views and recommendations expressed by Member States and stakeholders during official WIPO meetings in late 2014 show that there were still divergent views on whether sufficient progress had been made to improve the development-orientation of WIPO’s assistance, what progress would look like, and what follow-up was needed. If adequate progress had been made in terms of greater development-orientation of WIPO’s capacity-building, we would expect to see growing satisfaction from developing countries – its intended beneficiaries.

On the one hand, developed countries argued that the efforts undertaken and underway were satisfactory, emphasizing that the Secretariat should focus on partnerships to address specific problems and on “match-making” recipient needs

⁷¹ WIPO (2013) *Proposed Definition of Development Expenditure in the Context of the Program and Budget*, WO/GA/43/21, WIPO: Geneva.

⁷² See *ibid*, Annex B.

⁷³ The 2014 External Auditor report observed that no definition of development expenditure was available nor was there a clear method for determining the “development share” under each Program and activity, thus impeding the objective assessment of the effectiveness of efforts to mainstream development at WIPO. See WIPO (2014) *Report by the External Auditor: Prepared by the Secretariat*, WO/PBC/22/3, WIPO: Geneva, pp. 3, 13.

⁷⁴ See WIPO (2014) *General Report: Fifty-Fourth Series of Meetings, Assemblies of the Member States of WIPO, September 22 to 30, 2014, A/54/13*, WIPO: Geneva.

with the range of potentially interested donors.⁷⁵ On the other hand, at official WIPO meetings and in informal settings developing country delegates to WIPO — as well as sympathetic scholars and civil society actors — continued to argue that WIPO's assistance failed to reflect their broader strategic development goals, priorities and needs of their countries, or their different levels of development, as called for in DA Recommendation 1.⁷⁶

Developing countries cited several examples, for instance, of undue influence from WIPO's most powerful Member States and IP right-holders as evidence of inadequate progress on the DA in the area of capacity building.⁷⁷ In 2012, civil society groups and developing countries complained about WIPO's involvement in a proposed Ministerial-level "Africa IP Summit",⁷⁸ which they argued failed to reflect the DA; they called instead for a more balanced and transparent programme that was more representative of the diversity of interests at stake. This outcry resulted in the Summit being indefinitely postponed.⁷⁹ In addition, developing countries raised concern about the Secretariat's growing engagement in public-private partnerships (PPPs) to address public policy challenges,⁸⁰ calling for greater transparency and

⁷⁵ See WIPO (2014) *Report: Fourteenth Session of the CDIP*, CDIP/14/13, November 10-14, WIPO: Geneva.

⁷⁶ See, for instance, WIPO (2012) *Joint Proposal by the DAG and Africa Group on WIPO's Technical Assistance in the Area of Cooperation for Development*, CDIP/9/16, WIPO: Geneva; Dixon, S. (2013) "Discursive Intervention in International Intellectual Property Policymaking: How Developing Countries and Civil Society Employ Text to Challenge and Change the Status Quo", *Communication, Culture & Critique*, 6(4): 598–615. A study by the International Centre for Trade and Sustainable Development of WIPO curricula and materials found that WIPO capacity building has been focusing primarily on piracy and the enforcement concerns of right holders. It observed that WIPO's Development Agenda Recommendations were "conspicuously absent from most WIPO curricula and materials" and yet to be integrated in WIPO's capacity building. See De Beer, J. and Oguamanam, C. (2010) "Intellectual Property Training and Education: A Development Perspective", *International Centre for Trade and Sustainable Development, ICTSD Issue Paper 31*, Geneva.

⁷⁷ WIPO (1999) 'WIPO and Private Sector Forge New Relationship: Industry Advisory Committee Wraps up Inaugural Meeting,' *WIPO Press Release*, 5 February, Geneva: World Intellectual Property Organization (WIPO); Civil Society Coalition (2004) 'Geneva Declaration on the Future of the World Intellectual Property Organization,' available at <http://www.cptech.org/ip/wipo/generaldeclaration.html> (last viewed 30 October 2014); Gross, R. (2007) "World Intellectual Property Organization (WIPO): Institutional Overviews", *Global Information Society Watch 2007*, Global Information Watch: <http://www.giswatch.org> (last viewed 30 October 2014). Several other IGOs and NGOs have also published critical reflections on WIPO's governance, see for instance, Munsugu, S. and Dufield, G. (2003) *Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organization*, TRIPS Issues Paper 3, Geneva/Ottawa: Quaker United Nations Office (QUONO) and Quaker International Affairs Program (QIAP); and Center for International Environmental Law (CIEL) (2007) *A Citizens' Guide to WIPO*, CIEL: Geneva.

⁷⁸ The Summit was to be hosted jointly by the U.S., France, Japan, and WIPO, and sponsored by the private sector.

⁷⁹ In a letter to the WIPO Director General, for instance, NGOs drew attention to the Summit's lack of development and public interest dimensions, arguing that as an intergovernmental and UN specialized agency, WIPO "must take immediate measures to ensure that all its activities are evidence based, free of conflicts of interest and undue influence of actors that are known to promote an unbalanced IP agenda." See New, W. (2012) "US, WIPO Training Programme on IP Rights in Africa Comes Under Fire," *Intellectual Property Watch*, 12 February 2012, and IP-Watch (2012) "Brief: US, WIPO IP Summit in Africa Postponed," *Intellectual Property Watch*, 26 February 2012.

⁸⁰ Such concerns resulted, for instance, in a request for the Secretariat to provide more information on its activities. See WIPO (2014) *Information on the Activities of the IP and Global Challenges Program, Particularly on the Development-Related Aspects: Prepared by the Secretariat*, CDIP Thirteenth Session, CDIP/13/12, May 19-23, 2014, WIPO: Geneva.

development-orientation of the Secretariat's activities in this area. Although such PPPs clearly targeted policy challenges of interest to many developing countries – such as access to green technologies (WIPO Green), access to books (ABC Consortium), and the development of medical products for neglected diseases (Re:Search), developing countries and civil society raised questions about their governance and design. They argued, for instance, that several of PPPs had been established without prior Member State consultation, involved major multinational companies with which several countries were locked in IP-related battles, and had the potential to divert momentum away from policy and treaty/normative agendas of importance to developing countries.⁸¹

Further dissatisfaction and questions arose about the ultimate impact of a number of CDIP-approved DA projects and their influence on WIPO's broader development cooperation portfolio. Although the WIPO Secretariat designated many of the DA projects as successfully "completed" in its progress reports toward the end of 2014, some developing country Member States were not convinced: debates ensued about the accuracy of the Secretariat's reporting on the achievement of a range of DA benchmarks and their indicators,⁸² the follow up to projects, and the degree to which DA projects were and should be mainstreamed into WIPO's ongoing development cooperation activities. Amidst complaints about the 'cycle of disagreement' in the CDIP, developing country governments insisted that the implementation of the DA did not end with the implementation of CDIP projects.⁸³ Developing countries continued to express dissatisfaction with the Secretariat's legislative and policy advice, arguing that it was not sufficiently proactive in prompting discussion and use of flexibilities and options with regard to national IP laws and policy. Moreover, they continued to complain informally that the promise of WIPO assistance was still used as an implicit incentive or reward for backing efforts to strengthen IP norms at WIPO or for acceding to new WIPO treaties.

⁸¹ See presentations made at a meeting hosted by ICTSD in September 2014, entitled "WIPO Development Agenda+10," available at: <http://www.ictsd.org/themes/innovation-and-ip/events/the-wipo-development-agenda10-and-beyond>.

⁸² See, for instance, a presentation by a diplomat from the Algerian diplomatic in Geneva in September 2014. See Chakiri, A. (2014) *Monitoring the DA implementation: The CDIP and the Monitoring and Coordination Mechanism – How Effective?* Presented at a workshop entitled WIPO DA+10 and beyond, 29 September 2014, organized by the International Centre for Trade and Sustainable Development (ICTSD): Geneva, available at: <http://www.ictsd.org/sites/default/files/event/A.%20Chakiri%20-%20Monitoring%20the%20DA%20implementation.pdf>. For evidence of Member State concerns in this respect, also see WIPO (2014) *Report: Thirteenth Session of the CDIP*, CDIP/13/13, May 19-23, WIPO: Geneva.

⁸³ For evidence of Member State concerns in this respect, also see WIPO (2014) *Report: Thirteenth Session of the CDIP*, CDIP/13/13, May 19-23, WIPO: Geneva.

3. How WIPO's Governance and Institutional Management Stymied Progress on the Development-orientation of Capacity-Building

To understand why underlying problems with the orientation of WIPO's capacity building persisted one decade after the call for a WIPO Development Agenda, this Part of the paper argues first for attention to the powerful intervening role of institutional factors. It proposes that the prospects of a more development-oriented were compromised by weak management on the part of the Secretariat and by poor governance in terms of the processes and mechanisms for Member State oversight of the orientation of WIPO's development activities. Together, these two factors served to exacerbate North–South tensions and divisions, generate mistrust of the Secretariat among many developing country delegates, and expand the space for bureaucratic politics and imperatives to shape the Secretariat's activities and priorities in regard to development assistance. The importance of a third factor – inconsistent and ineffective demand for development-orientation from recipient Member States – is taken up in Part 4.

In making this argument, the following analysis responds to the various plausible explanations outlined in the introduction to this paper. Although WIPO faced a number of management crises during the period under study, it was not an organization failing on all fronts. The Secretariat was able, for instance, to respond to growing demand for its provision of treaty-related services (such as those related to the PCT, Hague and Madrid systems), which in turn generated a budget surplus for the organization – meaning that resource constraints also did not explain poor outcomes on improved development-orientation of assistance. Nor can we say that the quest for improved development assistance fell short due to a general disinterest or disengagement of powerful Member States from the organisation. Developed countries continued to seek to negotiate multilateral IP deals at WIPO, improve the organization's management and strengthen the performance of its treaty-related services even as they pursued bilateral, regional and plurilateral IP deals to further strengthen IP protections and despite intermittent threats to seek alternatives to an increasingly politicised WIPO as the administrator of global IP protection systems.

The following analysis also recognises power politics as background conditions vital to understanding how Member States interacted with the Secretariat and with each other in respect of the DA. Developed countries had greater economic power, technical and legal capacity, and diplomatic resources than developing countries across international IP relations and had long dominated agenda-setting at WIPO. Debate on WIPO's development cooperation activities occurred amidst such power asymmetries and consistent pressures from private interest groups, which favoured stronger IP policy and rules across international fora and decision-making processes where IP matters arose, and consistently insisted on WIPO's core mandate as the

promotion of stronger IP protection and enforcement.⁸⁴ Further, developed country Member States regularly adopted positions that favoured the interests of national IP right-holders and their associations.⁸⁵ Although developed country Member States historically had paid little attention to WIPO's capacity building (low Member State financial contributions to WIPO limited the financial stakes in terms of its impact or cost-effectiveness), their attention grew alongside fears from industry that more 'development oriented' WIPO assistance could spur developing countries to interpret and implement international IP rules – and the flexibilities therein – in ways that harmed their commercial interests.

Four further remarks help set the scene. First, the engagement of Member States, both developed and developing, in discussion of development assistance was highly variable. Second, developing countries were not a uniform mass. There were differences among and within many developing country governments (e.g., between ministries of foreign affairs and trade, national IP offices, and health ministries) on appropriate IP rules and their prospects for advancing development, and on whether the focus should be on how to use IP for development or on securing more balanced IP rules. Third, although private IP right-holders did not *directly* steer WIPO's development activities, they had considerable indirect influence on their overall thrust through participation in WIPO agenda-setting processes, interaction with national IP offices and joint delivery of some of WIPO's capacity building activities (elaborated in section 3.1.2 below).⁸⁶ Further, WIPO's senior management viewed responsiveness to IP right-holders, which were the organisation's core source of income, as vital to its financial viability and also to maintaining support of the organisation's developed country Member States. Powerful interest groups of IP right-holders openly challenged the DA as a distraction and a threat to what they considered to be WIPO's core mission – strengthening IP protection around the world – and argued against the fees they paid for WIPO's services being used to support Secretariat activities that might diminish that focus.

⁸⁴ Relevant fora include, for instance, the WTO's TRIPS Council and the World Health Organization (WHO) as well as negotiations on the Convention on Biological Diversity (CBD) and climate change. Deere Birkbeck, C. (forthcoming) *Global Knowledge Governance and Intellectual Property: An Agenda for Governing in the Public Interest*, Report of the Expert Taskforce on Global Knowledge Governance and Intellectual Property, Edward Elgar: Cheltenham.

⁸⁵ In the case of the United States, for instance, it is well-established that the agenda pursued by the US Patent and Trademark Office [PTO] and the Office of the US Trade Representative [USTR] at WIPO reflected the ability of private IP right-holders to capture U.S. policymaking in the area of IP. Kaminski, M. (2014). "The Capture of International Intellectual Property Law through the U.S. Trade Regime," *Southern California Law Review*, vol. 87, p. 978.

⁸⁶ Almost all of the international IP treaties administered by WIPO had been sought by private interest groups, primarily from developed countries, seeking to protect their investments in innovation and creativity. This legacy goes back to the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works, which together laid the foundations for current international system for IP protection. See Beier, F. (1984) 'One Hundred Years of International Cooperation: The Role of the Paris Convention in the Past, Present and Future', *International Review of Industrial Property and Copyright Law*, Vol. 15, No. 1: 1–20; Gaultier, G. (1997) 'The history of AIPPI', in *General Secretariat of AIPPI, AIPPI - 1897-1997 Centennial Edition: AIPPI and the Development of Industrial Property Protection 1897-1997*, AIPPI Foundation: Basel; and Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation*, Cambridge University Press: Cambridge.

Further, as is common-place across UN agencies and other international bureaucracies, the WIPO Secretariat had its own political interests — to bolster Member State support for the organization and its treaties; justify the Secretariat's importance and relevance; and expand the scope and scale of its activities. In this vein, development activities were perceived as instruments for building support for the global IP system and bolstering Secretariat ties with and support from developing country Member States.

3.1 Weak Governance of WIPO's Development Cooperation

WIPO's governance system impacted decision-making and action on the substantive direction of WIPO's development activities. Here, governance refers to the system through which WIPO Member States exercise their authority and control over the organization and oversight of its activities,⁸⁷ and through which the organization is held accountable to WIPO Member States and stakeholders.⁸⁸ WIPO's governance system has many components, including its mandate, legal foundations and purpose; decision-making structures, processes and practices; mechanisms for control and financing of the Secretariat; and policies with regard to transparency and external relations.⁸⁹

Ideally, governance arrangements in international organisations can serve to mitigate the impacts of power asymmetries, galvanise actions that advance common goals, and provide a forum through which States can articulate and seek ways to bridge differences where interests diverged. In practice, WIPO Member States and critical observers have long debated the need to reform WIPO's governance to bolster the organization's Member-driven character and facilitate more effective decision-making and oversight by Member States.⁹⁰ In this section of the paper, I argue that efforts by

⁸⁷ See WIPO (2011) *WIPO Governance Structure: Document Prepared by the Secretariat*, WO/PBC/17/2.Rev. WIPO: Geneva, p. 2.

⁸⁸ For an overview of the rich academic literature on the governance of international organisations, and related issues of accountability, see: Weiss, T. and R. Wilkinson (2013) *International Organization and Global Governance*, Routledge: London, and Woods, N. (1999) "Good Governance in International Organizations", *Global Governance*, Vol. 5, No.1, pp. 39–61.

⁸⁹ Deere Birkbeck, C. (2016) *The World Intellectual Property: A Reference Guide*, Edward Elgar: Cheltenham.

⁹⁰ See Deere Birkbeck, C. (forthcoming 2016) *Governing the World Intellectual Property Organization: The Power Politics of Institutional Crisis and Reform*, Routledge: London. Academic works on WIPO's governance debates include: Boyle J. (2004) 'A Manifesto on WIPO and the Future of Intellectual Property,' *Duke Law and Technology Review*, 9: 1–12; Kwakwa, E. (2002), "Some Comments on Rule Making at the World Intellectual Property Organization", *Duke Journal of Comparative and International Law*, Vol. 12, No. 1, pp. 179–95; and Wechsler, A. (2013) "International Economic Institutions: WIPO and the Public–Private Web of Global Intellectual Property Governance", in C. Hermann, M. Krajewski, & P. Terhechte (eds.), *European Yearbook of International Economic Law*, Vol. 4, pp. 413–40, Berlin; Heidelberg: Springer; May, C. (2006) *The World Intellectual Property Organization: Resurgence and the Development Agenda*, Oxford: Routledge; Debora Halbert. "The World Intellectual Property Organization: Past, Present and Future", *Journal of the Copyright Society of the USA*, Winter–Spring 2007, 54 (2–3): 253–284; Yu, G. (2007) "The Structure and Process of Negotiations at the World Intellectual Property Organization", *Chicago-Kent Law Review*, Vol. 82, p. 1452; Nandini, K. (2011) "From World Intellectual Property Organization (WIPO) to World Innovation Promotion Organization (WIPO): Whither WIPO?" *The WIPO Journal*, Vol. 3 (1); and Deere, C. (2009) "Reforming Governance to Advance the WIPO Development Agenda", in *Implementing WIPO's Development Agenda*, edited by

developing countries and civil society groups to improve the orientation of WIPO's development activities were thwarted by four shortcomings in the organisation's governance: underlying disputes among members about the organization's mandate and purpose; the structure of WIPO's financing; weaknesses in processes and mechanisms for Member State oversight and strategic guidance of WIPO's development cooperation; and lack of transparency, exemplified by closed bilateral negotiations on extra-budgetary resources for development activities. Although WIPO's governance system is itself a reflection of power asymmetries and could not be expected to fully overcome divergent interests among Member States in favour of development-orientation, it remains true that governance shortcomings hindered the prospects of achieving greater consensus and progress on the DA. Rather than help Members to abate tensions, bridge perspectives and broker compromises in favour of overarching goals, WIPO's governance system and processes too often served to perpetuate stand-offs and amplify tensions among the various stakeholders – the Member States, the Secretariat, the private sector and public-interest NGOs.

3.1.1 Contests over WIPO's Mandate and the Purpose of Development Cooperation

In the period from 2004-2015, efforts by WIPO Member States to agree on the goals and definition of the organization's development cooperation activities were repeatedly thwarted by underlying contests over WIPO's mandate and purpose. Whereas it is commonplace in UN agencies for Member States to articulate different interests and perspectives on the organization's goals, priorities and how they should be advanced, most such agencies nonetheless enjoy broad consensus on the overarching purpose of the organization (to promote public health for instance in the case of the WHO, to protect refugees in the case of UNHCR). At WIPO, however, Member States have been long unable to reconcile the competing visions that developed and developing countries have for the organisation. The 1967 WIPO Convention states the organization's mandate as one of promoting and protecting intellectual property.⁹¹ However, reflecting the efforts by developing countries in the 1970s to promote a global economic order that better advanced their interests, Article 1 of WIPO's 1974 agreement with the United Nations established WIPO's status as a UN specialized agency with a broader purpose: "...promoting creative intellectual activity and [...] facilitating the transfer of technology related to industrial property to ... the developing countries in order to accelerate economic, social and cultural development."⁹²

J. de Beer, Waterloo, ON: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre.

⁹¹ See WIPO Convention, Article 3. The 1967 WIPO Convention sets out WIPO's general objectives as: "to promote the protection of intellectual property throughout the world through cooperation among States" and "to ensure administrative cooperation among the Unions."

⁹² In 1974, WIPO and the United Nations forged an agreement which made WIPO a specialized agency of the UN system, charged with "promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to ... the developing countries in order to accelerate economic, social and cultural development." See WIPO (1975) *Agreement between the United Nations and the World Intellectual Property Organization*, WIPO Publication No. 111, WIPO: Geneva. The WIPO-UN agreement entered into effect on 17 December 1974, upon its approval by the General Assembly of the United Nations and General Assembly of WIPO. A Protocol incorporating the agreement was

Developing countries have consistently argued that the DA affirms the centrality of UN development objectives to WIPO's purpose and mandate, insisting that the organization's commitment and responsiveness to the needs of developing countries must be a core benchmark against which its performance and accountability is assessed. Developed countries, on the other hand, have retorted that WIPO's legal foundations and mandate as found in the WIPO Convention and ratified by 188 Member States have not been modified by either the UN Agreement or the DA, each of which were decisions adopted by the WIPO General Assembly not formal amendments to the organization's mandate as stated in the WIPO Convention (which would require an amendment of that treaty).⁹³

The enduring disagreements over WIPO's mandate persistently hampered efforts to advance stronger development-orientation in the organization. Debates about WIPO's mandate frequently arose as a central topic of contention in acrimonious and drawn-out debates among Member States on the terms of reference for an independent Review of the implementation of the Development Agenda as a whole,⁹⁴ and also on the follow up to the 2011 External Review of WIPO's development assistance. In 2014, protracted debates fuelled mistrust and frustration among Member States, with developing countries sounding an alarm that developed countries were taking the substance of WIPO discussions on development back to the pre-Development Agenda years.⁹⁵

In short, most developed countries did not concur in principle that WIPO ought to become a more 'development oriented' institution. With a few exceptions, developed countries fought the DA, working to water down the DA recommendations and insert proposals that better advanced their interests.⁹⁶ The DA Recommendations on WIPO's development cooperation activities need to be understood in this light. Although some developed countries wanted to ensure greater accountability of how WIPO's expenditures on development assistance (as part of a wider concern about the financial accountability of the organisation as a whole), including clearer evidence of cost-efficiency, they were not widely motivated by a concern for its development-orientation or impact. On the surface, the idea that more effective development cooperation could serve the interests of both developing and developed countries has a clear logic. Developing countries would gain better support for their institutions, which developed countries relied upon for the protection and enforcement of the

subsequently signed on 21 January 1975 by the two executive heads of the organisations, namely Kurt Waldheim, Secretary-General of the United Nations and Árpád Bogsch, Director General of WIPO.

⁹³ Each of these perspectives were heard in discussion at a meeting of delegates and stakeholders hosted by ICTSD in September 2014, entitled "WIPO Development Agenda+10," available at: <http://www.ictsd.org/themes/innovation-and-ip/events/the-wipo-development-agenda10-and-beyond>.

⁹⁴ See Saez, C. (2014) "WIPO Committee on Development and IP Opens with Overloaded Agenda," *Intellectual Property Watch*. <http://www.ip-watch.org/2014/11/10/wipo-committee-on-development-and-ip-opens-with-overloaded-agenda/>

⁹⁵ See WIPO (2014) *Summary by the Chair*, Thirteenth Session of the CDIP, 19–23 May 2014, CDIP/13/SUMMARY, WIPO: Geneva. Also see footnotes 2 and 94.

⁹⁶ See footnote 1.

interests of their IP right-holders. But the underlying politics and historical tensions were more complex.

In practice, two competing frames were used in regard to WIPO's development cooperation, each of which reflected broader debates about the purpose of WIPO, the impacts of IP rules, and the relationship between IP protection and development. The first frame presented WIPO's core purpose as the promotion of IP protection, proclaimed the benefits of IP protection, and asserted the importance of the "use of IP for development". This frame was regularly used by developed countries, the WIPO Secretariat, and IP right-holders, as well as by some developing countries, most notably representatives of IP offices. Within this frame, development-oriented IP assistance was equated with activities designed to strengthen national IP rules and institutions and to support international and local inventors and creators to seek and enforce IP rights.

A second frame presented a more nuanced view of WIPO's purpose and the role of IP in development. The Friends of Development, for instance, argued that WIPO's purpose must be to ensure that the IP system served the higher goal of development in their countries. They noted unresolved questions about the extent to which the IP system delivers more innovation, technology transfer, and foreign direct investment (FDI). They emphasized a need for a carefully tailored suite of laws and policies to boost national innovation and creativity in ways that serve development. Supporters of the DA viewed it as a vehicle to spur broader changes in WIPO's purpose, institutional culture, and entire portfolio of activities to shift the balance of the global IP system toward development priorities.⁹⁷ As such, while developing countries and some stakeholders acknowledged the potential utility of assistance to boost their "use" of intellectual property tools and the IP system, the focus on making IP better "work for development" was considered just one of the possible components of development-oriented assistance. The higher imperative in their view was to help countries design, implement, and benefit from more balanced frameworks at the global, regional, and national levels that would better address their development needs.

3.1.2 WIPO's Financial Arrangements: Private Sector Financing

The financial dimensions of WIPO's governance system also help explain the legacy of weak attention by Member States to the efficiency, performance, and impact of its development activities, and to WIPO's financial management in general.⁹⁸ As noted above, WIPO is almost entirely self-financing, making it unique among UN

⁹⁷ For scholarly analysis of these debates and perspectives, see footnote 1.

⁹⁸ In the case of development assistance, the motivation for stronger oversight on the part of developed country Member States was, as noted above, spurred not by national budget considerations, but rather by concerns that the orientation of WIPO's assistance may impact how developing countries implement international IP laws, which in turn had implications for national commercial interests and the kinds of international IP rules that developing countries would be willing to negotiate. As noted above, they started to care more when they noticed that the interpretations/capacity building may impact the implementation of binding WTO rules. So in fact they did care a great deal.

organizations. From 2004 to 2014/15, the organization raised between 89% and 94% of its income from fees paid by applicants and holders of IP rights in exchange for WIPO's treaty-related services⁹⁹ (such as the IP registration systems created by WIPO's Patent Cooperation Treaty (PCT)¹⁰⁰ and Hague Treaty on industrial designs).¹⁰¹ WIPO is also notable for its sizeable reserves.¹⁰² Notably, Member States contribute less than 5% of WIPO's annual budget (of which the contribution of most developing countries is a minor percentage and many have been in arrears for several years). In short, Member States have long lacked a strong, direct financial stake in how the organization's resources are spent.¹⁰³ Only since the departure of Idris has the Secretariat and Member States seriously taken on the task of modernizing and improving the accountability of the organization's financial affairs.

However, there were other interest groups with financial interests at stake at WIPO. As the primary source of income for WIPO's Regular Budget, associations of IP right-holders and IP professionals have long established their status as WIPO's core clients. Evidence of the special status that such private interests enjoyed at WIPO included the creation of an advisory body for the private sector in 1998.¹⁰⁴ Although this body ceased to exist in 2004 just as the call for the DA was being launched, there were enduring indicators of strong private sector access and influence in early 2015.

Although observer status for non-governmental organizations (NGOs) at WIPO is equally open to private and public-interest NGOs as long as they meet certain criteria, it is private sector associations that have most applied and they accounted for over 75% of NGOs accredited as WIPO observers in 2015.¹⁰⁵ Senior WIPO staff

⁹⁹ These treaties establish procedural rules mainly aimed at ensuring that one international registration or filing of an industrial property will have effect in all those countries signatory to the relevant treaties.

¹⁰⁰ The origins of WIPO's self-financing business model lie in the income streams from the PCT, which began in June 1978 when the filing of PCT applications commenced. In the 2014/15 biennium, over 75% of WIPO's income will come from PCT revenues.

¹⁰¹ WIPO also generates some additional income from the sale of publications, arbitration fees, interest, and some miscellaneous sources.

¹⁰² Income streams in 2012/13 exceeded budgeted amounts, for instance, resulting in a surplus of 34.6 million CHF and WIPO started the 2014/15 biennium with over 208 million CHF in reserves (above even the target level set by Member States. See WIPO (2014) *Financial Management Report for the 2012/13 Biennium*, WO/PBC/22/6, WIPO: Geneva, p. ii; WIPO (2014) *Review of WIPO's Financial Situation and its Policies Related to Reserves: Document prepared by the Secretariat*, WO/PBC/22/28, WIPO: Geneva, p. 8.

¹⁰³ Specifically, there was minimal need for national government representatives to WIPO to report back to national parliaments on how the organization had spent their citizens' tax funds. By contrast, Member State oversight of international organisations is stronger where governments must convince their legislatures to contribute considerable resources from their national budget and where they can exercise the threat to withhold payment, as the United States has done for instance in the case of the UN Economic, Social and Cultural Organization (UNESCO).

¹⁰⁴ The Industry Advisory Commission comprised 20 top-level representatives from the private sector. The IAC aimed to ensure that the "voice of the market sector is heard and that the organisation is responsive to its [market sector] needs." Although the role of the IAC was intended as purely advisory, the Director General stated that it was designed to ensure that there is "a direct input of industry into the policy-making process in WIPO." See press release on the first meeting of the IAC:

http://www.wipo.int/edocs/prdocs/en/1999/wipo_pr_1999_154.html (last viewed, 29 August 2014).

¹⁰⁵ Deere Birkbeck, C. (forthcoming 2016) *Governing the World Intellectual Property Organization: The Power Politics of Institutional Crisis and Reform*, Routledge: London.

also met and consulted more frequently in their daily work with private sector constituents than public interest representatives. A regular flow of speeches by WIPO's senior management at industry events provides evidence of the organization's focus on being seen as responsive and receptive to private sector interests.

Representatives of private IP associations and industry lobbying groups also established power and leverage more directly by threatening WIPO's income stream and relevance. As noted above, they repeatedly threatened to seek alternative institutional arrangements for the delivery of IP protection services such as those provided by the PCT system (thereby threatening WIPO's core source of income). They also lobbied their governments to pursue informal cooperation elsewhere (such as through the Patent Prosecution Highway Initiative among key IP offices) and to advance plurilateral, regional or bilateral negotiations as alternatives to multilateral norm-setting through WIPO.¹⁰⁶ In numerous debates at WIPO, associations of private IP right-holders argued that, as the organization's core financiers, they deserved a say in how WIPO spent its resources, including on development activities - a position which countries such as Japan and the United States regularly endorsed. They also lobbied Member States (and the Secretariat) on WIPO's policy agenda and development cooperation activities.¹⁰⁷ In addition, the private sector was involved directly in WIPO's capacity-building activities by regularly co-hosting events and providing speakers and instructors for training activities.

The original call for a WIPO Development Agenda explicitly called for curbing the private sector's influence on the organization and the skewed institutional culture this reinforces, advocating greater balance in the organization's engagement with stakeholders. IP right-holders are clearly relevant and important WIPO stakeholders, and there is a strong case for incorporating commercial lessons-learned in IP policy and practice as part of a balanced portfolio of development-oriented capacity building activities. However, in 2015 WIPO still lacked a clear policy to guide its engagement with the private sector (or indeed a policy on external relations, stakeholder engagement and partnerships in general) to promote overall development-orientation and to address potential conflicts of interest.

3.1.3 Poor Processes for Member State Oversight of Development Orientation

Poor political oversight of WIPO's development cooperation activities further undermined the prospects for greater improvement in development-orientation. The two key WIPO processes potentially available for Member State to exercise stronger oversight and provide strategic direction of WIPO's development cooperation were the Program and Budget process and meetings of the Committee on Development and IP (CDIP). In both instances, however, this potential was constrained by debate

¹⁰⁶ Deere Birkbeck, *op. cit.*

¹⁰⁷ This can be seen in numerous statements of the EU, Japan, and the United States at the CDIP, as well as in the statements made by Group B, a grouping of developed countries active at WIPO.

among Member States about the appropriate forum for discussion; inconsistent Member State engagement and uneven capacity; and the poor quality of information made available to Member States by the Secretariat.

First, developing countries faced challenges using WIPO's Program and Budget to monitor and guide the orientation of WIPO's capacity building. Notably, the adoption of the DA came on the heels of Member State concerns about inadequate opportunities for input into WIPO's Program and Budget process. This spurred the adoption of a new Program and Budget Mechanism that specified when the Director General should submit the draft Program and Budget document in order to allow time for discussion, comments, amendment, and recommendations from Member States.¹⁰⁸ In principle, the formulation of WIPO's Program and Budget subsequently emerged through an iterative process — combining work plans proposed by the Programs based on the activities and recommendations of Member State committees; additional ideas and initiatives proposed by programme managers; needs expressed by individual Member States; and feedback from the Secretariat's senior management. WIPO Member States could also provide feedback on Program Performance Reports, as well as through the elaboration of a new Medium Term Strategic Plan (MTSP), which Member States had also called for to guide the preparation of WIPO's work Program.¹⁰⁹

In practice, however, many Member States were not able to review the voluminous Program and Budget documentation, let alone engage substantively in related discussions. Although the Program and Budget is ultimately approved by Member States through the PBC and then by the General Assembly on a biennial basis, the PBC process did not provide Member States with an adequate strategic overview of WIPO's development cooperation priorities, activities, and budgetary allocation to ensure that the Development Agenda goals were advanced. For instance, neither the Secretariat's draft Program and Budget documents nor its annual and biannual Program Performance Reports (PPRs) — which were organized by Program — provided specific details on development assistance as a whole, or by region, country, topic, expected result, or orientation. Further, a review of PBC meeting records reveals that, in the period under study, there was little substantive discussion in that Committee of the overall strategic direction and content of development cooperation activities.¹¹⁰ The MTSP also failed to provide a clear direction and basis for Secretariat action in this regard. In 2009, the MTSP for the 2010-2015 period emerged as a contested and controversial document. As no consensus could be reached on many aspects, it was accompanied by all of the Member States comments.¹¹¹

¹⁰⁸ This was achieved through a revision of WIPO's Financial Regulations and Rules, which had previously called for the submission of only the budget for observations and possible recommendations. See A/42/9, p. 3. This mechanism was set out in an annex to WO/PBC/10/5.

¹⁰⁹ WIPO (2009) *Medium Term Strategic Plan (MTSP) 2010–15*, WIPO: Geneva.

¹¹⁰ Reports of the discussions that occurred during the formal sessions of the PBC are available by searching WIPO's meeting database at: <http://www.wipo.int/meetings/en/>.

¹¹¹ The proposed MTSP 2010-2015 was presented by the Secretariat for the consideration of the 2010 General Assemblies. The MTSP addresses several issues, including: "the changes in the external

Second, there was debate among Member States on whether the PBC or CDIP was the most appropriate forum for oversight of WIPO's development activities and on what the CDIP's role should be in regard to review of WIPO's ongoing development cooperation activities. On the one hand, the CDIP was not involved on a regular basis in the planning or assessment of WIPO's development cooperation activities as a whole.¹¹² The CDIP also had no direct role in the Program and Budget process with regard to the oversight, strategic direction, composition, or content of WIPO's development activities. On the other hand, the CDIP did make decisions on specific DA projects and reviewed related progress reports.¹¹³ In their statements at the CDIP, Member States also regularly debated the alignment of WIPO's development cooperation activities with DA Recommendations, received an annual Director General's 'Report on the Implementation of the Development Agenda'¹¹⁴ and devoted considerable time to debates on the mainstreaming of the DA throughout the organization. The CDIP was also the body that was responsible for responding to the 2011 External Review of WIPO's assistance to developing countries. Mounting concern among developing countries that CDIP deliberations were not properly feeding into the decision-making and deliberations of other WIPO bodies – on issues ranging from the Program and Budget, to capacity building and norm-setting – led them to propose a mechanism to support mainstreaming of the DA across the work of WIPO's many committees.¹¹⁵ After considerable debate, WIPO Members agreed on a "Coordination and Monitoring Mechanism for the WIPO Development Agenda" in 2010, adopting a series of principles on monitoring, assessing, and reporting modalities as well as coordination among WIPO Committees to ensure that development considerations form an integral part of the organization's work.¹¹⁶ Among other provisions, the decision instructed the relevant WIPO bodies to include a description of their contribution to the implementation of the DA Recommendations

environment over the medium term; the resulting challenges and opportunities for intellectual property and for the work of WIPO; the strategic level outcomes which the Organization seeks to achieve in the six year period; and the broad strategies that will be adopted to deliver those outcomes." The proposed MTSP was noted by the Membership, together with the comments provided by Member States (as reflected orally in the final report of the 2010 Assemblies and as reflected in the comments of Member States contained in the Annex to the Report), and was then used by the Secretariat as a high level strategic six-year framework to guide the preparation of the Program and Budget documents for the 2012/13 and 2014/15 biennia. That is, the MTSP became part of WIPO's overall planning and RBM framework, including for development cooperation activities.

¹¹² The PCT Working Group, for instance, has been discussing how and where to best review the organisation's patent-related development cooperation activities for several years. For reports of the work of the group see, <http://www.wipo.int/pct-wg/en/>.

¹¹³ The structure and desired outcomes of first set of such projects were presented at WIPO's "Open-ended Forum on Proposed Development Agenda Projects", held in October 2009.

¹¹⁴ WIPO (2010) *Director General's Report on the Implementation of the Development Agenda*, 18 March, CDIP/5/2, Geneva: WIPO.

¹¹⁵ WIPO (2010) *Summary: Prepared by the Secretariat*, CDIP Fifth Session, 26-30 April 2010, CDIP/5/10, Geneva: WIPO.

¹¹⁶ See http://www.wipo.int/ip-development/en/agenda/coordination_mechanisms.html (last accessed 1 September 2014). Also see WIPO (2010) *Coordination Mechanisms and Monitoring, Assessing and Reporting Modalities: Annex II of the Report of the CDIP*, WO/GA/39/7, WIPO: Geneva.

in their annual reports to the Assemblies.¹¹⁷ However, in 2015, Member States remained divided over which WIPO bodies should be considered “relevant.”¹¹⁸ While developing countries insisted that bodies such as the PBC and the Committee on WIPO Standards (CWS) should be considered “relevant”, developed countries refused.¹¹⁹

Third, by the end of 2014, with stalemates on many fronts, Member States found themselves debating the purpose of the CDIP, including its agenda and decision-making processes. Distrust, frustration, and fatigue among Member States were high. Many governments lacked the human and technical capacity to follow the thousands of pages of technical documents presented at each CDIP, attend all the relevant WIPO meetings, and keep track of intersections with work underway in other Committees. Governments faced challenges keeping up with discussions — which covered topics ranging from the high politics of the future of the global IP system; conceptual discussions of the relationship between IP and development; the review of technical, legal studies on aspects of the IP system; and approval and review of CDIP of project proposals and evaluations. This resulted, on the one hand, in Member State confusion, disengagement, and neglect of some agenda items, and, on the other hand, swings toward micromanagement.

As was the case elsewhere at WIPO, regional groups of countries were called upon to coordinate joint positions and to serve as platforms for informal consensus-building efforts in regard to the CDIP.¹²⁰ The opaque internal operations of regional groupings spurred suspicions in some instances about the credibility of group coordinators as representatives; some coordinators were viewed as mouthpieces for other interests – whether those of developed countries, NGOs, the WIPO Secretariat, or simply for the specific national interests of a sub-set of group members. Further, the national interests of countries within regional groups were sometimes heterogeneous. For instance, whereas some developed countries within Group B, such as the UK, Belgium and some Nordic countries, were willing to compromise on certain aspects of the agenda, the group was dominated by Japan, the U.S. and Germany, which broadly speaking wanted to limit the scope and impact of the DA on WIPO. The constraints of regional groupings were also reflected in the strategic

¹¹⁷ It also called on the General Assembly to forward the reports to the CDIP for discussion under the first substantive item of its Agenda and to request the relevant WIPO bodies to provide it with any information or clarification on the report that may be required.

¹¹⁸ See WIPO (2014) *Decision on the Committee on Development and IP (CDIP) Matters: Document prepared by the Secretariat*, WIPO General Assembly 46th Session, 22–30 September 2014, WO/GA/46/10, WIPO: Geneva. For discussion on this matter at the Assemblies, see WIPO (2014) *Draft Report: WIPO General Assembly*, 46th Session, 22–30 September 2014, WO/GA/46/12 Prov., WIPO: Geneva.

¹¹⁹ As of 2014, the IGC, SCP, SCT, SCCR, and the ACE each include an account of their activities relevant to the implementation of Development Agenda recommendations in their reports to the General Assembly. See WIPO (2014) *Description of the Contribution of the Relevant WIPO Bodies to the Implementation of the Respective Development Agenda Recommendations: Document by the Secretariat*, WO/GA/46/4, WIPO: Geneva.

¹²⁰ See Deere Birkbeck, C. (2014) “The Governance of WIPO: A Reference Guide,” *GEG Working Paper 2014/93*, Global Economic Governance Programme: Oxford.

formation of the cross-regional Development Agenda Group (DAG) by a group of developing countries to advance the DA.

Further, Member States frequently debated the appropriate procedure for CDIP meetings, which suffered varying quality of leadership by elected Chairpersons and increasingly deferred problem-solving to closed, informal consultations. CDIP meetings frequently ran over time, leaving some agenda items unaddressed and Member States scrambling to bridge their differences under time pressure. Such was the predicament of the CDIP that the usual WIPO practice of adopting a report on the final day of Committee sessions broke down. Where meetings went over time or ended in controversy, reports could not be concluded before the official close of the meeting. Although formal reports were then adopted at the next session, the Chairpersons meanwhile resorted (amidst some controversy) to producing a summary of proceedings under their own responsibility. The official standing of such summaries was ambiguous. Although Member States were generally given an opportunity to comment and propose revisions, many of which were incorporated by Chairs, the Committee did not adopt such summaries. Amidst the confusion, it is not surprising that Member States struggled to provide consistent, detailed oversight of the bulk of WIPO's development cooperation activities.

3.1.4 Governance Gaps: Poor Oversight of Extra-Budgetary Spending on Development Cooperation

FITs represent an important vehicle through which bilateral resources for IP-related development cooperation activities can be channelled toward multilaterally-defined priorities established through the WIPO Program and Budget, rather than toward more narrow, donor priorities widely pursued through bilateral assistance on IP. However, despite repeated developing country complaints about the poor accountability and transparency of Funds-in-Trust (FITs) used to finance some development cooperation activities, and recommendations in the External Review in this respect, governance in this area had not substantially improved by early 2015.¹²¹

From 2008/09 to 2014/15, the FITs resources available for WIPO's programming in developing countries grew from an estimated 10 million to over 15 million CHF (see Table 2)¹²² – collectively representing a greater amount than that specifically allocated for DA projects. For some of WIPO's programmes and development cooperation activities, extra-budgetary FITs were a significant, equal, or greater source of funds than those allocated from WIPO's Regular budget. This is particularly the case for the Regional Bureaus. For instance, the Africa Bureau had a dedicated Japan FIT, which provided it an additional CHF 6.6 million between 2008/09 and 2014/15. Whereas the Development Sector's LDC Division regular budget was

¹²¹ The provision of Funds in Trust to WIPO occurs in the framework of WIPO's Financial Regulations & Rules related to Voluntary Contributions.

¹²² Beyond FITs for development cooperation activities in developing countries, other extra-budgetary arrangements relevant to WIPO's development activities included: FITs for Junior Professional Officers; the WIPO Voluntary Fund for Accredited Indigenous and Local Communities; and national FITs established by some WIPO Member States for activities in their own country.

900,000 CHF for the 2010/11 biennium, a cost-sharing cooperation agreement with the Swedish International Development Agenda (SIDA) provided the Division a further 1 million CHF for the same period.

Table 2. Estimated Funds-in-Trust Resources for Development Programming in Developing Countries, 2008-2015 (in thousands of Swiss Francs)*

Fund-in-Trust (FIT)	Balance End 2007	Estimated Contributions 2008/09**	Estimated Contributions 2010/11**	Estimated Contributions 2012/13**	Estimated Contributions 2014/15**	Estimated Contributions available for programming in 2014/15
Australia					–	1,141
Brazil/IP and Innovation					950	1,130
Brazil/South–South Cooperation					400	600
Brazil, Sub-Total					1,350	1,730
Mexico					251	251
Ibero-American Program for Industrial Property	–	–	–	–	52	82
Finland/Copyright I	50	–	30	–	–	–
Finland/Copyright II	38	–	–	–	–	–
Finland/Copyright III	66	–	130	100	–	200
Finland, Sub-Total	154	–	160	100	–	200
France/Copyright	2	–	–	–	600	1,327
France/IP	649	400	600	300	600	1,327
France, Sub-Total	651	400	600	300	600	1,327
Germany/JPO	291	640	–	–	–	–
Italy	992	253	–	500	600	900
Italy/JPO	–	158	–	–	–	–
Italy, Sub-Total	992	411	–	500	600	900
Japan/Copyright	782	782	1,172	938	938	1,221
Japan/IP/Africa	–	1,100	1,100	2,200	2,200	2,707
Japan/IP	2,410	2,410	3,660	3,600	6,160	8,044
Japan, Sub-Total	3,192	4,292	5,932	6,798	9,298	11,972
Portugal	–	–	151	151	100	198
Republic of Korea (IP)	1,149	598	1,366	1,366	1,347	2,465
Republic of Korea (Copyright)	596	245	410	660	660	1,193
Republic of Korea (Copyright/PO)	–	540	–	–	–	–
Republic of Korea (Education)	–	–	–	–	400	550

Republic of Korea/JPO	527	464	–	–	–	–
Korea, Sub-Total	2,272	1,847	1,776	2,026	2,407	4,208
Spain	459	944	907	475	400	464
US Copyright	1,060	500	554	500	500	615
US IP	112	224	–	–	–	–
US IP/Enforcement	–	200	210	92	–	–
US SME	–	–	35	200	–	–
Sub-Total, USA	1,172	724	764	592	500	615
EU/Sri Lanka	65	–	–	–	–	–
EU/Bangladesh	–	644	1,060	–	–	–
EU/Pakistan	–	–	–	–	–	521
EU, Sub-Total	65	644	1060	592	500	615
TOTAL	9,247	10,102	11,350	10,942	15,558	23,609

*The figures do not include interest and exchange rate adjustments. It should also be noted that these funds generally provide for activities spanning a period of time exceeding or overlapping a single biennium, as income is received and expenditure incurred.

**This column is purely indicative and based on previous funding patterns. It does not represent Member States' commitments, except in those cases where FIT Agreement includes such a commitment.

Source: WIPO Program and Budget documents for 2008/09, 2010/11, 2012/13, 2014/2015.

From 2010 to 2013, FITs to support WIPO's development cooperation activities were in place for nine donor countries – the European Union, Finland, France, Italy, Japan, Korea, Portugal, Spain, and the United States – and the donor base was largely the IP offices of those countries.¹²³ (By the end of 2014, Brazil had also established a FIT to provide resources for a range of activities in other countries within Latin America.) Japan was the largest FIT donor, committing CHF 11.97 million for the 2014/15 biennium.¹²⁴ From the information on FIT-financed activities that can be gleaned from WIPO documents, it appears that donors mostly dedicated their resources to activities such as modernizing IP offices; promoting the importance of IP protection and enforcement; facilitating university–industry partnerships; enabling better use of IP assets by SMEs; supporting for the collective management of copyrights; and boosting enforcement of IP rights.¹²⁵

¹²³ There was also support from other government and inter-governmental entities, such as the European Communities and the International Trade Centre (ITC). The EC gave CHF 15 million in 2010/11 for development cooperation projects in South Asia.

¹²⁴ Notably, U.S. contributions to FITs are small, reflecting the fact that the U.S. government engages in direct provision of most of its assistance through bilateral programs hosted by a range of national agencies (ranging from the Departments of Commerce and State, and the USPTO), as well as through subcontracted consulting firms.

¹²⁵ Examples of specific FIT activities include the organisation of regional, sub-regional and national seminars and workshops, training courses, expert advisory missions, long-term fellowship Programs, provision of office equipment, and translation of selected WIPO materials. Japan was the first donor to set up a fund specifically for activities in Africa in accordance with Development Agenda Recommendation 2.

Administratively, FITs were managed as independent funds held for the purpose of activities agreed upon with respective donor.¹²⁶ A key governance shortfall was the lack of transparency of FIT negotiations, which occurred on a bilateral basis between the donor and WIPO staff, without opportunities for the broader WIPO membership to provide input or assess their relevance and development orientation. Each FIT Agreement, which set out the arrangements for consultation planning, monitoring, financial reporting, and review of FIT activities, was established bilaterally with donors and was not integrated with other WIPO reporting mechanisms.¹²⁷ FIT managers (or focal points within the WIPO Program or division receiving support) liaised directly with the FIT donor to plan and coordinate the activities, and undertook all reporting, monitoring, and evaluation of activities to the donor according to the individual FIT Agreement.¹²⁸ Responsibility for the intended synergy between FIT-financed activities and WIPO's wider Strategic Goals and expected results was deferred to individual FIT managers when negotiating their activities and implementing work plans. Neither the memoranda of understanding that lay the formal foundations for FITs nor the associated work plans (which set out in detail the activities for which funds were to be provided) were publicly available documents. In some cases, donors provided a junior professional from their country to assist WIPO with its FIT-financed activities.¹²⁹ There was thus considerable scope for donor influence on the content and orientation without opportunities for input or review from WIPO's wider membership, and with little transparency.

Although developed country donors responded positively to Secretariat efforts to boost transparency of FITs through an annual meeting to exchange views, ideas, and experiences, they did not agree to any specific measures that would boost transparency or to broaden the possibilities for input and oversight by other Member States. In 2008/09 and 2010/11, the WIPO Program and Budget document included only an Annex with a financial statement of the FIT resources available for development cooperation in developing countries, but without any information on the purpose or content of the activities supported.¹³⁰

¹²⁶ The only information available to Member States was Annex V of the 2010/11 Program and Budget provides a list of WIPO FIT donors, the balance of account as at end 2009, anticipated income 2010/11 and amount available for programming in the biennium. In addition, the financial details of all funds are published in the WIPO Financial Management Reports (FMR) for each biennium. An information document was also provided to CDIP 2, which provided general information on the purpose of each FIT.

¹²⁷ The financial management, reporting, and accounting for all funds are subject to WIPO Financial Regulations and Rules that include provision for both internal and external audit. In addition, individual donors may request specific financial accounting and reporting arrangements in the respective MOUs establishing the FIT agreements.

¹²⁸ The Korean and Japan FITs, for instance, had annual meetings with WIPO staff to monitor activities, which included some estimation or assessment of the project's impact. Further, in early 2011, there was a more formal evaluation of the impact of the Japan FIT's activities in Thailand and Vietnam, conducted in collaboration with WIPO's PMPS unit.

¹²⁹ For instance, allowing for a portion of expenditures to go towards the cost of that JPO or staffing the administration of the FIT activities within the WIPO Secretariat headquarters (as is the case with FIT Republic of Korea) or in one of its external offices (e.g., FIT Japan supports a JPO in the WIPO external office in Tokyo).

¹³⁰ The Program and Budget did not, however, contain information on national FITs; the sole source for information was the Financial Management Reports, which was limited to an accounting of the financial

Transparency slightly improved in the 2012/13 and 2014/15 Program and Budget when the Secretariat complemented its statement of the Regular Budget for each Program with a summary of the extra FIT resources available to it. However, the Program and Budget still did not systematically provide Member States any substantive information on the purpose or use of extra-budgetary resources. Although it is likely that a number of FIT activities did help, individually and collectively, to deliver on some of the organization's Strategic Goals and expected results in the area of development cooperation and in the implementation of the DA, there was no systematic reporting of where this occurred, or not. In addition, there was no systematic process or planning instrument to incorporate FIT-financed activities into WIPO's overall Program and Budget, RBM, evaluation and reporting processes, or to link priority-setting for FIT activities to country-based IP strategies, needs assessments or plans (which also had limitations as discussed in Part 3.2.3 below).

3.1.5 Slow follow-up of the External Review as an Illustration of Poor Governance

Slow follow-up of the 2011 External Review of WIPO's development cooperation activities further illustrates how poor governance frustrated the prospect of improved development orientation in WIPO's capacity building activities. For the subsequent five years, Member States became mired in ongoing procedural debates on how to respond to the Review and repeatedly postponed substantive discussions due to time constraints.

When the Review first arose on the CDIP's agenda at its November 2011 session, the Secretariat simultaneously presented its "Management Response" for consideration by Member States. Members subsequently debated whether their discussion should focus on the main Review report or the Secretariat's response, with many developing countries contesting the Secretariat's categorization of the Review's recommendations. The Management Response organized the recommendations into three categories: a) those already reflected in WIPO Activities or ongoing organizational reform initiatives; b) those that merited further consideration; and c) those whose potential implementation raised concerns.¹³¹ The Secretariat argued that many recommendations were redundant as they were already being addressed by the Secretariat. As evidence of such actions, it cited its decision to embark on a strategic review of the WIPO Academy; an improved focus on country planning; a project on national IP strategies; and the publication of a WIPO Code of Ethics. Beyond a brief introduction of the Review Report by one of the authors, no substantive presentation or discussion of the findings or

status of each FIT and a statement of available resources. Countries that entrust funds to WIPO for activities in their own countries included Brazil, Costa Rica, El Salvador, Libyan Arab Jamahiriya, and Uruguay.

¹³¹ WIPO (2011) *Management Response to the External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/9/14, WIPO: Geneva.

recommendations occurred.¹³² Members then debated the possible format of follow-up discussions on the content of the Review given the time constraints of the Committee. Some members argued for allotting dedicated time at the next CDIP session, while others called for an informal session of the CDIP to allow sufficient time for in-depth discussion of the Review and its findings. Ultimately, the CDIP Agreed to establish an Ad Hoc Working Group on the External Review to “identify recommendations that are redundant or no longer relevant, without any prioritization of recommendations”.¹³³ Although this Working Group met in early 2012, the meeting was dominated by procedural questions about the Group’s mandate and no consensus or decision was reached.

Meanwhile, the Review spurred members of the Development Agenda Group (DAG) and the Africa Group to submit a joint proposal to the CDIP, with priorities for action.¹³⁴ The proposal was briefly discussed at the May 2012 CDIP, but deferred until the November 2012 session of the CDIP. At that session, although there was some substantive discussion, much of the time was again spent on process - whether to discuss the Review in the CDIP’s regular session or to convene special sessions for that purpose. Ultimately, the Committee requested that the Secretariat prepare a document to report on which External Review recommendations were already under implementation.¹³⁵ At the subsequent May 2013 CDIP meeting, the Secretariat presented a report on its implementation of Review recommendations, which Member States again lacked time to discuss the Review in detail, amid continuing calls from developing countries for the allocation of adequate time to discuss the Review and the mounting volume of related documents.¹³⁶ The Committee did, however, agree that the Secretariat should compile a comprehensive manual on the delivery of WIPO technical assistance; upgrade the website to serve as a more effective, accessible, and up-to-date resource for communicating information about development cooperation activities; and improve its online Technical Assistance Database (TAD) with a view to facilitating search capabilities and more regular updating.¹³⁷ At the November 2013 CDIP meeting, the Secretariat reported on progress on each of these items, and the DAG and African Group submitted several further specific recommendations for action, drawn from their original proposal.¹³⁸ But time constraints again limited the scope for substantive

¹³² For a report on the content of the External Review, see Third World Network, “WIPO’s Technical Assistance Criticized for Shortcomings,” *Briefing Paper 1 on Intellectual Property Issues*, Third World Network: Penang.

¹³³ See WIPO (2012) *Report of the Ad Hoc Working Group on an External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, CDIP/9/15, WIPO: Geneva.

¹³⁴ WIPO (2012) *Joint Proposal by the DAG and Africa Group on WIPO’s Technical Assistance in the Area of Cooperation for Development*, CDIP/9/16, WIPO: Geneva.

¹³⁵ WIPO, *Status of Implementation of Certain Recommendations Extracted from the Report on the External Review of WIPO Technical Assistance in the Field of Cooperation for Development*, CDIP/11/4.

¹³⁶ The Secretariat also published a leaflet on Development Services and Tools in advance of this meeting. See WIPO (2013) *Report: Eleventh Session of the CDIP*, CDIP/11/9, WIPO: Geneva.

¹³⁷ *Ibid.*

¹³⁸ This included a call for the Secretariat to draft a policy on how WIPO should plan and organize training activities and its events including conferences, meetings, and workshops, including guidelines to improve their development orientation, ensure balance and diversity in speakers; ensure engagement both with public interest groups and entities having and representing commercial interests; and address

discussion as the CDIP's agenda was dominated by battles over other issues, most notably the terms of reference for a review of the implementation of the Development Agenda as a whole.¹³⁹ At the May 2014 CDIP meeting, the Committee again postponed discussion amid political tensions between developed and developing countries on a range of agenda items, which resulted in a deterioration of trust that ultimately brought about the breakdown of the entire meeting.¹⁴⁰ When the CDIP next met in November 2014, the Review remained an agenda item,¹⁴¹ but deliberations were further postponed as governments focused on resolving outstanding differences on the terms of reference for the wider review of the implementation of the entire Development Agenda.

The slow follow-up of the External Review not only constitutes a governance failure but was also a product of them. Although the report's length and numerous recommendations no doubt contributed to the challenge at hand, the underlying problem was political – the substantive divergences among Member States on the purpose of WIPO's development cooperation and thus the Review's recommendations. Developing countries wanted a full and comprehensive discussion of the purpose, priorities, and content of WIPO's assistance to developing countries. Developed countries feared that engagement in a substantive discussion could lead to more comprehensive reforms and development-orientation than they wished to see. Seeking to deflect attention from what stronger development-orientation would imply, they pushed instead for a discrete number of specific actions and advanced alternative proposals (such as for more rationale use of donor resources through a database to facilitate matchmaking between donors and developing country projects).

Governance matters exacerbated the political challenges. CDIP meetings often suffered poor chairmanship in terms of time management and strategic leadership and the agendas for CDIP sessions were consistently crowded, with inadequate attention to allocation of time according to the significance and importance of various agenda items. Chairs were not sufficiently well-equipped in terms of the background information and time needed to broker deals, solve problems or build consensus in

conflicts of interest and their disclosure; present the draft Partnerships and Resource Mobilization Strategy to the PBC for review and endorsement. The groups also called for a draft policy on Extra-budgetary Resources including FITs for the consideration of WIPO's Program and Budget Committee. In addition, they called for a "gap analysis" of staff skills, competences, and expertise needed in the Secretariat to improve the orientation, impact, and management of its development cooperation activities. Finally, they argued that the Secretariat should prepare guidelines to ensure transparent processes for selecting external experts, redesign/upgrade the online Roster of Consultants, and ensure regular updates of its content. See WIPO (2014) *Draft Report: Prepared by the Secretariat*, Twelfth Session of the CDIP, November 18-21, 2013, WIPO: Geneva.

¹³⁹ In 2010, alongside the creation of the DA Coordination Mechanism, the General Assembly requested the CDIP to undertake an independent review of the relevance, effectiveness, impact, sustainability and efficiency of WIPO's work in the implementation of the DA.

¹⁴⁰ See footnote 2.

¹⁴¹ An evaluation report for this project was presented for the consideration of the twelfth session of the CDIP (contained in CDIP/12/4). The report rightly argued that it may have been helpful to offer greater guidance to the consultants on the structure and presentation of recommendations. See WIPO (2014) *Summary by the Chair*, CDIP/13/SUMMARY, WIPO: Geneva.

advance of CDIP meetings. Although some delegates from the DAG and African Groups, as well as from Belgium and Spain, worked behind the scenes to form proposals for ways forward on the Review, delegates regularly complained that they lacked adequate time to read and digest relevant documents or to undertake consensus-building efforts between CDIP sessions. There was no sustained effort by any delegation or groups thereof to work *with* the Secretariat to identify concrete areas where progress could be made. Instead, specific interaction by delegates with the Secretariat on capacity building was generally focused on discussion of specific CDIP projects or assistance underway in their own specific countries. Meanwhile, broader, substantive discussion of how to improve the development-orientation of assistance languished, only to arise (and fall) in the more formal, political context of the bi-annual CDIP meetings. Finally, the Secretariat's Management Response to the Review complicated the process by obfuscating how many of the report's recommendations were indeed already being implemented. For more on how such management dimensions shaped the follow-up of the Review, see Part 3.2.5.

3.2 Poor Management by the Secretariat and the Bureaucratic Politics of Reform

The DA's push for stronger development orientation of WIPO's technical assistance and capacity-building emerged at a time of organizational crisis at WIPO, particularly in regard to WIPO's leadership, financial management, and staff policies. Although action to implement the DA was closely linked to wider organizational change initiatives, progress on some of the latter was not sufficient to address the obstacles that persistent poor management practices posed to greater development orientation in WIPO's highly politicized context. This section identifies five such areas of weakness in management, namely: 1) measurement and monitoring allocation of resources; 2) transparency of data regarding resource-allocation within programmes; 3) evaluation of development impacts and lessons learned; 4) planning processes at the country and Program level; and 5) internal leadership, culture, and coordination.

3.2.1 *Measuring and Monitoring Resource Allocation by Country*

Although there were improvements in the Secretariat's results-based management over the period under review (see Part 2.2 above), internal processes for data-gathering and monitoring of the distribution and orientation of WIPO's development cooperation budget and expenditure remained weak in 2015. The Secretariat's failure to put into place adequate tools for tracking, monitoring, and reporting on its development activities undermined the prospect for closer review, oversight and strategic direction by Member States or stakeholders of their evolution and orientation.

Reported data on development expenditure by types of activity, country, or region were limited, and estimates of expenditure were derived from partial information (and relied on a vague, broad definition of what counted as "development expenditure"

pending Member State approval of a new definition as discussed above). The Development Sector did not systematically produce a country-by-country breakdown of its expected results, activities, budgets, or expenditure, nor were such figures available according to level of development or GDP per capita of recipient countries. Although some individual Programs did produce breakdowns of activities by country and region on a regular basis, this information was compiled in internal documents and was not compiled or shared in ways that could form the basis of a broader organization-wide view.¹⁴² Although from 2008 to 2011 the Secretariat presented a broad breakdown of how personnel and non-personnel resources were allocated by region, even this element was missing from the 2012/13 and 2014/15 Program and Budget documents. Notably, one DA project approved by Member States aimed to address the data shortfall through the creation by the Secretariat of an online database of technical assistance. However, the database did not provide information on the expected outcomes of activities, their content, impact, or approved budget, and actual expenditure. The database also lacked other relevant information, such as evaluations, management reports, or expected follow-up.

3.2.2 The Secretariat's Black Box: The Development Activities of the Regional Bureaus

Lack of transparency on the allocation of resources within WIPO's Development Sector was a further, fundamental management shortcoming as it limited the potential for Member States to monitor and review the largest portion of WIPO's activities, namely the work of WIPO's Regional Bureaus. (Housed within the Development Sector, the work of the Bureaus is referred to as Program 9 in the WIPO Program and Budget.) The Regional Bureaus account for the greatest share of WIPO's budget for development assistance and for the greatest number of staff posts devoted to this purpose. In the 2013/14 biennium for instance, Program 9 accounted for almost 25 percent of the Secretariat's estimate of total spending on Development Cooperation. The proportion of total resources available to the Regional Bureaus was even higher if additional allocations through extra-budgetary FITs were included (see Table 3).¹⁴³

Yet, Member States received very limited information about the activities of the Regional Bureaus. The Program and Budget documents and Program Performance Reports summarized WIPO's activities, expected results and outcomes at a very high level of abstraction and aggregation over just a few pages. Member States received no detailed complementary breakdowns of expenditure or impacts of Program 9's work by activity, country, or expected results. The "black box" of WIPO's work under

¹⁴² Internal quarterly management reports provide a summary of activities undertaken and planned for each quarter in beneficiary countries. These reports are, however, internal, memo-based communications to senior management. They are not available for public review nor do they serve as a basis for compiling and analysing activities across the organisation. They are not integrated into any information management system to facilitate monitoring by beneficiary countries, member states, staff, or stakeholders. The WIPO technical assistance database offers only a partial list of activities by country and provides no information about, or links to, the level of expenditure by activity or country.

¹⁴³ See WIPO (2014) *Financial Management Report 2013, A/54/8*, WIPO: Geneva.

this programme left Member States without tools to properly monitor and guide the work; while simultaneously giving the Secretariat considerable autonomy in terms of the priorities and details of the activities it pursued in Member States.

Table 3. Regional Bureau Budgets from WIPO Regular Budget and FITs (in thousands of Swiss Francs)*

		2008/2009 Estimated Contributions	2010/2011 Estimated Contributions	2012/2013 Estimated Contributions	2014/2015 Estimated Contributions
Africa Bureau	Total Regular Budget	7,737	8,205	Not available	Not available
	FIT Portugal	–	151	151	100
	FIT Japan IP/Africa	1100	1100	2200	2200
	FIT France Copyright	2	–	–	–
	FIT France IP	400	600	300	600
	TOTAL	7,737	8,205		
Arab Bureau	Total Regular Budget	6,892	7,156	Not available	Not available
	TOTAL	6,892	7,156		
Asia Pacific Bureau	Total Regular Budget	8,333	8,298	Not available	Not available
	FIT Korea IP	598	1366	1366	1347
	FIT Japan IP	2410	3660	3660	6160
	FIT EU/Bangladesh	664	1060	–	–
	ITC-Pakistan	–	–	1,186	521
	EU-Sri Lanka	65	–	–	–
	TOTAL	8,333	8,298		
Latin America & Caribbean Bureau	Total Regular Budget	6,982	7,582	Not available	Not available
	FIT Spain	944	907	475	400
	FIT Mexico	–	–	–	251
	FIT Ibero-American Program for Industrial Property	–	–	–	82
	TOTAL	6,982	7,582		
LDC Bureau	Total Regular Budget	3,808	4,296	Not available	Not available
	FIT Japan IP/Africa**	See above	See above		
	TOTAL	3,808	4,296		

* This does not include JPOs funded by FITs to work in the Bureaus.

** The Japan/Africa-LDCs FIT is for countries in Africa and LDCs (see resources for Africa Bureau).

N.B. The table does not capture all of the possible expenditure that might occur by region, such as through activities conducted by other WIPO programmes in the various regions.¹⁴⁴

¹⁴⁴ In addition, four of WIPO's five external offices are engaged in the provision of development cooperation activities at the regional level. They each assist with the implementation of development cooperation activities financed through the budgets of other parts of WIPO, but also have a portion of their own budgets allocated to development cooperation activities. WIPO does not have a breakdown of the budgets of each of the external offices and their development-related activities for the period under review.

3.2.3 Evaluating Results and Impact

Weaknesses in the Secretariat's tools and processes for evaluation of the results of its assistance further limited the scope for improved development orientation. Although the Secretariat was implementing a new information management system during the period under review (approved as part of an organisation-wide Enterprise Resource Planning (ERP) initiative), effective evaluation of development cooperation activities remained impossible in the absence of regularly updated substantive information about the content of activities, their associated budgets and expenditures, as well as their impacts and evaluations. Further, in 2015, the Secretariat's processes and methodologies for evaluating the impacts of particular categories of capacity-building activities remained nascent.

On a positive note, the effort to establish a results framework for WIPO's work programme and to improve results-based management (RBM) meant that it was possible to view information on WIPO's resource use and performance indicators according to expected results. However, by early 2015, the use of RBM remained nascent and the Secretariat had not yet devised RBM frameworks for its development activities at the country or regional level. Moreover, the impact of RBM on development orientation relied on the quality, relevance, and appropriateness of the expected results and performance indicators. Although there were important efforts by some WIPO staff to push for meaningful expected results and indicators, these staff nonetheless relied on inputs from Program Directors and staff, many of whom were reluctant to implement RBM and lacked the expertise needed to define meaningful expected results and indicators that would facilitate progress toward stronger development orientation. The process of defining these and anchoring them in goals and strategies aligned with the spirit and recommendations of the DA demanded deeper Senior Management attention and interest in long-term strategies that would improve the development-orientation and outcomes of IP systems. In the push to implement the RBM system, and without sufficient backing and resources from Senior Management, staff relied heavily on external consultants for advice. Although a necessary step in the right direction, the expected results that emerged for the development activities of many Programs reflected a re-packaging of existing work through the cosmetic adoption of new 'development' language rather than a substantive shift in organizational thinking and culture on how to achieve stronger development-orientation.

In addition, despite its growing emphasis on results, the Secretariat made little use of project management tools for planning, design, implementation, and monitoring of development activities. Beneficiaries of WIPO assistance rarely had experience with project management and monitoring tools. The Secretariat also lacked methodologies for evaluating its development cooperation activities and had not devoted significant attention on devising relevant tools.¹⁴⁵ There were no systematic processes for gathering data relevant to evaluation by the Secretariat or recipients in

¹⁴⁵ See Deere and Roca (2011) *op cit*.

the course of projects. Only two country-level evaluations of WIPO's assistance had been completed (conducted by WIPO's Internal Oversight Division) in the form of Country Portfolio Evaluations (CPE) of Kenya and Thailand.¹⁴⁶ Even where data on the results of activities was gathered, the Secretariat faced a sizeable methodological challenge of establishing the causal links between WIPO's specific activities, immediate results and longer-term development impacts, as well as accounting for the individual impact of WIPO's activities amid assistance from other donors. The potential for progress in this respect was complicated by the absence of effective mechanisms for information-sharing and coordination among donors on the design, reporting and monitoring of capacity-building activities in developing countries.¹⁴⁷

A final shortfall on the evaluation front was the Secretariat's style of reporting to Member States on its intentions and achievements. In both its Program and Budget documents and Program and Performance Reports, details were glossed over and there was considerable scope for the Secretariat to present overly-optimistic assessments and projections. For instance, in the 2014/15 Program and Budget, the Secretariat stated that "[t]he mainstreaming of development across all substantive Strategic Goals and all relevant Programs of the Organization in line with the Development Agenda (DA) recommendations continues to be reflected in the consolidated results framework for 2014/15."¹⁴⁸ The Secretariat asserted: "The biennium will therefore see further mainstreaming of WIPO's activities related to: a) national IP regulatory frameworks that promote creativity and innovation and reflect the level of development of the different WIPO Member States."¹⁴⁹ In addition, the Secretariat stated that "[t]he DA recommendations continue to guide WIPO development activities. Program linkages to the DA recommendations continue to be substantively reflected in each relevant Program narrative. DA projects have been mainstreamed, both in terms of substance and resources."¹⁵⁰

Although the Secretariat's Program and Performance Reports were scrutinized by the Internal Oversight Division (IOD) through its verification reports, the IOD's review followed an auditing logic – focusing on whether evidence could be produced to back various claims – and did not critically appraise the substance of the Secretariat's assertions, the quality of the evidence or the scope of claims. Although the Secretariat's use of development language throughout its Program and reporting documents signaled a recognition of the political need to demonstrate action on development issues, Member States and stakeholders lacked the information needed to independently verify Secretariat claims and assertions in the absence of transparent and independent evaluations.

¹⁴⁶ See, for instance, WIPO (2012) *Kenya Country Portfolio Evaluation: Executive Summary*, WIPO/IAOD/GE12/4, WIPO: Geneva.

¹⁴⁷ There is, for instance, no overarching multilateral framework for needs assessments, priority-setting or evaluation to guide the design and delivery of assistance. Further, among donors, there is variation in which national ministry or agency they interact with, so tracing the amount of assistance and its impact is complicated. The US government has a website on what it does afterward and the OECD database.

¹⁴⁸ See WIPO (2013) *Program and Budget 2014/15*, WIPO: Geneva.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

3.2.4 Weak Processes for Country Planning of Assistance

At early 2015, the WIPO Secretariat had not yet devoted systematic attention to development-oriented planning of activities at the country or Program level. And yet, careful planning was increasingly important in light of the expanding scope of WIPO's activities within developing countries, the demands from Geneva-based developing country delegates for greater development-orientation, and the expanding array of stakeholders and potential beneficiaries at the national level.

In 2011, the Development Sector embarked for the first time on designing a common template for country planning to be used by each of WIPO's regional bureaus.¹⁵¹ Although the Secretariat made the template available to the public in 2013, it overstated its subsequent use.¹⁵² In 2014, for instance, the Secretariat stated that the country plans and templates were in use,¹⁵³ but WIPO's external auditor report in the same year underlined that the actual number of existing country plans was not clear and noted that those reported to have been completed were not easily available for review.¹⁵⁴ Similarly, although the Secretariat piloted a new methodology and tools for the formulation of IP strategies (as called for by a DA project), only a small minority of developing countries had designed such strategies using that methodology. The point here is not that such IP strategies (or country plans for that matter) should have been rushed; ensuring development orientation in both country plans and IP strategies demands careful reflection, consultation, and buy-in from Member States. However, it was reasonable to expect more accurate reporting by the Secretariat and swifter, stronger commitment by WIPO's Senior Management to the implementation of country plans and IP strategies. In their absence, WIPO's assistance to most developing countries remained a function of ad-hoc requests from national governments (mostly from IP offices); top-down work plans formulated by WIPO's programmes during the Program and Budget process; CDIP-approved DA projects; and work plans negotiated bilaterally through WIPO FITs. Although there were some improvements to WIPO's planning processes to better reflect development priorities (such as the articulation of expected results for development cooperation in the Program and Budget process), the Secretariat did not establish clear procedures for linking these to bottom-up country-level planning processes or for generating better results in terms of development relevance, orientation, and impact of the concrete activities undertaken on the ground. In practical terms, development orientation continued to rely on efforts of those individual staff committed to boosting the development outcomes of WIPO's work despite growing frustration with the failures

¹⁵¹ Although some motivated staff had devised country templates in earlier years, the sector's management did not take up their efforts more widely.

¹⁵² WIPO (2012) *Technical Assistance Manual*, CDIP/12/7, WIPO: Geneva.

¹⁵³ See WIPO (2013), *Status of Implementation of Certain Recommendations Extracted from the Report on the External Review of WIPO Technical Assistance in the Field of Cooperation for Development*, CDIP/11/4, WIPO: Geneva, and WIPO (2015) *Program Performance Report 2014*, WIPO: Geneva.

¹⁵⁴ WIPO (2014) *Report by the External Auditor: Prepared by the Secretariat*, WO/PBC/22/3, WIPO: Geneva, pp. 3, 13.

by WIPO's Senior Management to take a more systematic approach to strengthening development cooperation.¹⁵⁵

In sum, the enduring and widespread lack of national IP strategies; systematic 'bottom-up' process of needs assessment and priority-setting; and multi-year strategic country planning hampered the prospect for more development-oriented WIPO assistance to developing countries. (Part 4 below argues that inconsistent demand for greater development-orientation from recipient governments constrained the prospects of improved country-planning, noting the disconnects that arose between the priorities of Geneva-based delegates and representatives of national IP offices).

3.2.5 Poor Institutional Leadership, Bureaucratic Politics and Institutional Culture

A final set of management shortcomings related to poor leadership by the Secretariat's Senior Management on the task of shifting WIPO's pro-IP institutional culture¹⁵⁶ toward stronger development orientation. The prospect of greater progress on development orientation was hampered by the failure of WIPO's leadership to clearly guide Secretariat staff on what development-orientation required, take effective action to promote the required internal cultural change and coordination. While some WIPO employees gave greater consideration to development concerns in their work, most senior WIPO staff still viewed themselves as guardians of the organisation's international IP treaties and routinely took on a role of defending the IP system from critics. Although the Director-General spoke in favour of a balanced IP system and increasingly integrated language of development, the enduring emphasis on IP protection as the organization's core purpose remained clear throughout his speeches, statements, and reports.¹⁵⁷

During the period under review, the Director General faced a range of political constraints and management challenges associated with the implementation of the Strategic Realignment Program (SRP).¹⁵⁸ Like most such organizational reform efforts, the SRP provoked considerable internal resistance. Further, changing WIPO's institutional culture to favour development was always going to be a difficult task. Even before reforms began, an independent review had already revealed low

¹⁵⁵ Such staff had long been aware of the need for better planning of development cooperation. In 2009, for instance, several staff in the Development Sector elaborated a discussion paper to help systematize and strengthen the planning and delivery of WIPO's capacity building activities in ways that would respond to development needs, but this was not taken up by management. See "Strengthening Development Cooperation: Elements for Discussion", Discussion Paper, 2 October 2009, on file with author.

¹⁵⁶ Boyle (2004) "A Manifesto on WIPO and the Future of Intellectual Property", *Duke Law and Technology Review*, 9:1–12; Deere-Birkbeck, C. and R. Marchant (2010) "The Technical Assistance Principles of the WIPO Development Agenda and their Practical Implementation", ICTSD: Geneva; May (2007) "The World Intellectual Property Organization and the Development Agenda (Global Insights)", *Global Governance: A Review of Multilateralism and International Organization*, 13, 2: 161–70.

¹⁵⁷ See WIPO (2014) *Director General's Annual Report*, WIPO: Geneva.

¹⁵⁸ These included an Enterprise Resource Planning (ERP) initiative and Strategic Realignment Program (SRP), which included a new approach to results-based management, and a Performance Management and Staff Development System (PMSDS).

staff performance and morale, as well as a sense of entitlement to promotions among staff.¹⁵⁹ Further, staff employment conditions (such as in regard to types of contracts, promotions, and dismissals of staff on permanent contracts) limited the extent to which changes in staffing could be used as a driver for organizational change in favour of the stronger efficiency, service delivery, and professionalism favoured by the Secretariat's new leader, far less the development orientation called for by developing countries. Nonetheless, the Secretariat did not show the initiative it could have (and has demonstrated itself capable of taking in other areas) in proposing and implementing management improvements that could have helped stimulate stronger development orientation.

One way in which the Secretariat's leadership could have acted to spur improved development-orientation was to systematize a culture of collaboration, public engagement, and openness to different perspectives on the IP system and its role in development. In 2015, however, the organization still lacked a clear strategy and policy to guide its relationships with external stakeholders. Nonetheless, the Secretariat's senior management interacted regularly with private sector stakeholders. While it was logical for the Secretariat to meet extensively with private sector actors as the core users and "clients" of WIPO services, the Secretariat devoted considerably more time to engagement with its major financial shareholders than to public interest stakeholders on a range of policy matters. Although the Director-General had initiated bi-annual briefings with NGOs, the Secretariat's outreach to public interest NGOs and development experts was ad hoc and relied on the motivation of individual staff. In 2012, the Director General usefully initiated a project to develop "high-level strategies on IP and development," which aimed to engage experts with a broad range of views on the IP system in a number of working groups on sectoral issues from health to agriculture. However, when challenged by developed countries and IP right-holders, the Director General did not spend political energy or capital defending the initiative. After several early meetings of the working group on health, the U.S. government and members of WIPO staff with strong industry connections expressed concerns to WIPO's senior management, and also to some of the invited experts, that the composition and orientation of the working groups was too much in favour of development considerations and complained that the specifics of the project had not been divulged in the Program and Budget process. With no public explanation, the project was cancelled.¹⁶⁰ Further, although public scrutiny could have been harnessed to help improve the orientation of WIPO's assistance, the Secretariat devoted minimal attention to broadening the public transparency of the organization's development activities necessary for external review, input and evaluation and for accountability. WIPO's website was not, for instance, properly maintained or updated to serve either as an effective instrument

¹⁵⁹ WIPO (2007) *Desk-to-Desk Assessment Final Report*, by PriceWaterhouse Coopers, WO/GA/34/12, WIPO: Geneva.

¹⁶⁰ See WIPO (2013) *Status of Implementation of Certain Recommendations Extracted from the Report on the External Review of WIPO Technical Assistance in the Field of Cooperation for Development*, CDIP/11/4, WIPO: Geneva.

for communication about WIPOs development assistance activities or as an effective platform for collaboration or critical evaluation.

WIPO's senior management also failed to clarify the meaning of the terms such as "demand-driven" and "development-oriented" for Secretariat staff. In that vacuum, many staff engaged in development activities interpreted the DA's call for more demand-driven assistance as a need for greater responsiveness to developing country requests. Many staff continued, for instance, to consider themselves obliged to respond to Member State requests even where links to national needs or the DA were unclear, or where activities were not likely to be cost-efficient or yield development impact. Perceptions among staff that they should "never say no" to requests from IP offices contributed to problems of morale and motivation, ranging from frustration to complacency among some staff in respect of outcomes and accountability. Responsiveness to requests were also seen by some individual WIPO Divisions and staff as tools for protecting and expanding budget, positions, and status, as well as for boosting their profile, political standing, and "client base." Through the provision of assistance, the heads of the Development Sector and its regional bureaus (or staff aspiring to those positions) cultivated strong relationships with IP offices, many of which in turn supported their bids to secure promotions and senior WIPO posts. Although only posts at or above the Deputy and Assistant Director General were formally political appointments, political endorsements from Member States were often helpful and sometimes critical to securing less senior positions at the head or within regional bureaus.

Further, WIPO's Director General did not provide decisive leadership in favour of swifter improvement in country planning, better internal coordination, and boosting the level of development expertise within the Secretariat. When Francis Gurry took over as WIPO's Director General in 2008, it was well known that he viewed the Development Sector's work and substantive expertise on IP issues in a dim light. The Secretariat's leadership and staff were not a uniform mass; internal personal and bureaucratic conflicts impacted how development resources were allocated. A high proportion of the Sector's Regional Bureau staff were former diplomats, who, although providing WIPO with political connections to their countries and region, were not often experts on either IP or development issues. Gurry opted instead to boost the role of WIPO's substantive Sectors in the delivery of development assistance, thereby taking some responsibilities away from the Regional Bureaus, prompting concern among developing countries of a cut back of the organization's budget and commitment to development work. To dispel this perception, the Secretariat presented estimates of the "development share" of budget for each of the organization's Programs (not just those in the Development Sector).

Such efforts did not, however, address the significant confusion and in-fighting among WIPO Programs and divisions about the appropriate division of budget, roles and responsibilities for development assistance. In the area of training for developing countries, four of WIPO's seven Sectors and ten of its Programs were involved in

delivery of different activities in developing countries, with no mechanism or focal point for overall prioritization. The Development Sector in particular was loathe to relinquish its role in the delivery of assistance, while staff in other sectors increasingly viewed development activities as a way of boosting support for their work among developing country Member States, and thus the status and budget of their divisions. As the Director General worked to rein in the Development Sector, focusing its role more tightly on planning and political liaison, internal rifts deepened. In 2014, as the Director General's first term drew to a close, the head of the Development Sector ran against the Director General in the race for the organizations' top post.

Struggles over resources devoted to the organization's Program on Small and Medium-sized Enterprises (SMEs), the WIPO Academy, and Innovation Division provide further illustrations of political in-fighting and empire building. When the Director General eliminated the SME Program, its head appealed directly to Member States for its reinstatement, arguing that activities for the benefit of SMEs were central to a development-oriented approach to IP. Under pressure from developing countries, the Program was reinstated. While developing countries viewed his turn around as a success, their symbolic victory squandered an opportunity to ensure that whatever work WIPO undertook on SMEs had a clearer strategy and impact.¹⁶¹ The DA's call for greater attention to issues such as innovation and technology transfer also become embroiled in an internal bureaucratic battle.¹⁶² A U.S. national was appointed to run a division on innovation. As the division's budget soared and the scope of its activities grew, senior managers from other Sectors expressed concern about overlap as well as unclear strategy and expected results. When the Director General attempted to rein in the growing division, reports emerged that its head appealed to the U.S. government and industry stakeholders to put pressure on the Secretariat's leadership. In the survival game that followed, the division head remained but with a diminished budget. Each of these examples shows how Secretariat staff were able to exploit the DA and manoeuvre to bolster their work, as well as the Secretariat's vulnerability to political pressure from Member States keen to sustain activities they viewed as politically and symbolically important, even if not strategically or effectively implemented.

Finally, several groups of developing country Member States expressed disappointment in 2014 and 2015 that the Secretariat was passive, formulaic, and reticent in response to DA recommendations and in its stewardship of CDIP deliberations and decision-making. Although the Secretariat fulfilled its formal duties in terms of implementing approved projects as well as reporting and follow up on specific recommendations, they complained that it did so cautiously. A key example cited in this respect was the Secretariat's reports to Member States (in line with the DA Monitoring Mechanism) on how the various WIPO Committees were

¹⁶¹ Saez, C. (2013) "SMEs, Innovation Division, External Offices Capture Attention at WIPO", *Intellectual Property Watch*, 12 September 2013.

¹⁶² IP-Watch (2013) "Brief: WIPO Innovation Division on Chopping Block?" *Intellectual Property Watch*, 1 July 2013.

implementing the DA.¹⁶³ There were also complaints about the Secretariat's defensive response to the independent External Review of WIPO's development assistance, and its reticence to embrace or engage substantively with the External Review's recommendations. Although the Secretariat's leadership recognised the political need to be seen by developing country Member States as responsive to the DA, it remained diffident about the specific Review recommendations and what development-orientation required in the area of capacity building. The Friends of Development opposed the Secretariat's push to have its own Management Response serve as the basis of discussion. They argued that the Management Response deflected attention from the Review's findings and recommendations, many of which it asserted were either out-dated or already being addressed. The Secretariat's control over information on its activities gave it the power to frame discussion and the terms of debate. Its reports, which Member States had difficulty verifying, had the effect of exaggerating the degree of progress, which in turn enabled developed countries to insist that enough was already being done and undermined developing country claims on the need for further improvement. They argued that the Secretariat had the scope to be more assertive and creative in how it worked to implement the DA and that stronger leadership from the Director General and the Development Sector could have enabled swifter and more substantive action on the many Review recommendations that were neither expensive nor politically controversial but would simply reflect common-sense management improvements.

The Secretariat's tepid approach to the Review and to improving the development-orientation of its assistance generated growing mistrust among attentive developing country delegates. Across WIPO's work, there is no doubt that the Secretariat faced important challenges in responding to and managing the divergent interests among and within its developed and developing country Member States, and the various stakeholders. As in other areas of the DA, the Secretariat had to balance developed and developing country views on capacity building, as well as those of stakeholders. On the one hand, the Secretariat's continued responsiveness to *ad hoc* requests for assistance from governments, mostly IP offices, illustrated its tendency to use capacity building as a vehicle to placate Member States and buy their support. On the other hand, the Secretariat's desire not to appear "too activist" on development issues helps explain the emphasis on analysis and projects to help developing countries make use of "IP for development" – an agenda that could appeal to both developing and many developed country Member States. To avoid charges of activism and controversy amidst divisive debates among Member States, the Secretariat frequently justified its reticence as deference to the Member-driven character of the organization – suggesting that their scope for any action was limited without clear consensus and decisions from Members States. Although it was clearly rational for the Secretariat to avoid attention, intervention and backlash from Member States opposed to greater development orientation, a number of developing country delegates were not satisfied that the Secretariat needed to tread so cautiously. They

¹⁶³ See WIPO (2014) *Report: Fourteenth Session of the CDIP*, CDIP/14/13, November 10-14, WIPO: Geneva; WIPO (2014) *Report: Thirteenth Session of the CDIP*, CDIP/13/13, May 19-23, WIPO: Geneva.

observed that in other aspects of WIPO's work the Secretariat had acted independently without explicit Member State approval and regularly maneuvered politically behind-the-scenes to advance its perspectives. The Secretariat had, for instance, worked to establish public-private partnerships without extensive Member State consultation and was routinely proactive in seeking the support of Member States and regional in regard to norm-setting proposals, organizational reforms and proposed activities. Even with the many disagreements among Member States on the implementation of the DA and follow up to the External Review, they argued that the Secretariat had scope to be more proactive in promoting development orientation in how it implemented CDIP projects and managed its wider development portfolio.

4. Inconsistent Demand for Development-orientation from Developing Countries Hindered Prospects of Improvement

The orientation of WIPO's development cooperation activities was also a function of demands from recipients, their interest in development-orientation, the absorptive capacity of beneficiary Member States, and the approach countries took to interacting with the WIPO Secretariat. Across the decade, few developing countries consistently articulated a development-oriented national strategy on IP matters generally or on capacity-building specifically. Few countries had the institutional structures and processes necessary to provide a framework for external assistance on IP matters. Further, there were regularly disconnects between the agenda and priorities pursued by the Geneva-based diplomatic missions in respect of WIPO deliberations and those advanced by government officials from national IP offices.

4.1 The National and Regional Dimension: Weak Institutions and Inconsistent Interest in Development-orientation

In the period under study, developing countries relied heavily on national intellectual property authorities – patent and trademark offices, copyright offices, and sometimes combined intellectual property offices – to take charge of IP matters. In many developing countries, such IP offices were simultaneously responsible for devising the legislative agenda for compliance with international treaties, policy advice, IP administration, adjudication of disputes, IP promotion and outreach, participation in international norm-setting negotiations, and securing technical assistance and capacity-building. This is not to imply that IP offices in developing countries were always strong. On the contrary, they were often secondary and under-resourced institutions. While a handful of developing country IP offices had 50+ staff, the majority had between 3 and 10 professional staff combined across their various IP agencies. Nonetheless, IP offices often found themselves in the driver's seat and what expertise the country had tended to be consolidated within them.

Further, many countries had a shortfall of critical, development-oriented policy direction and expertise within relevant government institutions on IP matters. Given minimal national policy debate, limited strategic direction and oversight from the rest of government, as well as limited technical and policy expertise in other government ministries or among relevant stakeholders, the dominant position of IP offices was reinforced, as was their ability to shape their countries' IP system. There was generally limited coordination with other government ministries; whether on national IP reforms, technical decisions on issues such as patentability criteria, or positions taken in international fora. In addition, national IP offices were often separated from other parts of government and operated in a silo away from broader national policy considerations and debates.

Notably, national IP offices were the core recipients of WIPO's assistance to developing countries, and WIPO placed considerable emphasis on institutional support for them, which in turn reinforced their dominant technical position. Further, many national IP offices deferred to regional IP institutions – to which over 60 developing countries in the Andean, Arab, francophone African and anglophone African regions belonged¹⁶⁴ – that had long been recipients of WIPO's assistance in their own right and maintained close organizational ties and allegiance to the organisation as well as their respective bilateral donors.¹⁶⁵ The WIPO Secretariat was, for instance, involved in the creation of each of Africa's regional IP organizations. Although the regional legal regimes and institutional frameworks for francophone and anglophone Africa differed in important respects, in both cases their members delegated significant responsibilities to their respective regional Secretariat and WIPO served as their core source of financial, human, legal, and organizational support. The WIPO Secretariat, for instance, hosts the website of both the African Regional Intellectual Property Organization (ARIPO) and *l'organisation Africaine de la Propriété intellectuelle* (OAPI), provided staff training, drafted legal texts for their respective conventions, and was involved in shaping their strategic direction through regular "tripartite meetings" of the Secretariats.¹⁶⁶ OAPI's close institutional ties with WIPO were also illustrated by the appointment in 2007 of a former senior WIPO official as its Director General.

At the national level, developing country governments often lacked effective processes for internal coordination on IP policy and decision-making. Countries struggled to coordinate the many divisions of government relevant to making and implementing policies and regulations relevant to IP — from courts and IP offices to regulatory bodies on issues as diverse as health and safety, customs, and competition. Further, there was generally weak communication between the staff of IP offices and other government officials charged with broader economic development planning either within their ministry or beyond. This had implications for developing country requests for IP-related development assistance, which were formulated and negotiated separately from other development cooperation activities

¹⁶⁴ There are also regional intergovernmental IP arrangements in Europe, central and Eastern Europe as well as the former Soviet countries.

¹⁶⁵ See Deere (2009) *op. cit.*; Leesti, M. and Pengelly, T. (2002) *Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration and Enforcement*, Study Paper No. 9, Commission on Intellectual Property Rights: London. Karachalios, K. (2002) *Current Situation of regional organizations in the IPR field and future challenges*, Commission Workshop, Institutional Capacity Issues, Commission on Intellectual Property Rights, 18 February, 2002.

¹⁶⁶ In the francophone African case their regional IP accord, called the Bangui Agreement, vested in the OAPI Secretariat the authority to grant single regional patents with effect in each of their countries. One implication of this approach was the accumulation of expertise at the regional level, and the slower growth of technical and legal capacity at the national level, both to manage and guide IP policies, and also to be able to effectively exercise oversight of the regional regimes. In the case of Bangui Agreement, it has already been shown that policy vacuum at the national level provided space for the OAPI Secretariat, aided by WIPO's technical and legal assistance, to have a definitive impact on the final text of the Agreement, which emerged in 2001 as the most TRIPS-plus legislation among developing countries despite the fact that 12 of OAPI's 16 Members were least developed countries (LDCs). Fifteen years later, governments within the region are still struggling to accumulate sufficient expertise and influence over the OAPI Secretariat to revise the treaty to better take advantage of TRIPs flexibilities. See Deere (2009) *op. cit.*, Chapter 5.

or assistance plans. In addition, the quality of government consultation and engagement of stakeholders – including those non-government actors that received WIPO's assistance – varied. National IP offices rarely had a clear overview of what support other parts of their governments or national stakeholders received from WIPO; and nor did their Ministries of Foreign Affairs.

The incentives and priorities of developing country officials that negotiated with the Secretariat for technical assistance were not consistently, or indeed, primarily those of ensuring development orientation. IP offices tended to be focused on modernizing and making use of the IP system, believing that this would be in itself a contribution to development. The staff of IP offices also had bureaucratic incentives to acquire international financing and support for their own institutions – sometimes to pursue worthy modernization efforts but also to build the prestige and profile within their national context of their superiors, their institutions or themselves. As such, the emphasis of IP offices was often on projects to modernize the infrastructure of their offices, for training opportunities (such as those available through the WIPO academy), and for CDIP projects such as national IP academies and TISCS that offered the prospect of new resources for their institutions. In addition, negotiations for activities were sometimes skewed by the quest for personal benefits – ranging from training opportunities to lucrative *per diems* associated with participation in WIPO events and trainings, as well as the prospect of potential employment or consultancies at WIPO or in other international organizations. Although a number of national IP offices had created or consulted with advisory groups of users of the IP system (such as local SME associations, R&D and scientific institutions, associations of IP attorneys, chambers of commerce, and industry associations), such efforts rarely engaged public interest stakeholders or organisations with a development focus. It was not surprising therefore to find that IP offices rarely spoke in favour of development-oriented IP assistance that went beyond the call for institutional strengthening, training and support to make use of the IP for development.

A further consideration was that a growing number of IP offices in larger developing countries financed a growing portion of their budget through fees collected from (mostly foreign) private IP applicants in exchange for services (such as processing patent applications and maintaining IP rights). Thus, although they continued to report to their respective governments, such IP offices did not rely entirely on the central government budget or external assistance to fund their operations. As has been observed in developed countries,¹⁶⁷ the growing trend toward self-financing – where fees received were held in their own accounts (rather than being attributed to the government's central budget) – served to reduce the reliance of IP offices on appropriations from the government's budget and thus a degree of budget-related scrutiny, political oversight, policy direction and accountability from wider governments and legislatures.

¹⁶⁷ Roth, Z. (2005) "The Monopoly Factory: Want to Fix the Economy? Start by fixing the Patent Office," *Washington Monthly*, 5 June 2005.

In this context, it should not surprise us that most developing countries lacked either clear development priorities for WIPO's assistance, mechanisms to ensure the assistance they received was indeed oriented to serve their development needs, or capacity to coordinate the range of assistance on offer. The policy vacuum at the national level meant that governments widely depended on external expertise, technical advice, and capacity-building even to advise them on what capacity-building they needed. This reliance provided ample scope for the expectations, interests, and priorities of trading partners, foreign companies, and donors – such as the WIPO Secretariat – to shape the purpose and content of the capacity-building provided.

4.2. Interface with the Secretariat on Assistance

Finally, the orientation of WIPO's development assistance was shaped by consultations between the Secretariat and individual Member States in the course of the planning, design and implementation of country-specific activities. As the scope of WIPO's activities broadened, Member States reported uncertainty about the appropriate roles and responsibilities within the Secretariat for development cooperation activities and whom they should approach for different kinds of advice and cooperation. There was often a disconnect between the calls from Geneva-based WIPO delegates for more development-oriented approaches, and the actual requests made by national IP officials for whom the Development Agenda was largely understood in terms of providing more resources to help modernize their IP systems and institutions; boost access to training opportunities; support local innovators, industry and SMEs; and respond to pressures to boost IP protection from foreign investors and governments.

In many developing countries, bureaucratic and substantive tensions sometimes emerged between the views of staff of IP offices and those from other ministries engaged directly in international IP negotiations. Staff of the IP offices that negotiated and received a considerable proportion of WIPO's assistance regularly reported never having met officials from their foreign affairs and trade ministries responsible for international IP negotiations and diplomacy at WIPO.¹⁶⁸ Further, the engagement by developing country Member States in WIPO decision-making processes and oversight of development cooperation activities varied widely among countries and over time depending on the resources of diplomatic missions and motivation of individual WIPO delegates, many of which rotated away from their position within three years. The approach of Member States ranged from grand political posturing about the purpose and direction of development activities to micro-management of some and neglect of others. In lieu of detailed oversight of the portfolio as a whole and management systems in place, the focus remained on broad political battles around 'maintaining the development budget share' and jostling between developed

¹⁶⁸ Ahmed Abdel-Latif (2005) 'Developing Country Coordination in International Intellectual Property Standard-Setting,' *TRADE Working Paper 24*, South Centre: Geneva.

and developing countries on the details of a small number of particular activities deemed politically or symbolically important.

For their part, WIPO Secretariat staff widely favoured focusing assistance on IP offices, which had long been WIPO's core interlocutors and focal points in national capitals, as well as the core beneficiaries of its assistance. Secretariat staff generally considered IP offices to be "closest to the ground" in terms of understanding national needs, particularly compared to Geneva-based missions which WIPO staff often criticized for an overly politicized and negative approach to IP protection.¹⁶⁹ Well aware of the gap that often existed between national and Geneva-based officials, developed country negotiators and WIPO officials regularly courted national IP officials as 'voices of reason' in IP debates and encouraged them to raise their voices in favour of making use of the IP system for development. Nonetheless, WIPO faced pressure to broaden its relationships with Member States by reaching out to a wider group of ministries and stakeholders and to boost its relationship with Ministries of Foreign Affairs and their Geneva-based ambassadors.

¹⁶⁹ Author interviews with WIPO staff 2011-2015.

5. Conclusion

This paper has shown that the task of improving WIPO's development assistance was a deeply political undertaking. Efforts to promote greater development orientation of WIPO's assistance from 2004 to 2015 occurred in the context of ongoing diplomatic debates and pressures on developing countries to adopt stronger IP policy and rules. North–South power asymmetries and pressures from private interest groups were a critical part of that context, in which the adoption of the WIPO Development Agenda reflected political compromise not consensus. Throughout the decade, there were thus enduring North–South differences on the importance of the DA and on how it should be interpreted and implemented. Together, these power politics as well as wider debates on the relationship between IP and development constituted important background constraints on efforts to improved WIPO's development orientation.

Although the adoption of the DA proved that developing countries could under certain circumstances set the agenda at WIPO, this paper has argued that progress on the development-orientation of WIPO's development assistance was disappointing. Although there was a growing emphasis on using CDIP projects as spearhead for mainstreaming greater development-orientation of WIPO's portfolio of development activities, this paper has shown that as of 2015, fundamental preconditions were missing. There were few country assistance plans and national IP strategies in place that aimed explicitly to align assistance with development priorities. There were also important gaps in transparency, as illustrated by the 'black box' in regard to the activities of regional bureaus, and in regard to publically available data on the allocation of resources and content of activities. Overall trends in the development allocation and share of WIPO's budget were difficult to verify in the absence of a clear agreement among WIPO's Member States on what counts as development assistance, and more broadly the purpose of the assistance. There were also ongoing concerns among developing countries and civil society observers that decisions about WIPO's assistance were inadequately insulated from political discussions and norm-setting negotiations on IP standards.

This paper has argued that governance shortcomings, weak management, and inconsistent demand from beneficiary countries impeded the prospect of achieving greater development orientation of WIPO's capacity-building activities. In so doing, it has provided new evidence of how management and governance systems can help or hinder the progress of organizational change agendas in international agencies.

On governance, this paper has shown that WIPO's contested mandate along with its complex decision-making structure and processes constrained the ability of Member State's to exercise oversight, review and take decisions necessary to boost the development orientation of WIPO's assistance. The reliance on out-dated regional groupings as informal vehicles for building consensus too often failed to break deadlock, sometimes instead galvanising differences. In lieu of careful, strategic

oversight of the overall development portfolio, the engagement by Member States in decision-making processes on development activities ranged between grand political posturing, micro-management, and neglect. The paper has shown that the oversight of the effectiveness and development-orientation of WIPO activities financed through voluntary extra-budgetary contributions was weak. It has also argued that WIPO's unique financial arrangements — under which IP right-holders finance around 95% of WIPO's regular budget and Member States finance less than 5% — were an important factor that had long weakened the financial incentives for, and the emergence of a practice of, careful and close Member State oversight of how effectively and appropriately WIPO's development resources were allocated.

On management, the paper has underscored the weak transparency of WIPO's development activities and resource allocation, particularly in regard to the work of WIPO's Regional Bureaus, which account for over a quarter of WIPO's development activities, and activities financed through Funds-in-Trust. It has also provided evidence of weak monitoring, evaluation, country planning, and internal coordination. Together, such management shortfalls reflect poor Secretariat leadership on development issues. Poor oversight also gave the Secretariat considerable room for discretion in the interpretation and implementation of the work programme as approved in the Program and Budget, particularly when it came to designing the substance, format, and prioritization of particular development activities and work plans for their implementation. They also enabled staff within the WIPO Secretariat to pursue their own bureaucratic agenda(s) when it came to development activities, sometimes using the promise and provision of assistance to secure the support of countries on their respective priorities (e.g., promotions, political standing, greater staff and resources, as well as policy influence) as well as those of their most powerful financiers, donors, and stakeholders. Moreover, the close links between the Secretariat, IP right-holders and IP offices, as well as an organisational culture that favoured IP protection (rather than a concern for development issues) as its core purpose, meant that the institutional incentives for real progress on development orientation beyond political statements and the adoption of DA language and terminology were weak. The progress that did occur in development orientation of the Secretariat's activities thus relied more on the motivation and expertise of particular staff, than the Secretariat's leadership and management efforts to embed the necessary incentives and systems, and acquire relevant expertise.

Finally, few developing countries effectively or consistently demanded more development-oriented assistance when it came to the planning and implementation of specific activities in their country. At the national level, weak expertise, poor coordination among the various national ministries involved, and policy vacuums within governments meant that only a handful of developing countries had a clear conception of what greater development orientation would mean in their country and what this implied when it came to the priorities and details of WIPO assistance to their country. Among developing country governments, there was widespread deference of responsibility on IP matters to national or regional IP offices, which were

not primarily concerned with development considerations, but were nonetheless WIPO's main interlocutors and the core recipients in regard to the details of its assistance to their respective countries. The paper has argued that the relationships between the WIPO Secretariat and IP offices in developing country Member States were clientelist. Although few Geneva-based delegates or development advocates disputed the importance of maximizing opportunities to use the IP system for development purposes, they maintained a broader view of the DA as a vehicle to promote balance and development-orientation in the architecture and rules of the IP system.

The interaction of these three dimensions — weak governance, poor management by the WIPO Secretariat, and inconsistent demand from developing countries — impeded the potential for Member States to manage their differences in ways that could provide clearer strategic direction for assistance, and undermined effective political oversight of development orientation by Members.

Although neither improved governance nor stronger management would have been enough to vanquish political differences, they could have fostered progress on key preconditions for stronger development orientation, such as adequate definitions and evaluation of development assistance, and effective country planning. Stronger leadership could also have helped smooth the complex web of relationships among Member States and constituencies to enable a stronger prioritization of development-orientation in its portfolio of assistance.

Looking to the future, greater development orientation of WIPO's assistance requires a governance system that better helps Member States to manage and overcome politics driven by special interests. It demands more committed and active leadership from senior Secretariat officials in favour of management tools and systems that would support movement toward stronger development orientation. And, it requires more proactive, strategic and consistent focus and coordination in developing countries on IP policy frameworks that could serve their development goals, capacity building needs and the management of external donors. Although no easy task, such improvements are vital to ensuring that development-orientation leads as the priority both in diplomatic decision-making on the overall direction of WIPO's assistance and in interactions with the WIPO Secretariat on country-specific assistance.

Annex 1. Examples of WIPO Development Agenda Recommendations Relevant to WIPO's Development Cooperation Activities

CLUSTER A. Technical Assistance and Capacity-building

Recommendation 1. WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.

Recommendation 2. Provide additional assistance to WIPO through donor funding, and establish Trust-Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra-budgetary resources, to promote, inter alia, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.

Recommendation 3. Increase human and financial allocation for technical assistance programs in WIPO for promoting, inter alia, development-oriented intellectual property culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on intellectual property.

Recommendation 4. Place particular emphasis on the needs of small and medium-sized enterprises (SMEs) and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting up appropriate national strategies in the field of intellectual property.

Recommendation 5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.

* Recommendation 6. WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.

Recommendation 8. Request WIPO to develop agreements with research institutions and with private enterprises with a view to facilitating the national offices of

developing countries, especially LDCs, as well as their regional and sub-regional intellectual property organizations to access specialized databases for the purposes of patent searches.

Recommendation 9. Request WIPO to create, in coordination with Member States, a database to match specific intellectual property-related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide.

Recommendation 10. To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote a fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to regional and sub-regional organizations dealing with intellectual property.

Recommendation 11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations, and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

* Recommendation 12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.

* Recommendation 13. 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, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

* Recommendation 14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in TRIPS.

CLUSTER D. Assessment, Evaluation and Impact Studies

Recommendation 33. To request WIPO to develop an effective yearly review and evaluation mechanism for the assessment of all its development-oriented activities, including those related to technical assistance, establishing for that purpose specific indicators and benchmarks, where appropriate.

Recommendation 38. To strengthen WIPO's capacity to perform objective assessments of the impact of the organization's activities on development.

CLUSTER E. Institutional Matters including Mandate and Governance

Recommendation 40. To request WIPO to intensify its cooperation on IP related issues with United Nations agencies, according to Member States' orientation, in particular UNCTAD, UNEP, WHO, UNIDO, UNESCO and other relevant international organizations, especially the WTO in order to strengthen the coordination for maximum efficiency in undertaking development Programs.

Recommendation 41. To conduct a review of current WIPO technical assistance activities in the area of cooperation and development.

Note: Recommendations preceded by a * were selected by Member States for immediate implementation.

Annex 2. Development Share of Budget by Program*

Programs (relevant shares of program resources)	New Programs and program names	2008/2009 Revised Budget	2010/2011 Expenditures	2012/13 Expenditures	2014/15 Expenditures
Patents	Patent Law			3,560	4,139
Trademarks, Industrial Designs and Geographical Indications		1,709	2,136	1,979	3,157
Copyright and Related Rights		6,362	8,476	14,832	12,812
Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources		5,495	5,959	5,603	5,576
The PCT System		4,555	2,768	5,026	4,727
Madrid, Hague and Lisbon Systems	Madrid and Lisbon Systems (since 2012/13)	2,814	1,864	5,309	6,889
	WIPO Arbitration and Mediation Centre			282	151
Development Agenda Coordination		5,414	5,269	4,132	3,677
Africa, Arab, Asia and the Pacific, Latin America and the Caribbean Countries, LDCs		44,493	35,534	33,126	32,383
Small and Medium-sized Enterprises		3,567	8,739	9,816	5,508
Cooperation with certain countries in Europe and Asia		5,604	6,460	6,348	7,055
The WIPO Academy		8,859	9,492	11,856	11,484
International Classifications and WIPO IP Standards		248	197	1,058	1,379
Global IP Information Services		833	1,493		
	Global Databases		138	1,075	1,202
	Services for access to information and		7,634	6,310	7,293

	knowledge				
IP Office Modernization		5,435	5,712		
	Business Solutions for IP Offices			6,501	9,921
Economic Studies, Statistics and Analysis		1,586	2,621		
	Economics and Statistics			1611	807
Building Respect for IP		2,922	3,017	2,384	3,779
IP and Global Challenges		4,990	3,914	4,497	4,720
Communications		6,590	11,877	7,648	5,550
External Offices and Relations	External Relations, Partnerships and External Offices	997	4,840	4,055	5,479
	Executive Management			2,082	2,283
	Programme and Resource Management			691	
	General Support Services				826
	Internal Oversight			1,753	480
SUB-TOTAL		112,472	120,236		
Costs incurred in 2008 for activities discontinued in 2009		5,017			
TOTAL		117,489	120,236	142,859	142,321
Resources devoted to development activities as % of total budget		18.7%	19.4%	20.9%	20.9%

* The estimates in this Annex do not include the extra-budgetary resources for development activities provided by Funds-in-Trust (FITs), or resources leveraged through in-kind arrangements. This table includes resources devoted for cooperation with certain countries in Europe and Asia. The grand totals are as provided in the original WIPO documents and reflect rounding of numbers. In 2010/11, 4,540 thousand Swiss Francs were earmarked for the Development Agenda. The 2010/11 total for the development share of expenditure excludes Development Agenda project resources, which for that biennium were accounted for in a separate budget line. From 2012/13, the Program amounts integrated funds earmarked for Development Agenda projects. The expenditures columns reflect WIPO figures on the budget after transfers. The final expenditures for each biennium often differ to those presented in the Program and Budget documents approved by Member States, either due to factors arising in the implementation of a Program that may lead to allocated funds not being spent or to the transfer of resources between Programs by the Director General (a possibility provided for, with certain conditions, in WIPO's Financial Regulations and Rules).

Annex 3. Approved Projects for the Implementation of Development Agenda Recommendations, 2007-2014

Projects for recommendations 2, 5, 8, 9 and 10

Rec. #	Project	Documents	Status
2	Conference on “Mobilizing Resources for Development”	Progress report CDIP/6/2 Evaluation report CDIP/9/3	Completed and evaluated
5	Intellectual Property Technical Assistance Database (IP-TAD)	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/9/4	Completed and evaluated
8	Specialized Databases’ Access and Support - Study paper regarding recommendation No. 8. Specialized Databases’ Access and Support	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/9/5	Completed and evaluated
9	IP Development Matchmaking Database (IP-DMD)	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/10/3	Completed and evaluated
10	A Pilot Project for the Establishment of “Start-Up” National IP Academies	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/9/6	Completed and evaluated
10	Smart IP Institutions Project	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/10/4	Completed and evaluated
10	Innovation and Technology Transfer Support Structure for National Institutions - Project paper on innovation and Technology Transfer Support Structure for National Institutions (recommendation No. 10)	Progress reports CDIP/6/2; CDIP/8/2 Evaluation report CDIP/10/8	Completed and evaluated
10	Strengthening the Capacity of National IP Governmental and Stakeholder Institutions to Manage, Monitor and Promote Creative Industries, and to Enhance the Performance and Network of Copyright Collective Management Organizations	Progress reports CDIP/6/2, CDIP/8/2, CDIP/10/2, CDIP/12/2 and CDIP/14/2 Evaluation report CDIP/15/4	Completed and evaluated
10	Improvement of National, Sub-Regional and Regional IP Institutional and User Capacity	Progress reports CDIP/6/2, CDIP/8/2 Evaluation report CDIP/10/7	Completed and evaluated

Thematic CDIP Projects

Rec #(s)	Project	Documents	Status
16, 20	IP and the Public Domain • Scoping Study on Copyright and Related Rights and the Public Domain	Progress reports CDIP/6/2, CDIP/8/2 Evaluation report	Completed and evaluated

	<ul style="list-style-type: none"> • Study on Patents and the Public Domain • Feasibility Study on the Establishment of National Patent Register Databases and Linkage to PATENTSCOPE • Study on Misappropriation of Signs • Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment 	CDIP/9/7	
7, 23, 32	<p>IP and Competition Policy</p> <ul style="list-style-type: none"> • Interaction of Agencies Dealing with Intellectual Property and Competition Law • Interface Between Exhaustion of Intellectual Property Rights and Competition Law • An Analysis of the Economic/Legal Literature on the Effects of IP Rights as a Barrier to Entry • Survey on Measures to Address the Interface between Antitrust and Franchising Agreements • Survey on Compulsory Licenses Granted by WIPO Member States to Address Anti-Competitive Uses of Intellectual Property Rights • Study on the Anti-Competitive Enforcement of Intellectual Property (IP) Rights: Sham Litigation 	CDIP/4/4 Rev. Progress report CDIP/6/2 Evaluation report CDIP/9/8	Completed and evaluated
19, 24, 27	<p>IP, Information and Communication Technologies (ICTs), the Digital Divide and Access to Knowledge</p> <ul style="list-style-type: none"> • Using Copyright to Promote Access to Information and Creative Content • Implementation Proposal on Possible New WIPO Activities Related to Using Copyright to Promote Access to Information and Creative Content 	Progress reports CDIP/6/2, CDIP/8/2 Evaluation report CDIP/10/5	Completed and evaluated
19, 30, 31	<p>Developing Tools for Access to Patent information</p> <ul style="list-style-type: none"> • Patent Landscape Report on Ritonavir • Patent Landscape Report on Atazanavir • Patent Landscape Report on Vaccines for Selected Infectious Diseases • Patent Landscape Report on E-Waste Recycling Technologies • Patent Landscape Report on Solar Cooking • Patent Landscape Report on Solar Cooling • Patent Landscape Report on Desalination Technologies and Use of Alternative Energies for Desalination • Patent Landscape Report on Membrane Filtration and UV Water Treatment 	Progress reports CDIP/6/2, CDIP/8/2 Evaluation report CDIP/10/6	Completed and evaluated
33, 38, 41	<p>Project on Enhancement of WIPO's Results-Based Management (RBM) Framework to Support the Monitoring and Evaluation of Development Activities - An External Review of WIPO Technical Assistance in the Area of Cooperation for Development</p>	Progress reports CDIP/6/2, CDIP/8/2, CDIP/10/2 Evaluation report CDIP/12/4	Completed and evaluated
4, 10	<p>Project on IP and Product Branding for Business Development in Developing Countries and Least-Developed Countries (LDCs)</p>	Progress reports CDIP/8/2, CDIP/10/2 and CDIP/12/2 Evaluation report CDIP/13/3	Completed and evaluated

19, 30, 31	Project on Capacity Building in the Use of Appropriate Technology-Specific Technical and Scientific Information as a Solution for Identified Development Challenges	Progress reports CDIP/8/2, CDIP/10/2 Evaluation report CDIP/12/3	Completed and evaluated
35, 37	Project on IP and Socio-Economic Development <ul style="list-style-type: none"> • The Potential Impact of Intellectual Property Rights on the Forestry Chain in Uruguay • Intellectual Property and Socio-Economic Development Country Study - Brazil • Intellectual Property Protection and Socio-Economic Development in Chile • Study on the Use of Utility Models (UMs) in Thailand • Exploratory Study on the Egyptian Information Technology (IT) Sector and the Role of Intellectual Economic assessment and recommendations • Trademarks Squatters: Evidence from Chile • Study on the Impact of Utility Models in Thailand • Study on the Use of Intellectual Property and Export Performance of Brazilian Firms • Report on IP Use in Brazil (2000-2011) 	Progress reports CDIP/8/2, CDIP/10/2, CDIP/12/2 and CDIP/14/2 Evaluation report CDIP/14/3	Completed and evaluated
19, 25, 26, 28	IP and Technology Transfer: Common Challenges – Building Solutions - Project paper for the Project on IP and Technology Transfer: Common Challenges - Building Solutions <ul style="list-style-type: none"> • Economics of IP and International Technology Transfer • Intellectual Property-Related Policies and Initiatives in Developed Countries to Promote Technology Transfer • Case Studies on Cooperation and Exchange Between R&D Institutions in Developed and Developing Countries • Policies Fostering the Participation of Businesses in Technology Transfer • International Technology Transfer: An Analysis from the Perspective of Developing Countries • Alternatives to the Patent System that are used to Support R&D Efforts, Including both Push and Pull Mechanisms, with a Special Focus on Innovation-Inducement Prizes and Open Source Development Models 	Progress reports CDIP/8/2, CDIP/10/2, CDIP/12/2, CDIP/14/2 and CDIP/16/2 Evaluation report CDIP/16/3	Completed and evaluated
36	Open Collaborative Projects and IP-Based Models - Taxonomy-Analytical Study for the Project on Open Collaborative Projects and IP-Based Models <ul style="list-style-type: none"> • Global Knowledge Flows • In-Depth Evaluation Study for the Project on Open Collaborative Projects and IP-Based Models 	Progress reports CDIP/8/2, CDIP/10/2, CDIP/12/2 and CDIP/14/2 Evaluation report CDIP/15/3	Completed and evaluated
16, 20	Patents and Public Domain <ul style="list-style-type: none"> • Study on Patents and the Public Domain (II) • Addendum to the Study on Patents and the Public Domain (II) 	Progress reports CDIP/10/2 and CDIP/12/2 Self-evaluation report CDIP/13/7	Completed and evaluated

1, 10, 11, 13, 19, 25, 32	<p>Enhancing South-South Cooperation on IP and Development Among Developing Countries and Least Developed Countries</p> <ul style="list-style-type: none"> • First Inter-Regional Meeting on South-South Cooperation on IP Governance; Genetic Resources, Traditional Knowledge and Folklore (GRTKF); and Copyrights and Related Rights (Brasilia, August 8 to 10, 2012) • First Annual Conferences on South-South Cooperation (Geneva, September 28, 2012) • Second WIPO Inter-Regional Meeting on South-South Cooperation on Patents, Trademarks, Geographical Indications, Industrial Designs and Enforcement (Cairo, May 6 to 8, 2013) • Second WIPO Annual Conference on South-South Cooperation on Intellectual Property and Development (Geneva, November 22, 2013) 	<p>Progress reports CDIP/10/2, CDIP/12/2, CDIP/14/2 and CDIP/16/2 Evaluation report CDIP/13/4</p>	<p>Completed and evaluated</p>
39, 40	<p>IP and Brain Drain</p> <ul style="list-style-type: none"> • Study on IP and Brain Drain - A Mapping Exercise • Summary of a Workshop on Intellectual Property (IP), the International Mobility of Knowledge Workers and the Brain Drain 	<p>Progress reports CDIP/10/2 and CDIP/12/2 Evaluation report CDIP/13/6</p>	<p>Completed and evaluated</p>
34	<p>IP and the Informal Economy - Project Implementation Proposal - IP and Informal Economy (Recommendation 34)</p> <ul style="list-style-type: none"> • Conceptual Study on Innovation, Intellectual Property and the Informal Economy • Country Study on Innovation, Intellectual Property and the Informal Economy: Traditional Herbal Medicine in Ghana • Country Study on Innovation, Intellectual Property and the Informal Economy: The Informal Metalworking Sector in Kenya • Country Study on Innovation, Intellectual Property and the Informal Economy: Informal Manufacturers of Home and Personal Care Products in South Africa 	<p>Progress reports CDIP/10/2 and CDIP/12/2 Evaluation report CDIP/13/5</p>	<p>Completed and evaluated</p>
1, 2, 4, 10, 11	<p>Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries</p> <ul style="list-style-type: none"> • Scoping Study on Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries • Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector 	<p>Progress reports CDIP/12/2, CDIP/14/2 and CDIP/16/2</p>	<p>Implementation started Jan 2013</p>
8	<p>Specialized Databases' Access and Support – Phase II</p>	<p>Progress reports CDIP/10/2, CDIP/12/2 and CDIP/14/2 Evaluation report CDIP/14/5</p>	<p>Completed and evaluated</p>
10	<p>A Pilot Project for the Establishment of “Start Up” National IP Academies – Phase II</p>	<p>Progress reports CDIP/10/2, CDIP/12/2 and CDIP/14/2</p>	<p>Completed and evaluated</p>

		Evaluation report CDIP/14/4	
19, 30, 31	Developing Tools for Access to Patent information – Phase II	Progress reports CDIP/12/2 and CDIP/14/2 Evaluation report CDIP/14/6	Completed and evaluated
4, 10	Pilot Project on Intellectual Property (IP) and Design Management for Business Development in Developing and Least Developed Countries (LDCs)	Progress report CDIP/16/2	Implementa tion started in January 2014
19, 30, 31	Project on Capacity-Building in the Use of Appropriate Technology Specific Technical and Scientific Information as a Solution for Identified Development Challenges - Phase II	Progress reports CDIP/14/2 and CDIP/16/2	Implementa tion started in June 2014
Rec #(s)	Project	Documents	Status
3, 4	IP Advantage Database (ex E-SPEED)	CDIP/3/8	Completed
6	Roster of Consultants	CDIP/3/2	Completed

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Jomo K.S.	WP 2004/08 'Malaysia's Pathway through Financial Crisis'
Cyrus Rustomjee	WP 2004/07 'South Africa's Pathway through Financial Crisis'

Arunabha Ghosh	WP 2004/06 'India's Pathway through Financial Crisis'
Calum Miller	WP 2004/05 'Turkey's Pathway through Financial Crisis'
Alexander Zaslavsky and Ngaire Woods	WP 2004/04 'Russia's Pathway through Financial Crisis'
Leonardo Martinez-Diaz	WP 2004/03 'Indonesia's Pathway through Financial Crisis'
Brad Setser and Anna Gelpern	WP 2004/02 'Argentina's Pathway through Financial Crisis'
Ngaire Woods	WP 2004/01 'Pathways through Financial Crises: Overview'

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