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# Five Decades of Intellectual Property and Global Development

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☞ Intellectual property; International law; Legal history; Sustainable development; WIPO

## Introduction

The 2016–2017 biennium marks the historical milestones of several major pro-development initiatives relating to intellectual property law and policy. In 1967, the Intellectual Property Conference of Stockholm (Stockholm Conference) was held to update the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention) and, to a lesser extent, the Paris Convention for the Protection of Industrial Property 1883 (Paris Convention).<sup>1</sup> This conference ended up transforming the international intellectual property regime by creating the World Intellectual Property Organization (WIPO).<sup>2</sup>

In December 1986, about 20 years later, the UN General Assembly adopted the Declaration on the Right to Development (UNDRD).<sup>3</sup> Article 1(1) of this declaration expressly states:

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

While this declaration has remained controversial in the developed world, the right to development was reaffirmed “as a universal and inalienable right and an integral part of fundamental human rights” in the World Conference on Human Rights in June 1993.<sup>4</sup> The UNDRD further ushered in the development of “right-based approaches to development”,<sup>5</sup> which have since “transformed both development theory and practice”.<sup>6</sup>

In October 2007, about yet another 20 years after the proclamation of the right to development, WIPO adopted the Development Agenda and its 45 recommendations for action.<sup>7</sup> Based on these recommendations, WIPO introduced a wide variety of pro-development initiatives, ranging from technical assistance and capacity building to norm setting and public policy, and from technology transfer to assessment, evaluation

\* Copyright © 2016 Peter K. Yu. The discussion of the Intellectual Property Conference of Stockholm draws on research from the author’s earlier article in the *Ohio Northern University Law Review* and his book chapter published by Sage Publications.

<sup>1</sup> Peter K. Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N. U. L. Rev.* 465, 471–484.

<sup>2</sup> Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N. U. L. Rev.* 465, 484–493.

<sup>3</sup> “Declaration on the Right to Development”, December 4, 1986, U.N. Doc. A/RES/41/128.

<sup>4</sup> “Vienna Declaration and Programme of Action”, July 12, 1993, U.N. Doc. A/CONF.157/23, para.10.

<sup>5</sup> Samuel Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Sterling: Kumarian Press, 2009); Takhmina Karimova, *Human Rights and Development in International Law* (Abingdon: Routledge, 2016), pp.74–77; Peter Uvin, *Human Rights and Development* (Bloomfield: Kumarian Press, 2004), pp.122–166.

<sup>6</sup> Isabella Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford: Hart, 2012), p.5.

<sup>7</sup> Jeremy de Beer (ed.), *Implementing the World Intellectual Property Organization’s Development Agenda* (Waterloo: Wilfrid Laurier University Press, 2009); Neil Weinstock Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009).

and impact studies.<sup>8</sup> As this special issue enters into production, WIPO is poised to commemorate the tenth anniversary of this Development Agenda.

As if these three historical milestones were not enough, the UN Sustainable Development Goals (SDGs) came into force on January 1 this year. Adopted by the UN General Assembly in September 2015, the 2030 Agenda for Sustainable Development featured 17 SDGs and 169 targets. Prominently mentioned in Target 3.b of SDG 3 are the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement) and the Doha Declaration on the TRIPS Agreement and Public Health 2001 (Doha Declaration).

When all of these developments are taken together, the past five decades have seen the launch of a wide variety of pro-development initiatives relating to intellectual property law and policy. To help us take stock of these important yet diverse initiatives and to think ahead about the varied ways to harness our intellectual property system to better promote global development, this special issue focuses on the development aspects of intellectual property rights.

This introductory article begins by looking back at the various contributions of the Stockholm Conference. The article then examines the present efforts to realise the SDGs in the intellectual property arena, bringing to the discussion insights drawn from the development of the UNDRD. This article concludes by offering four general observations that aim to advance the debate on intellectual property and global development.

## The past

Although the WIPO Development Agenda has received considerable policy and scholarly attention, this agenda is actually not the first development agenda in the intellectual property field. Nor will it be the last, given the cyclical developments in the international intellectual property regime.<sup>9</sup>

In the 1960s and 1970s, developing countries already pushed for a similar development agenda.<sup>10</sup> At that time, the post-World War II decolonisation movement had led many colonies and dependent territories to declare independence. These newly independent countries were eager to exercise their newfound independence and sovereignty by affirming international obligations into which their former colonial masters had entered on their behalf.<sup>11</sup> They also harboured serious concern that the extant obligations were too burdensome, especially in light of their limited economic development and technological backwardness.<sup>12</sup>

Consider, for example, the Berne Convention, the predominant international copyright treaty. A major decision for these newly independent countries at that time was to determine whether they should continue as convention members in their own right or whether they should withdraw from the convention. While India, Pakistan, the Philippines and many former French and Belgian African colonies elected to remain bound, Indonesia withdrew.<sup>13</sup>

To entice newly independent states to stay in or join the international intellectual property family, members of the Berne Convention, many of whom were also members at the Paris Convention, pushed for reforms within the international intellectual property regime. These reforms culminated in the Stockholm Conference, which was organised in June and July 1967 under the auspices of WIPO's predecessor, the United International Bureaux for the Protection of Intellectual Property (BIRPI).<sup>14</sup>

<sup>8</sup> World Intellectual Property Organization, "The 45 Adopted Recommendations under the WIPO Development Agenda", available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> [Accessed November 15, 2016].

<sup>9</sup> Peter K. Yu, "Déjà Vu in the International Intellectual Property Regime" in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (London: Sage Publications, 2015).

<sup>10</sup> Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N. U. L. Rev. 465, 468–511.

<sup>11</sup> Georges M. Abi-Saab, "The Newly Independent States and the Rules of International Law" (1962) 8 Howard L.J. 95, 103.

<sup>12</sup> Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd edn (Oxford: Oxford University Press, 2005), pp.881–882; Charles F. Johnson, "The Origins of the Stockholm Protocol" (1970) 18 Bull. Copyright Soc'y U.S.A. 91, 93; Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N. U. L. Rev. 465, 472–474.

<sup>13</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2005), p.885.

<sup>14</sup> BIRPI stands for "Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle" in French.

From the standpoint of intellectual property and global development, this conference was important for four reasons. First, the participating countries recognised the need to accommodate the special needs of developing countries in the international intellectual property regime. As then-US Register of Copyrights Barbara Ringer recounted, “[t]here was obviously a fear that ... Berne would become a moribund old gentlemen’s club”.<sup>15</sup> At the time of the Stockholm Conference, the Universal Copyright Convention, an alternative international copyright treaty established under the auspices of the UN Educational, Scientific and Cultural Organization (UNESCO), was competing directly against the Berne Convention for members from the developing world. While the former already attracted 26 developing country members, its total membership had only two fewer countries than that of the latter.<sup>16</sup> Had accommodation not been made to developing countries, the Berne Convention would be unlikely to have become the dominant international copyright treaty today.

Secondly, members of the Berne Convention adopted the Protocol Regarding Developing Countries (Stockholm Protocol). Had this protocol entered into effect, it would have allowed developing countries to make reservations to the Berne Convention in the area of copyright duration and in regard to reproduction, translation and broadcasting licences.<sup>17</sup> The strong opposition from developed countries and their publishing industries eventually caused this protocol to remain unratified.<sup>18</sup> Adopted in its stead, in the Paris revision conference in July 1971, was the optional appendix to the Berne Convention, which has since been incorporated by reference into the TRIPS Agreement and the WIPO Copyright Treaty.

Thirdly, members of the Paris Convention successfully amended the international industrial property treaty to accommodate the use of inventors’ certificates in the former Soviet Union and other socialist countries for the purposes of determining the right of priority.<sup>19</sup> These certificates “acknowledged an economic remuneration to the inventor but reserved the actual use and commercial exploitation of the invention for the state”.<sup>20</sup> Although the transition of socialist economies since the fall of the Berlin Wall has consigned inventors’ certificates to the dustbin of history, the acceptance of these certificates at the Stockholm Conference provided an important reminder of the different acceptable modalities of protection in the international intellectual property regime.

Finally, the Stockholm Conference sought

“to effectuate the structural and administrative reform of the Paris and Berne Unions as well as of the then existing five special agreements under the Paris Union”.<sup>21</sup>

By revamping BIRPI’s structure, this conference helped prepare for the organisation’s eventual transformation into a UN specialised agency. Although WIPO did not join the United Nations immediately after its establishment in 1970,

“the draft of the WIPO Convention and the drafts for the revision of the then existing seven treaties, presented by BIRPI to the Stockholm Conference, were proposed with [that] objective in mind”.<sup>22</sup>

<sup>15</sup> Barbara A. Ringer, “The Role of the United States in International Copyright—Past, Present, and Future” (1968) 56 Geo. L.J. 1050, 1066.

<sup>16</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2005), p.886.

<sup>17</sup> Ruth L. Okediji, “Sustainable Access to Copyrighted Digital Information Works in Developing Countries” in Keith E. Maskus and Jerome H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005), p.157.

<sup>18</sup> Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2005), p.899; Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio N. U. L. Rev. 465, 477–478.

<sup>19</sup> Arpad Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (Geneva: World Intellectual Property Organization, 1992), pp.18–21; Sam Ricketson, *The Paris Convention for the Protection of Industrial Property: A Commentary* (Oxford: Oxford University Press, 2015), pp.93–96.

<sup>20</sup> Pedro Roffe and Taffere Tesfachew, “The Unfinished Agenda” in Surendra J. Patel, Pedro Roffe and Abdulqawi Yusuf (eds), *International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct* (The Hague: Kluwer Law International, 2001), p.387.

<sup>21</sup> Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (1992), p.24.

<sup>22</sup> Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (1992), p.26. In addition to the Paris and Berne Conventions, the five other treaties were the Madrid Agreement concerning the International Registration of Marks 1891, Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891, the Hague Agreement concerning the International Registration of Industrial

In December 1974, WIPO finally became a UN specialised agency, thereby transforming BIRPI

“from a developed country club into an organisation with a multilateral character that could attract developing countries including the newly independent ones”.<sup>23</sup>

Today, WIPO’s membership has grown exponentially to 189 and includes over 100 developing country members.<sup>24</sup>

## The present

In December 2015, the United Nations completed its cycle for the UN Millennium Development Goals, which were launched in September 2000 as part of the UN Millennium Declaration. Adopted in its place were 17 SDGs, which sought to achieve development for the next 15 years. Because the SDGs came into force only earlier this year and will continue until 2030, the adoption of these goals provided a timely and important opportunity for us to think more deeply about intellectual property and global development.

The incorporation of the SDGs into WIPO’s activities was indeed an important issue at the latest meeting of the WIPO Committee on Development and Intellectual Property (CDIP) in late October and early November 2016.<sup>25</sup> At that meeting, the CDIP explored the relationship between the SDGs and WIPO’s mandate and strategic goals. Considered directly related to WIPO were SDG 9 (“Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”) and SDG 17 (“Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development”).

Also listed as relevant to WIPO’s programmes and activities in a CDIP document were SDG 2 (“End hunger, achieve food security and improved nutrition and promote sustainable agriculture”), SDG 3 (“Ensure healthy lives and promote well-being for all at all ages”), SDG 4 (“Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”), SDG 7 (“Ensure access to affordable, reliable, sustainable and modern energy for all”), SDG 8 (“Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”) and SDG 13 (“Take urgent action to combat climate change and its impacts”).<sup>26</sup>

Thus far, developing countries have actively pushed for a broadened focus on the relationship between the SDGs and WIPO’s activities, as shown by the submissions from China, the Latin American and Caribbean Group (GRULAC), Uganda and Brazil.<sup>27</sup> Developed countries, by contrast, have been highly critical of this approach. Speaking on behalf of the Group B developed countries, the delegate from Turkey declared:

“WIPO’s work in relation to the SDGs must be in line with the organisation’s mandate as per its Convention and focus on the areas of expertise of the organisation.”<sup>28</sup>

Designs 1925, the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1957 and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration 1958. Ricketson, *The Paris Convention for the Protection of Industrial Property* (2015), p.95.

<sup>23</sup> Sisule F. Musungu and Graham Dutfield, “Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)” (2003) Quaker United Nations Office, TRIPS Issues Paper No.3, 4.

<sup>24</sup> World Intellectual Property Organization, “Member States”, available at <http://www.wipo.int/members/en/> [Accessed November 15, 2016].

<sup>25</sup> Catherine Saez, “WIPO Committee Debates SDGs, Review of Development Agenda Recommendations”, *Intellectual Property Watch*, November 1, 2016, available at <http://www.ip-watch.org/2016/11/01/wipo-committee-debates-sdgs-review-development-agenda-recommendations/> [Accessed November 15, 2016].

<sup>26</sup> Committee on Development and Intellectual Property, “WIPO and the Post-2015 Development Agenda”, October 9, 2015, WIPO Doc. CDIP/16/8.

<sup>27</sup> Committee on Development and Intellectual Property, “Compilation of Member State Inputs on SDGs Relevant to WIPO’s Work”, August 8, 2016, WIPO Doc. CDIP/18/4.

<sup>28</sup> Catherine Saez, “WIPO Members Divided on IP Agency’s Role in Implementation of UN Sustainable Development Goals”, *Intellectual Property Watch*, November 2, 2016, available at <http://www.ip-watch.org/2016/11/02/wipo-members-divided-ip-agencys-role-implementation-un-sustainable-development-goals/> [Accessed November 15, 2016].

While it is not difficult to understand the developed countries' resistance to the consideration of other SDGs when reviewing WIPO's programmes and activities, it is somewhat disingenuous to deny the direct relevance of SDG 3 to WIPO's mandate and strategic goals. After all, this goal was the only SDG that explicitly mentions the TRIPS Agreement and the Doha Declaration.

As WIPO and its CDIP explore ways to better incorporate the SDGs into the organisation's programmes and activities, it may be useful to revisit another historic milestone in the development arena—namely, the adoption of the UNDRD 30 years ago. Although controversy continues to exist in the developed world concerning the necessity, validity, viability, usefulness and legal status of the right to development,<sup>29</sup> along with the usual complications about recognising group rights in the international human rights regime, this section does not attempt to rehash arguments about whether the right to development should be protected as a human right. Instead, this section focuses on the consensus reached by the international community when the UN General Assembly adopted the UNDRD.

This consensus provided five important insights into our current efforts to realise the SDGs in the intellectual property arena. First, developing countries have warmly embraced the right-based approach to development—whether economic, social, cultural or political. Although one could still debate the human rights status of the right to development, the active push by developing countries for the recognition of this right through the UNDRD and a subsequent reaffirmation in the Vienna Declaration and Programme of Action underscored the importance of right-based approaches.<sup>30</sup> These approaches—or what Mary Ann Glendon has referred to as “rights talk”<sup>31</sup>—have earned growing support from academic and policy literature.<sup>32</sup>

Secondly, development needs to be human-centred. Article 2(1) of the UNDRD explicitly states:

“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

This human-centred approach explains in part why the protection—or, some would say, over-protection—of intellectual property rights has been increasingly discussed in human rights terms.<sup>33</sup> Among the oft-cited exogenous human rights-based constraints on intellectual property protection and enforcement are the right to life, the right to health, the right to food, the right to freedom of expression, the right to education, the right to cultural participation and development, the right to enjoy the benefits of scientific progress and its applications, and the right to self-determination.<sup>34</sup>

<sup>29</sup> Bunn, *The Right to Development and International Economic Law* (2012), pp.1, 127. On this controversy, see Philip Alston, “The Shortcomings of a Garfield the Cat Approach to the Right to Development” (1985) 15 Cal. W. Int'l L.J. 510; Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 Cal. W. Int'l L.J. 473; Stephen Marks, “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 Harv. Hum. Rts. J. 137; Oscar Schachter, “Implementing the Right to Development: Programme of Action” in Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart (eds), *The Right to Development in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1992).

<sup>30</sup> “Vienna Declaration and Programme of Action”, 1993, U.N. Doc. A/CONF.157/23, para.10.

<sup>31</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

<sup>32</sup> E.g. Hickey and Mitlin (eds), *Rights-Based Approaches to Development* (2009); Karimova, *Human Rights and Development in International Law* (2016), pp.74–77; Uvin, *Human Rights and Development* (2004), pp.122–166.

<sup>33</sup> E.g. Sub-Commission on the Promotion and Protection of Human Rights, “The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner”, June 27, 2001, U.N. Doc. E/CN.4/Sub.2/2001/13; Committee on Economic, Social and Cultural Rights, “General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c))”, January 12, 2006, U.N. Doc. E/C.12/GC/17; Special Rapporteur in the Field of Cultural Rights, “Copyright Policy and the Right to Science and Culture: Report of the Special Rapporteur in the Field of Cultural Rights”, December 24, 2014, U.N. Doc. A/HRC/28/57 (by Farida Shaheed); Special Rapporteur in the Field of Cultural Rights, “Cultural Rights”, August 4, 2015, U.N. Doc. A/70/279 (by Farida Shaheed).

<sup>34</sup> For the author's earlier articles on intellectual property and human rights, see Peter K. Yu, “The Anatomy of the Human Rights Framework for Intellectual Property” (2016) 69 SMU L. Rev. 37; Peter K. Yu, “Digital Copyright Enforcement Measures and Their Human Rights Threats” in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar Publishing, 2015); Peter K. Yu, “Intellectual Property and Human Rights in the Nonmultilateral Era” (2012) 64 Fla. L. Rev. 1045; Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 U.C. Davis L. Rev. 1039; Peter K. Yu, “Ten Common Questions about Intellectual Property and Human Rights” (2007) 23 Ga. St. U. L. Rev. 709.

Thirdly, development is a collective responsibility. It is the responsibility of neither the Global North nor the Global South, but one shared by the entire international community.<sup>35</sup> As art.2(2) of the UNDRD declared: “All human beings have a responsibility for development, individually and collectively.” Although intellectual property laws, policies and treaties have been frequently criticised for favouring developed country interests, intellectual property rights per se are not biased towards either the north or the south. At the moment, the standards favour the north, due in large part to the developed countries’ predominant role in creating and shaping the international intellectual property regime. This bias, however, could be greatly reduced when the regime is adjusted to provide developing countries with greater benefits or stronger recognition of their intellectual property interests.

Fourthly, development depends on the existence of an enabling environment,<sup>36</sup> similar to the one needed for effective protection and enforcement of intellectual property rights.<sup>37</sup> As the preamble of the UNDRD declared,

“everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized”.

While the existence of this order is essential to the realisation of the right to development, such realisation, in turn, could help foster creativity and innovation. Thus, through the generation of a virtuous cycle, the creation of an appropriate social and international order will not only help ensure the realisation of the right to development, but can also provide important benefits to the international intellectual property regime.

Finally, the preamble of the UNDRD recognises that “development is a comprehensive economic, social, cultural and political process”.<sup>38</sup> Because development is a cumulative enterprise, the process may be just as important as the outcome itself. This insight is important to the intellectual property field because knowledge production is an equally cumulative enterprise.<sup>39</sup> A greater focus on the process will certainly highlight the close interrelationship between intellectual property law and policy on the one hand and sustainable development<sup>40</sup> and intergenerational equity on the other.<sup>41</sup> Moreover, as the UK Commission on Intellectual Property Rights rightly reminded us, the protection of intellectual property rights should be “a means to an end, not an end in itself”.<sup>42</sup> Such protection therefore needs to be balanced against other important, and often more important, goals, such as the 17 recently-adopted SDGs.

In sum, the right to development and the adoption of the UNDRD provide important insights into the debate on intellectual property and global development. Sadly, except for the occasional mentions, this right has thus far been under-utilised in this debate. Indeed, very little academic or policy literature, if any, has discussed how the right to development or the UNDRD should, or could, be applied in the intellectual property context. It is therefore worthwhile to think more deeply about how this right, the UNDRD and other related documents can be leveraged to facilitate greater access to essential medicines,

<sup>35</sup> Khurshid Iqbal, *The Right to Development in International Law: The Case of Pakistan* (London: Routledge, 2010), pp.86–87; Karimova, *Human Rights and Development in International Law* (2016), p.110; Subrata Roy Chowdhury and Paul J.I.M. de Waart, “Significance of the Right to Development: An Introductory View” in Chowdhury, Denters and de Waart (eds), *The Right to Development in International Law* (1992), p.19.

<sup>36</sup> Iqbal, *The Right to Development in International Law* (2010), p.9; Karimova, *Human Rights and Development in International Law* (2016), pp.181–183.

<sup>37</sup> “Creating an Enabling Environment to Build Respect for IP: Concept Paper by Pakistan” in Advisory Committee on Enforcement, World Intellectual Property Organization, “Conclusions by the Chair”, November 4, 2009, WIPO Doc. WIPO/ACE/5/11, annex I; Peter K. Yu, “Intellectual Property, Economic Development, and the China Puzzle” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, 1st edn (New York: Oxford University Press, 2007), pp.213–216.

<sup>38</sup> Bunn, *The Right to Development and International Economic Law* (2012), pp.119–121; Rumu Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (Oxford: Oxford University Press, 2009), p.78; Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999), p.3; Uvin, *Human rights and Development* (2004), pp.137–139.

<sup>39</sup> Rochelle Cooper Dreyfuss, “TRIPS-Round II: Should Users Strike Back?” (2004) 71 U. Chi. L. Rev. 21, 22.

<sup>40</sup> Bunn, *The Right to Development and International Economic Law* (2012), p.120.

<sup>41</sup> “Intergenerational Equity and Intellectual Property” [2011] Wis. L. Rev. 103, 103–562.

<sup>42</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (2002), p.6.

computer software, cultural and educational materials, and patented seeds and food products, as well as to strengthen protection for genetic resources, traditional knowledge and traditional cultural expressions.

## The future

As we look for ways to harness our intellectual property system to realise the SDGs, we will need to devote more attention to the debate on intellectual property and global development. Thus far, development remains a concept that is vague, complex and highly difficult to define.<sup>43</sup> As shown by the considerable disagreement over efforts to establish development agendas at WIPO, the World Trade Organization and other international fora, different people subscribe to different concepts of development.<sup>44</sup> In the words of Upendra Baxi, “Development means many different things to many people at different times”.<sup>45</sup> Likewise, Gary Horlick observed:

“there is no consensus on what ‘development’ is, how to measure it, what causes it, or what law has to do with it”.<sup>46</sup>

Notwithstanding these challenges, this section outlines four general observations that aim to advance the debate on intellectual property and global development. The first observation concerns the holistic approach required by development. Development is multi-dimensional, covering many different disciplines and issue areas.<sup>47</sup> Greater inter- and multi-disciplinary research is therefore needed to foster a deeper and fuller understanding of development.

This holistic approach can be further extended to the debate on intellectual property and global development. After all, intellectual property is equally inter- and multi-disciplinary. Indeed, every year since its inception, this journal has devoted a special issue to highlighting intellectual property research in a different discipline. Thus far, the journal has published special issues on law and policy (Vol.1), economics (Vol.2), politics and international relations (Vol.3), culture (Vol.4), history (Vol.5), geography (Vol.6) and philosophy (Vol.7). Collectively, these issues have shown that intellectual property research is not, and cannot be, limited to a single discipline. Instead, intellectual property scholars can enrich our understanding regardless of their interests or disciplinary focus.

While a holistic approach will help us formulate more complete, and therefore better, perspectives on intellectual property and global development, such an approach can also contribute to the development of a greater variety of rights for the benefits of both developed and developing countries. Due to historical legacy and path dependency, copyrights, patents and trademarks have remained the three main branches of intellectual property law. Beginning in the mid-1990s, the TRIPS Agreement has also facilitated the wide adoption of international minimum standards for five other categories of intellectual property rights—namely, trade secrets, geographical indications, industrial designs, layout designs of integrated circuits, and plant variety protections.

Although all of these eight categories of rights have distinct boundaries, which overlap at times, the intellectual property rights can be designed more holistically to cover subject matters that do not fall neatly

<sup>43</sup> On the deconstruction of the concept of development, see Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995); Ruth E. Gordon and Jon H. Sylvester, “Deconstructing Development” (2004) 22 *Wis. Int’l L.J.* 1.

<sup>44</sup> Michael A. Gollin, Gwen Hinze and Wong Tzen, “Scenario Planning on the Future of Intellectual Property: Literature Review and Implications for Human Development” in Wong Tzen and Graham Dutfield (eds), *Intellectual Property and Human Development: Current Trends and Future Scenarios* (New York: Cambridge University Press, 2010), p.352. On the different theories of development, see Richard Peet and Elaine R. Hartwick, *Theories of Development* (New York: Guilford Press, 1999).

<sup>45</sup> Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (New Delhi: Oxford University Press, 2007), p.76.

<sup>46</sup> Gary N. Horlick, “Nonconclusions” in Lee Yong-Shik, Gary N. Horlick, Choi Won-Mog and Tomer Broude (eds), *Law and Development Perspective on International Trade Law* (Cambridge: Cambridge University Press, 2011), p.395.

<sup>47</sup> Baxi, *Human Rights in a Posthuman World* (2007), p.116; Bunn, *The Right to Development and International Economic Law* (2012), p.113; Karimova, *Human Rights and Development in International Law* (2016), p.105; Madhukar Hiralal Kania, “Advancing the Interests of Mankind by the Rule of Law” in Chowdhury, Denters and de Waart (eds), *The Right to Development in International Law* (1992), p.5.

into traditional categories. The continued mismatch between these categories and the intellectual property interests in developing countries is indeed why these countries have been actively pushing for greater protection of genetic resources, traditional knowledge and traditional cultural expressions.<sup>48</sup> Until we develop a more holistic conception of intellectual property rights and interests, we will continue to have a tough time seeing how such protection could fit well within our existing international intellectual property regime.

The second observation relates to the context-sensitive nature of development. Since its establishment, the TRIPS Agreement has been harshly and repeatedly criticised for embracing a “one size fits all” approach—or, more precisely, a “super-size fits all” approach.<sup>49</sup> Economists and development experts have empirically shown that countries need to adopt intellectual property standards that are tailored to their economic conditions, imitative or innovative capacities, research and development productivities, and availability of human capital.<sup>50</sup> By now, it is apparent that one size does not fit all, whether it is for intellectual property, trade or investment. More importantly, if there is only one size, that size should not be extra-large.<sup>51</sup>

While the TRIPS Agreement has already privileged developed countries by adopting their preferred standards and pushing those standards towards countries in the developing world, the aggressive negotiation of bilateral, regional and plurilateral trade agreements in the past decade has led to the further strengthening of these standards and therefore even more privileging of developed countries. From the Anti-Counterfeiting Trade Agreement 2011 to the Trans-Pacific Partnership Agreement 2016, these agreements have included intellectual property standards that fail to meet the needs, interests, conditions and priorities of developing countries. These standards have also made it more difficult for developing countries to catch up with their more developed counterparts.

The third observation pertains to how development evolves over time.<sup>52</sup> When the TRIPS Agreement was being negotiated in the late 1980s and early 1990s, developed country governments and their supportive industries were deeply disappointed by the lack of intellectual property protection and enforcement in developing countries. Appearing on the ground were massive piracy and counterfeiting problems, at least based on the developed countries’ intellectual property standards.

Today, however, these countries—at least the larger ones—have begun to benefit from stronger protection and enforcement of intellectual property rights. Although they continue to resist the positions taken by the European Union, the United States and other developed countries, and may prefer a different path from the one trodden by these countries,<sup>53</sup> they have also slowly embraced intellectual property reforms to promote economic and technological developments.

China has provided a paradigmatic example. While its intellectual property laws in the 1980s and early 1990s remained far behind international standards, the country is now “at the cusp of crossing over from a pirating nation to a country respectful of intellectual property rights”.<sup>54</sup> In 2015, for instance, China had the world’s third largest number of international applications filed through the Patent Cooperation Treaty

<sup>48</sup> Tania Bubela and E. Richard Gold (eds), *Genetic Resources and Traditional Knowledge: Case Studies and Conflicting Interests* (Cheltenham: Edward Elgar Publishing, 2012); Peter Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge: Cambridge University Press, 2014); Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham: Edward Elgar Publishing, 2012); Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Cheltenham: Edward Elgar Publishing, 2010).

<sup>49</sup> Peter K. Yu, “The Global Intellectual Property Order and Its Undetermined Future” (2009) 1 WIPO J. 1, 9.

<sup>50</sup> Claudio R. Frischtak, “Harmonization Versus Differentiation in Intellectual Property Rights Regimes” in Mitchel B. Wallerstein, Mary Ellen Moguee and Roberta A. Schoen (eds), *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington: National Academy Press, 1993), p.97; Peter K. Yu, “The International Enclosure Movement” (2007) 82 Ind. L.J. 827, 889.

<sup>51</sup> James Boyle, “A Manifesto on WIPO and the Future of Intellectual Property” [2004] Duke L. & Tech. Rev. 9, at 3–4.

<sup>52</sup> Hiroyuki Odagiri, Akira Goto, Atsushi Sunami and Richard R. Nelson, “Introduction” in Hiroyuki Odagiri, Akira Goto, Atsushi Sunami and Richard R. Nelson (eds), *Intellectual Property Rights, Development, and Catch-up: An International Comparative Study* (Oxford: Oxford University Press, 2010), p.3.

<sup>53</sup> Yu, “The Global Intellectual Property Order and Its Undetermined Future” (2009) 1 WIPO J. 1, 13.

<sup>54</sup> Peter K. Yu, “The Rise and Decline of the Intellectual Property Powers” (2012) 34 Campbell L. Rev. 525, 528.

(PCT) and seventh largest number of international trademark applications under the Madrid System.<sup>55</sup> Among all corporate applicants, two Chinese firms, Huawei Technologies and ZTE Corporation, also had the first and third largest number of PCT applications, respectively.

Although China continues to be confronted with piracy and counterfeiting problems—due in large part to the country’s large size, internal complexities and uneven development—many of the traditional arguments advocating for China to be treated as a developing country are no longer as convincing as they were two decades ago. In fact, with all of the country’s recent improvements in economic development and technology proficiency, it remains unclear whether China is now the exciting proof of the success brought by TRIPS-based intellectual property reforms or a painful reminder that developing countries should strive hard to resist high international intellectual property standards until they can start benefiting from those standards. The truth probably lies somewhere in between.

The final observation involves the participatory aspect of development,<sup>56</sup> which commentators have linked to the right to self-determination.<sup>57</sup> Article 2(3) of the UNDRD emphasises the “active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”. Article 8(2) further provides: “States should encourage popular participation in all spheres as an important factor in development”. Similar to this provision, Recommendation 21 of the WIPO Development Agenda states:

“WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and [least developed countries]”.

A widely cited example illustrating the importance of participation and self-determination concerns the protection of traditional knowledge and traditional cultural expressions. Policymakers and commentators have widely attributed the deficiency in such protection to the historical lack of respect and representation for traditional communities in domestic and international political processes. As Rosemary Coombe observed:

“Although indigenous peoples are now recognized as key actors in this global dialogue, it will need to be expanded to encompass a wider range of principles and priorities, which will eventually encompass political commitments to indigenous peoples’ rights of self-determination. Only when indigenous peoples are full partners in this dialogue, with full juridical standing and only when ... their cultural world views, customary laws, and ecological practices are recognized as fundamental contributions to resolving local social justice concerns will we be engaged in anything we can genuinely call a dialogue.”<sup>58</sup>

To a large extent, the public’s urge for democratic participation, transparency and accountability have driven the common and widespread criticisms of the recent efforts by developed and like-minded countries to conduct secret plurilateral negotiations to ratchet up international standards of intellectual property protection and enforcement.<sup>59</sup> In regard to ACTA, for example, these secret negotiations backfired by

<sup>55</sup> World Intellectual Property Organization, “Who Filed the Most Madrid Trademark Applications in 2015?”, available at [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics\\_madrid\\_2015.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_madrid_2015.pdf) [Accessed November 15, 2016]; World Intellectual Property Organization, “Who Filed the Most PCT Patent Applications in 2015?”, available at [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics\\_pct\\_2015.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographics_pct_2015.pdf) [Accessed November 15, 2016].

<sup>56</sup> Bunn, *The Right to Development and International Economic Law* (2012), pp.187–191; Iqbal, *The Right to Development in International Law* (2010), pp.84–86.

<sup>57</sup> Bunn, *The Right to Development and International Economic Law* (2012), p.291; Tatjana Ansbach, “Peoples and Individuals as Subjects of the Right to Development” in Chowdhury, Deters and de Waart (eds), *The Right to Development in International Law* (1992), p.157.

<sup>58</sup> Rosemary J. Coombe, “The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law” (2001) 14 *St. Thomas L. Rev.* 275, 284–285.

<sup>59</sup> David S. Levine, “Transparency Soup: The ACTA Negotiating Process and ‘Black Box’ Lawmaking” (2011) 26 *Am. U. Int’l L. Rev.* 811; Peter K. Yu, “Six Secret (and Now Open) Fears of ACTA” (2011) 64 *SMU L. Rev.* 975, 998–1019; Peter K. Yu, “TPP and Trans-Pacific Perplexities” (2014) 37 *Fordham Int’l L.J.* 1129, 1170–1176.

leading to the widespread online coverage of the leaked drafts and updates on the negotiations, which in turn mobilised the public and sharpened the debate on intellectual property rights. The effort to adopt ACTA in the European Union also led to massive street protests throughout Europe in the middle of winter—in major cities such as Amsterdam, Berlin, Copenhagen, Krakow, Munich, Paris, Prague, Sofia, Stockholm and Vienna.<sup>60</sup>

## Conclusion

When *The WIPO Journal* was launched in summer 2009, the WIPO Development Agenda was only less than two years old. Countries worldwide were also going through the global economic crisis, raising important questions about what this crisis would mean for intellectual property and global development. Today, however, WIPO, or at least its developing country members, is poised to celebrate the tenth anniversary of the establishment of the WIPO Development Agenda. The organisation has also actively explored ways to implement the recently-adopted SDGs through its programmes and activities.

Although it remains debatable how much the WIPO Development Agenda has achieved in relation to what developing countries and civil society organisations set out to do, there is no denying that it is now a good time to think more deeply about intellectual property and global development and to take stock of all the recent pro-development initiatives in the intellectual property field. In fact, many would deem it urgent to do so considering the developing countries' continuous and considerable struggle with problems caused by a lack of access to essential medicines, computer software, cultural and educational materials, and patented seeds and food products.

In view of this timely opportunity and the potential urgency, this special issue has been devoted to the development aspects of intellectual property rights. The articles in this issue will enrich our understanding of intellectual property and global development. Coincidentally, they will also bring us back to where the journal started when it was launched eight years ago. I hope you will enjoy reading these articles.

<sup>60</sup> Monica Horten, *A Copyright Masquerade: How Corporate Lobbying Threatens Online Freedoms* (London: Zed Books, 2013), pp.107–114.