Policy Brief 1

UNCTAD–ICTSD Project on IPRs and Sustainable Development

A2K and the WIPO Development Agenda: Time to List the "Public Domain"*

by

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Access to knowledge (A2K)-related issues have been an important component of the initiative of a Development Agenda for the World Intellectual Property Organization (WIPO) since its launch in 2004.[1] The WIPO Development Agenda is an ambitious document that calls for WIPO to revisit its mandate and shift from its traditional emphasis on the promotion and expansion of intellectual property rights towards a more development-oriented approach. In 2007, the WIPO General Assembly adopted 45 recommendations with a view to integrating this development dimension in all of the organization's activities.[2] The recommendations are divided into six clusters. The most relevant ones in relation to the A2K movement are Cluster B (norm-setting, flexibilities, public policy, and public domain) and Cluster C (technology transfer, information and communication technologies (ICT), and access to knowledge).

The recommendations that this paper considers most directly relevant to A2K are as follows:

(a) Preserve the public domain and support norm-setting processes that promote a robust public domain;
(b) Initiate discussions on how to further facilitate access to knowledge for developing countries and least developed countries (LDCs) in order to foster creativity and innovation; and
(c) Establish a forum for exchange of experiences on open collaborative projects such as the Human Genome Project.

I. The importance of the "public domain" as a unifying concept

The WIPO Development Agenda serves as an opportunity, not only for developing countries and public interest organizations, but also for more developed countries to place the notion of

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the "public domain" at the centre of the intellectual property (IP) debate. The term "public domain" is relevant to three areas: (a) the interrelation between intellectual property rights (IPRs) and various facets of development; (b) the A2K mobilization efforts; and (c) the nature and governance of creativity (and innovation).

A. IPRs and development

Not only is the notion of "public domain" clearly incorporated within the WIPO Development Agenda, it is also part of the more general call for "inclusive and member-driven" norm-setting processes.[3] Recommendation 16 of the WIPO Development Agenda states that WIPO's normative processes should consider "the preservation of the public domain" and "deepen the analysis of the implications and benefits of a rich and accessible public domain." Recommendation 20 aims to promote "norm-setting activities related to IP that support a robust public domain in WIPO's member States, including the possibility of preparing guidelines that could assist interested member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions".

The concept of "public domain" (or its variants, such as "information commons", "open access" or "open source") has been employed by various stakeholders to point to the growing social and economic disparity between developed regions (such as the United States and the European Union) and developing countries. The usage, without discrimination, has been applied to the pharmaceutical, knowledge and biotechnology industries, covering goods such as medicines, digital products such as software, and educational and scientific research. As one commentator describes it, "From the "digital divide", to biotechnology, to medical research, open source and open access have become key components in the strategy to boost the fortunes of developing countries." [4]

B. Framing the "A2K movement"

The rhetoric of the A2K movement has also employed the ethos of the "public domain" to mobilize disparate interest groups such as access-to-medicine campaigners, farmers' rights groups, indigenous rights claimants, and collaborative-centred groups (such as GNU Linux and other free/open software projects, and the Human Genome Project). The notion of the public domain thus allows various stakeholders with different objectives and aims to find a commonality in purpose vis-à-vis intellectual property rights.

C. Nature and governance of creativity and innovation

"Public domain" has been at the heart of current discourse on the legitimacy and continuing relevance of the modern legal interpretation of the subject matter and scope of protection of innovative products as well. Specifically, the notion of "public domain" has been a rallying force, uniting many of the current dissatisfactions expressed against various facets of intellectual property law, such as (a) the fact that limitations and exceptions tend to be permissive rather than mandatory; (b) anti-competitive behaviour in the knowledge industries is poorly curtailed; (c) the growing expansion of IP law has led to a lack of access to essential medicines and education; and (d) increasing obstacles impede follow-on innovation.

Reforming our perceptions has transformed IP politics and policy.[5] Boyle, for instance, suggests that IP changes can be better effected through "affirmative arguments for the public domain" and the "use of the language of the commons to defend the possibility of distributed methods of non-proprietary production."[6] Thus, the notion of preserving a "public domain" has been at the core of arguments of activists who clamour for different and alternative governance structures based on contract law, liability-based rules, open IPR models and private ordering schemes (such as the Creative Commons). Advocates argue that such open systems are the most efficient means to access knowledge and foster creativity and innovation, especially for LDCs and developing countries. Part of this argument relies on their suggestion that widening the public domain/intellectual commons will spur development and promote a more equitable distribution of the world's resources. Nevertheless, as Boyle himself concedes, "the public domain must be "invented" before it is saved."

2. "Inventing" norms – the tale of the "three-step test"

The proposals in Cluster B – "norm-setting, flexibilities, public policy and public domain" – appear to propose reforms that will govern the treaty-making process. Part of the task will include drafting the definition of "public domain" and setting out the guidelines for countries to identify and list public domain works. This will be one of the most challenging tasks: obfuscation has to be consciously avoided, diplomatic language should be eschewed, and placatory compromises – so often found in international treaties – should be omitted. The Berne/Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) "three-step test" offers a useful historical lesson in this respect.

A. Sophistry: treaty interpretation

The three-step test is a good example of a typical international legal provision that is difficult to interpret and implement in the domestic context. The provision, which is set out in different terminology even within the same treaty,[7] subjects signatories of the Berne Union, the TRIPS Agreement, and the two WIPO copyright treaties to "confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder" (language of art. 9(2), Berne Convention).

There are no specific provisions within the Berne Convention, the TRIPS Agreement, or the WIPO treaties dealing with the interpretation of specific provisions. This is a notable gap, given that the extreme vagueness of the TRIPS Agreement's provisions and its language, especially as far as the exceptions and limitations are concerned, make it difficult to interpret.[8] For example, annex 1 of the Dispute Settlement Understanding in the agreement suggests that, in order to clarify any TRIPS provisions, one should adopt "customary rules of interpretation of public international law". Another popular approach is to resort to the Vienna Convention on the Law of Treaties, which codifies the customary rules of interpretation of public international law, especially article 31, which states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[9]

These words do not actually convey anything useful to jurists or legislators, whether they hail from developed nations, developing countries or LDCs. For example, one reading of article 31 of the Vienna Convention calls for an interpretation of treaties on the presumed basis that the text is the authentic expression of the intention of the parties. How does a local court

practically and pragmatically apply this guideline? What are the criteria for determining whether a particular interpretation expresses the intention of the drafting parties? Faced with such vague treaty language, courts in several developed countries have adopted a broader teleological interpretation of the treaties; however, this can only work if it is backed by judicial activism, as in the United States and European Union.[10]

We face a similar dilemma in relation to recommendation 20 of the WIPO Development Agenda. The words sound promising: norm-setting activities that foster and encourage a robust public domain. Yet, what constitutes a work within the "public domain"? How do we guard against the misappropriation of existing public domain works via relaxed IP rules? Who is the final arbiter of whether something is within the public domain or not?

Defining the "public domain" and listing a set of works as constituting "public domain" is a good start.

B. Teleology: local interpretation

What is the teleological approach? The teleological (evolutionary) approach suggests that, in addition to looking at the "meaning of the text" or the "intention of the parties" or at "good faith interpretation" and "legitimate expectations of the parties" (all of which is required to a certain extent by article 31 of the Vienna Convention on the Law of Treaties), courts should also look to the general purpose of the treaty and regard the treaty as having an existence independent of the original intentions of the framers.[11]

The teleological approach is in line with a specific endorsement under the Vienna Convention on treaties in that it calls for judges and courts to interpret law taking account of present day conditions.[12] Legal rules cannot be detached from societal, political, and economic changes, and the law will only remain relevant if these changes are considered.[13] What the teleological approach teaches us is that international rules (and norms) are not inscribed on a stone tablet; it is very much up to local stakeholders (law enforcers, courts, jurists, activists and lawyers) to define an international norm. And if a norm-setting exercise involves a revolutionary, holistic and all-embracing phrase – such as "public domain" – that is beyond local endeavours, it should be taken up on a regional or international scale.

C. Norm-setting: the Munich Declaration on the "three-step test"

In respect of a newly invented term such as "public domain", the practical policy would be to draft parameters of interpretation, accounting for the fact that *global norms* are being processed into *local norms*. Such parameters can take any, or even all, of these forms:

- Guidelines;
- Declarations;
- Explanatory memoranda.

Such parameters should be clear and yet flexible enough to suit a developing country's own constitutional, developmental and socio-economic needs. This paper does not, however, advocate that the whole of the TRIPS Agreement or other international treaties be interpreted employing this approach. Rather, it may be time to define certain phrases, provisions and principles by looking at these contextually within specific factual and political circumstances, as opposed to an abstract fashion (i.e. by looking at the intention of the parties to the treaty).

One example of a recent norm-setting activity is the initiative by the Max Planck Institute for Intellectual Property and the School of Law at Queen Mary, London. After two years of round-table discussion, a group of European experts launched a declaration on "A Balanced Interpretation of the "Three-Step Test" in Copyright Law". The concern was mainly that, while international copyright harmonization appeared to primarily serve the "interests of copyright-exporting countries in a secure and predictable trading environment, historic evidence, economic theory and the principle of self-determination suggest that individual States should have sufficient flexibility to shape copyright law to their own cultural, social and economic development needs".[14]

Perhaps the most surprising aspect of this declaration is that the group of experts comprised many "traditional" advocates of the copyright system, rather than A2K activists or other public interest non-governmental organizations. Nevertheless, these experts (comprised of academics and practitioners) believe that current definition and interpretation of the three-step test by European national courts and the World Trade Organization (WTO) Dispute Settlement Panel, is incomplete, and sometimes inaccurate.[15] Thus, the declaration attempts to give possible interpretations of the test by eschewing the intent of the framers of the test (if any), and instead contextualizing it within the overall public interest basis of copyright law. Indeed, as paragraph 6 of the declaration emphasizes:

> "The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including:
> - Interests deriving from human rights and fundamental freedoms;
> - Interests in competition, notably on secondary markets; and
> - Other public interests, notably in scientific progress and cultural, social or economic development."

III. Guidelines on the "public domain"

There are several practical steps that can be adopted in relation to defining "public domain", including the following: (a) defining the concept (either by means of a positive or negative definition); (b) setting out the criteria for types of works that fulfil the definition; and (c) listing works of public domain.

A. Avoiding the trap of defining the concept

While it might not make sense to define the concept, any guideline should contain a group of definitions, if only to demarcate clearly the ethos of public domain, if not the actual legal construct. Indeed, it may even be prudent to avoid a definition, as most attempts tend to be circular: to fall into the public domain, the subject matter is not protected by any IPRs, and subject matter that rightfully falls into the public domain will not be protected by any IPRs.

Thus, a summation of all the following definitions can prove useful, even if they cannot be reduced to an all-embracing, cogent legal definition:

(a) The *public domain* refers to a vast repository of the basic building blocks of creation, commonplace subject matter, or new entrants to the public domain for which the relevant intellectual property rights have expired;

(b) The *public domain* refers to abstract subject matter, such as ideas or discoveries, as well as matters that have entered the public domain due to the end of protection or due to standardization;

(c) The *public domain* is the realm of "intellectual property-free resources" unprotected either because they were ineligible for protection in the first place or because they have been "freed" by invalidation or expiry of the relevant intellectual property right;[16]

(d) The *public domain* is the status of an invention, creative work, commercial symbol or any other creation that is not protected by any form of intellectual property;[17]

(e) The *public domain* is defined as the "laws' primary safeguard of the raw material that makes authorship possible [...] (it) should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use";[18]

(f) The *public domain* is considered part of the common cultural and intellectual heritage of humanity. It provides a fertile foundation on which creators can build new works, as well as a rich source of content for education;[19]

(g) The term *public domain* refers to creative materials that are not protected by intellectual property laws such as copyright, trademark or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without obtaining permission, but no one can ever own it.[20]

One difficulty is determining whether the notion of "public domain" is equivalent with terms such as "open source,"[21] "open access," "information commons," "intangible commons of the mind" and "knowledge commons." Perhaps the most pragmatic means of solving this definitional problem is to incorporate the various nuances and accept them as a means of defining the "public domain". For instance, the phrases "open access" and "open source" are concepts based on the perspective that innovation and creativity can only be fostered in the presence of an open, commons-based pool of ideas and knowledge, i.e. a "robust public domain".

B. An international register of "public domain matter"

A public domain does not exist *ex nihilo*; rather, one must consider the maturity of any existing open source community as relating to a particular technology and the corpus of existing public domain material that later innovators can use.[22] Developing countries and LDCs should be able to rely on an international and mature listing of public domain material to boost their own indigenous innovation.

Another reason why an international list of public domain works could be important is the mandate conferred by recommendation 19, which calls on WIPO to foster creativity and innovation in developing countries and LDCs.

Innovation can be categorized as "discrete" or "cumulative"; in reality, however, a vast majority of scientific and cultural creations, if not all, are built on pre-existing creations and discoveries, and do not represent giant leaps beyond what we already know.[23] Innovation and creativity also depend, to a very large extent, on access to a corpus of existing public domain sources, or at least, viable access in terms of technology and pricing. Such access should not

be limited to the existing body within a particular jurisdiction, but should be extended to an international list of "public domain" materials.

Thus, a list of public domain material may only be really useful in furthering innovation within LDCs and developing countries if it drew upon other more developed countries. In this respect, one should note that recommendation 20 may have the tendency to narrow the mandate as it recommends that member States identify "subject matters that have fallen into the public domain within *their* respective jurisdictions."

There is no rational or convincing reason why the "public domain" should be confined jurisdictionally. In many respects, building an international list of public domain works may be the only way to adjust our conceptual notion of IP law.

C. Selection criteria for public domain – borrowing from the World Heritage

How should a future WIPO/Stakeholders Committee determine whether the material is within the public domain or not? The first, relatively easy, task is to build a framework of the current flexibilities within the international intellectual property agreements. This would allow one to immediately identify a list of public domain matters, such as the texts and translations of official texts and decrees.

The second, and possibly more challenging task, would be to formulate the selection criteria.

As a comparison, we can look at the efforts made since the 1970s to build an international list of world heritage sites – a task that must have been daunting, especially in terms of selection criteria.[24] It is worth noting some of the selection criteria of what constitutes a world heritage site:

(a) To exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town planning, or landscape design;

(b) To bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;

(c) To be directly or tangibly associated with events or living traditions, with ideas – or with beliefs – that have artistic and literary works of outstanding universal significance; and

(d) To contain the most important and significant natural habitats for in situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

More instructive is the manner in which the United Nations Educational, Scientific and Cultural Organization (UNESCO) has implemented the convention's mandate by setting up a permanent intergovernmental committee to consider nominations from State parties, and by drawing up and constantly revising its operational guidelines. The current 173-page guidelines set out that nominations for heritage sites must not only be based on the selection criteria, but also on "carefully prepared documentation" that is evaluated by "qualified experts" and expert referees.[25] The guidelines may be lengthy but the pastoral language is undoubtedly more helpful than formal treaty language for States considering whether to nominate a particular national cultural or natural site for World Heritage status. Examples of these pastoral guidelines include:

(a) Attributes such as spirit and feeling do not lend themselves easily to practical applications of the conditions of authenticity, but nevertheless are important indicators of character and sense of place, for example, in communities maintaining tradition and cultural continuity;

(b) The use of all these sources permits elaboration of the specific artistic, historic, social and scientific dimensions of the cultural heritage being examined. "Information sources" are defined as all physical, written, oral and figurative sources, which make it possible to know the nature, specificities, meaning and history of the cultural heritage.

D. Let's start with "PUBLIC"

It is difficult, at this point, to offer quick solutions but perhaps we can draw some preliminary conjectures as to what the selection criteria should incorporate. Thus, I conclude by offering, as an initial basis for further discussion, a list of queries based on the notion of PUBLIC:

(a) **P**rovenance: What is the provenance of the work in terms of origin and authorship?

(b) **U**niversal: Does the work constitute outstanding universal significance, value or benefit to mankind? Should such types of matter remain or be returned to the "public domain" list (for example, natural resources or genetic resources)?

(c) **B**arriers: Should a protected work be declared to be in the public domain if it constitutes a barrier to competitive practices, collaborative efforts, upstream innovation or protection of human rights?

(d) **L**egal attributes: Should the work, irrespective of public domain claims, be objectively protected by intellectual property rights and/or other legal mechanisms, such as under a licence?

(e) **I**nterests: Are there, or is it likely that there will be, any interests vested in the work? Are there derivative versions of a public domain work? Is the public domain work part of a protected collection?[26]

(f) **C**ommons: Should the rule be that all works are presumed to be within the commons unless it can be proved otherwise? The notion of commons includes common property, information commons and the common heritage of mankind.

Key conclusions and recommendations

- The WIPO Development Agenda is an opportunity, not only for developing countries and public interest organizations, but also for more developed countries to place the notion of the "public domain" at the centre of the intellectual property debate.
- The experience of interpreting and implementing the Berne/TRIPS "three-step test" provides useful lessons for promoting norm-setting activities that support a robust public domain and setting out the guidelines for countries to identify and list public domain works.
- Access to the public domain should not be limited to the existing body within a particular jurisdiction, but should be extended to an international list of "public domain" materials.
- Countries, particularly developing countries and LDCs, should be able to rely on an international and mature listing of public domain material in order to boost their local innovation, as innovation and creativity depend, to a very large extent, on viable access to existing public domain sources.
- Selection criteria for public domain material in an international register for "public domain matter" could benefit from the work carried out by UNESCO in listing world heritage since the adoption of the landmark Convention on the Protection of the World Cultural and Natural Heritage (1972).

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[1] On 4 October 2004, the General Assembly of the World Intellectual Property Organization (WIPO) agreed to adopt a proposal presented by the Group of Friends of Development (namely Argentina and Brazil), for the establishment of a Development Agenda for WIPO, Doc. WO/GA/31/11.

[2] See http://www.wipo.int/ip-development/en/agenda/. A Committee on Development and Intellectual Property (CDIP) was established to develop a work programme for the implementation of these recommendations.

[3] Recommendation 15, WIPO Development Agenda.

[4] Opderbeck DW (2007). The Penguin's Paradox: The political economy of international intellectual property and the paradox of open intellectual property models. *Stanford Law and Policy Review.* No. 18: 101 at 102.

[5] Kapczynski A (2008) The access to knowledge mobilization and the new politics of intellectual property. *Yale Law Journal:* 804 at 854 *et seq.*

[6] Boyle J (2003) The second enclosure movement and the construction of the public domain. *Law and Contemporary Problems.* Winter/Spring 2003: 52.

[7] See articles 13, 17, 26(2) and 30 TRIPS.

[8] For further reasons, see UNCTAD–ICTSD *Resource Book on TRIPS and Development*. Cambridge University Press: 690 *et seq.*

[9] Article 3:2, Dispute Settlement Understanding; See *Japan – Taxes on Alcoholic beverages*. Report of the Appellate Body, WT/DS8, 10, 11/AB/R, 4 October 1996; and United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS/2/AB/R, 29 April 1996.

[10] Zeitler HE (2005). Good faith in the WTO jurisprudence: necessary balancing element or an open door to judicial activism? *Journal of International Economic Law*. No. 8: 721.

[11] For an expanded discussion on this, see Suthersanen U (2005). The future of copyright reform in developing countries: teleological interpretation, localized globalism and the "public interest" rule. In UNCTAD–ICTSD *Dialogue on IPRs and Sustainable Development: Revising the Agenda in a New Context*. Bellagio, Italy. http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf.

[12] Article 31(3)(c),Vienna Convention on the Law of Treaties.

[13] UNCTAD–ICTSD *Resource Book on TRIPS and Development*. Cambridge University Press: 693.

[14] For a text of the declaration, see http://www.ip.mpg.de/shared/data/pdf/declaration_three_steps.pdf.

[15] Citing the decision of the French Supreme Court, 28 February 2006, 37 IIC 760 (2006); the WTO Panel report WT/DS114/R of 17 March 2000 (*Canada – Patents*); and the WTO-Panel report WT/DS160/R, 15 June 2000 (*United States of America – Copyright*).
[16] Samuelson P (2006). Enriching discourse on public domains. *Duke Law Journal.* No. 55: 783, 789–91.
[17] McCarthy J (1988). *McCarthy on Trade Marks and Unfair Competition*. Matthew Bender: New York, third edition. Vol. 1, paragraph. 1.01[2].
[18] Litman J (1990). The public domain. *Emory Law Journal.* No. 39: 965, at 967–968. See also Lange D (1981). Recognizing the public domain (1981). *Law and Contemporary Problems:* 147. For criticisms of the concept, especially in relation to claims by indigenous groups, see Chander A and Sunder M (2004). The romance of the public domain. *California Law Review.* No. 92: 1331 at 1335.
[19] Joint Statement by IFLA, EIFL and EBLIDA to the Provisional Committee on Proposals Related to a WIPO Development Agenda, Second Session, Geneva, 26–30 June 2006, at http://www.ifla.org/III/clm/p1/A2K-7.htm.
[20] From "Copyright and Fair Use, Stanford University Library and Academic Information Resources," at http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/index.html.
[21] For one definition of open source, see http://www.opensource.org/docs/definition.php.
[22] Opderbeck DW (2007). The penguin's paradox: the political economy of international intellectual property and the paradox of open intellectual property models. *Stanford Law & Policy Review.* No. 18: 101 at 126.
[23] Dutfield G and Suthersanen U (2007). Innovation and development. In *Innovation without Patents: Harnessing the Creative Spirit in a Diverse World* (2007). Suthersanen U, Dutfield G, Kit Boey Chow and Elgar E, Eds.
[24] See 1972 Convention concerning the Protection of the World Cultural and Natural Heritage**.**
[25] The Operational Guidelines for the Implementation of the World Heritage Convention, WHC.08/01, January 2008, available at http://whc.unesco.org/archive/opguide08-en.pdf.
[26] An out-of-copyright work can be easily re-converted into a protected work by transforming the nature of the work or the manner in which the public domain work is now consumed. Thus, for example, a public domain work, including statutes and old manuscripts, can be disseminated in a new format or published as a revised edition. This can be a particular problem if countries adopt the infamous European "database right" as a recent referral of a German decision to the European Court of Justice indicates. The ECJ has to determine whether a list of German poems from 1720 to 1933 constitutes a protected work under the European Court database right. See *Directmedia Publishing GmbH v. Albert-Ludwigs-Universität Freiburg*, 10 July 2008, Opinion of Advocate General, European Court of Justice, Case C-304/07.

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ICTSD has been active in the field of intellectual property since 1997, among other things through its programme on Intellectual Property Rights (IPRs) and Sustainable Development, which since 2001 has been implemented jointly with UNCTAD. One central objective of the programme has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries that includes decision-makers and negotiators, as well as representatives from the private sector and civil society, who will be able to define their own sustainable human development objectives in the field of IPRs and advance these effectively at the national and international level.

For further information, visit: http://ictsd.net/, www.iprsonline.org or www.unctad.org.

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Founded in 1996, the International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit and non-governmental organization based in Geneva. By empowering stakeholders in trade policy through information, networking, dialogue, well-targeted research and capacity-building, ICTSD aims to influence the international trade system so that it advances the goal of sustainable development.

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