

EXPLORING OPTIONS AND MODALITIES TO MOVE THE NEW DEVELOPMENT AGENDA FORWARD

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The 2004 decision to launch discussions on a Development Agenda propelled WIPO back onto centre-stage of global debates on intellectual property policy. In taking that step, WIPO Member States signaled, albeit belatedly, their recognition of the need to ensure that global and national IP policies and institutions properly account for and advance development. With the close of WIPO's 2005 General Assemblies in early October, a year has now passed, providing a timely moment to reflect on the progress of the Development Agenda and to consider what next for a development-oriented approach to IP policymaking.

Discussion over the past year has highlighted that a growing number of scientists, public-interest groups, industries and government agencies—from *both* developed *and* developing countries—share common priorities and concerns with respect to IP policy that defy a North-South divide. The convergence of interests and potential coalitions vary from issue to issue but it is clear that as technologies and business models alter economic dynamics, the pressures properly to explore the range of possible options for promoting innovation, creativity and economic dynamism are here to stay—whether altering the approach to IP policies, using IP policies more creatively, or looking beyond them.

To stimulate discussion in Bellagio, this background note offers suggestions of actions, strategies and options that could help move a development-oriented agenda forward. Importantly, this background note is not exhaustive with respect to the range of possible actions or the full diversity of substantive issues on the table; rather its purpose is to simulate discussion by setting out just some of the possible cross-cutting elements of a broad strategy for action.²

Part I proposes a set of strategic priorities at the national and international level. Part II draws out and expands upon some of the specific actions and roles that different stakeholders could consider. In both instances, the note aims to consider both immediate (within the coming year) and longer-term priorities.

I. KEY NATIONAL AND INTERNATIONAL STRATEGIC PRIORITIES

While the key decisions of the 2005 Assemblies were procedural, they signaled a step forward for the Development Agenda—most importantly because they generate and renew opportunities for stronger integration of a development dimension in global IP policymaking.³ This section proposes actions in seven areas that would help harness the opportunities and move the agenda forward.

(i) Bolster national policy-making processes in developing countries

The intensifying complexity of international IP policymaking presents challenges for developing country negotiating capacity and policy coherence. The proliferation of IP discussions in a range of international organisations and processes reinforces the need for developing countries to bolster their

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² For issues, see background note for this meeting, "Towards Development-Oriented Intellectual Property Policy: Updating Strategic Priorities", June 7, 2005.

³ For an overview of the key decisions of the WIPO Assemblies and the dynamics of the meetings, see coverage in Intellectual Property Watch and BRIDGES.

capacity independently to develop and sustain coherent, consistent policies at the national and international level.⁴ There is a particular need to ensure such capacity exists in those countries most vulnerable to external pressures and most critical to regional and international policymaking.

The vulnerability of some countries—even the strongest—stems from a combination of factors: unclear national priorities for global IP policymaking, a lack of coordination among Ministries in capitals about national interests, inadequate information flows between Geneva and capitals, inadequate resources to follow international IP debates closely, the tendency to mischaracterize IP issues as technical rather than deserving of high-level political and economic interest, the absence of strong independent national IP capacity and expertise, and the failure to conduct and build processes of consultation among all relevant domestic stakeholders.

More consultative and better-informed internal decision-making processes would help developing countries develop more coherent IP policy strategies—it would help them align positions in capitals and in Geneva on key policy debates, devise domestic and international policies that take into account a broad array of national public policy objectives, maintain consistent negotiating positions across international fora, make the best possible use of bargaining space in bilateral FTA negotiations, and ensure national IP policies, laws and regulations maximize potential development gains.

In developing countries, building this capacity will require efforts to:

- promote greater inter-agency coordination in domestic IP policymaking;
- build ongoing consultation processes that engage the full range of relevant domestic ministries, non-government stakeholders (including industries with a range of IP interests and perspectives, NGOs and civil society groups), and independent sources of expertise (e.g., academics and think tanks);
- support stakeholder organizations and cross-sectoral networks which can advise, push, and support governments. This should include building and supporting capacity for advocacy, policy leadership, and activism; and
- invest in independent research capacity that can serve as a durable source of expertise for government on IP and development issues.

(ii) Democratize, monitor and strengthen IP policymaking in developed countries

Advancing a development-oriented agenda will require a concurrent push for pro-competitive and pro-public interest IP policies and practices in developed countries that reflect and balance diverse industry preferences, public interests, and international responsibilities. The domestic IP policy choices made in key developed countries (most notably in the United States and the European Union) have a significant influence on developing country economies and industries. Standards promulgated first in developed countries (particularly in the EU and United States) are often subsequently globalised (e.g., through international negotiations, training and technical assistance, or because the majority of patent applications are made in developed countries). Moreover, IP practices within developed countries establish informal standards and models for patent offices, IP professionals, companies, industries and business models across the world.

In developed countries, key actions would help advance the development-oriented IP agenda include:

- promoting more diverse and representative domestic consultative processes. Whether at the European Commission, the European Parliament, USTR, USPTO or US Congress, participation on government advisory committees should be expanded to better reflect the range of actors with a stake in national and international IP policy decision-making. On the one hand, more public interest groups should be engaged in the effort. On the other hand, government advisory councils should also be expanded to reflect the full-range of industry

⁴ The analysis and recommendations in this section draw extensively from Abdelatif, A. (2005) *Developing country coordination in international intellectual property standard-setting*, South Centre: Geneva.

interests in the IP policy system—not just those of rights holders. Even among rights holders, there should be a diversity of voices to ensure that national policies properly address the nuanced needs and perspectives of different business actors;

- supporting policy reform efforts by national advocates concerned that domestic IP policies do not adequately promote either innovation or consumer interests within their borders. In both the EU and the United States, there are heated debates underway regarding the appropriate direction of IP laws and reforms. In the EU, for example, recent efforts to advance software patents showed that with an active and engaged set of public interest advocates, rights holders do not necessarily hold sway;
- expanding and sharpening coalitions. This should include reaching out to more industry groups and devoting greater attention to the money-politics of decision-making in key capitals. The need to ‘follow the money’ and to think about how to harness powerful economic constituencies is particularly important in the context of US politics, where moral and public suasion may not always be a match for the influence of industry lobbyists on Congress and on key agencies in the Administration; and
- forging stronger links between key constituencies and players engaged in domestic and international reform debates. This should include efforts to harness powerful domestic advocates to join in lobbying to alter the international IP policies of their governments, particularly with respect to developing countries.
- building support for specific policies and practices in key developed countries that would help address developing country needs (such as stronger procedures for reviewing prior art in patent examinations, requirements for disclosure of origin of genetic materials for inventions claimed in patent applications, cheaper procedures for challenging low-quality patents, and greater opportunities for public input in the patent examination process).

(iii) Build cross-regional coalitions and alliances at the multilateral level

Moving forward the development agenda in the coming year will require ongoing commitment to multilateral-level action from supportive governments, civil society organisations, academics and industry groups.

At the last WIPO General Assemblies—as on other occasions—external pressures on coalitions of developing countries resulted in fragmentation and sometimes defections at critical moments. In the coming year, developing countries will need to work to protect and bolster cross-regional coalitions of countries and to cultivate stronger alliances with industry, civil society and developed countries that share key interests. The poorest countries, in particular, perceive WIPO primarily as a source of development financing and frequently admit to being inadequately informed of what is at stake in WIPO policy debates. With billions of dollars on the table, the determination of the most powerful states to protect and advance their share of the global knowledge economy for key commercial interest groups puts weaker states in a precarious position—vulnerable to calls to bolster support among allies in capitals, letters to Presidents, and promises of more aid to gain their backing or acquiescence on key policy priorities.

At the multilateral level, necessary actions include:

- consolidating the base of support for the WIPO Development Agenda between formal meetings. This will require greater attention by the Friends of Development to listen to and exchange views with the full-range of WIPO’s membership to build reliable support for the development agenda—from the smallest to the richest economies. This may involve finding ways to acknowledge the diversity of interests between and within developing countries at different levels of development with respect to IP policies. This could also include forging alliances with developed countries (Group B) on particular issues where possible;
- encouraging stronger engagement in multilateral decision-making by industries with critical perspectives on current trends in IP policy;

- ensuring high-level government delegations to key international IP policy discussions, including participation of (and prior input from) non-IP government agencies, industry and public interest groups;
- promoting greater linkages and information-sharing between government officials and advocates engaged in the range of multilateral fora (WIPO, TRIPS, CBD, WHO, UNESCO, etc); and
- identifying and supporting key allies within WIPO and other multilateral agencies that could offer support to a development-oriented perspective. This should also include supporting pro-development approaches to IP-related issues under discussion in different parts of the UN system.⁵

(iv) Monitor and engage with ongoing procedural and political issues at WIPO

The struggle among commercial powers and between specific industries and broader public policy goals places the WIPO Secretariat in an unenviable position—*coincé* between its mandate as a UN agency to advance the global public good, the interests of the majority of its Member States, and the need to keep its more powerful Members and traditional constituents on board. This reality means that procedural challenges can be expected to continue.

Reflecting on the recent WIPO General Assemblies, one delegate likened WIPO to a DisneyWorld—a virtual reality in which things are never quite as they seem. Behind WIPO's professional and orderly public face are multiple investigations into matters ranging from financial mismanagement to opaque hiring practices. Where there have been substantive disagreements on norm-setting discussions, the Secretariat has reported consensus or has taken matters into their hands to build it. Carefully crafted and closely negotiated decisions reappear distorted several months later. Countries arrive at WIPO with one position only for it mysteriously to flip a few days later. On several occasions, WIPO Members have expressed concern that procedural policies for the conduct of meeting and consultations are often unclear and sometimes altered mid-meeting. Even as the Secretariat urges countries that it is indeed the Member-driven organization they expect, even the most sanguine observers concur that the Secretariat exercises exceptional influence on WIPO's work and negotiations and that this is embedded in the organisation's culture. The task of discerning why, for whose interests and at whose bidding this occurs is beyond the scope of this note.

A more development-oriented IP global IP policy system will depend on the accountability of WIPO and its Member-driven character. Key priorities in this respect include the following:

- Geneva-based negotiators need to keep their capital-based colleagues within and beyond their IP agencies fully-informed of the range of issues and processes in play. Along with civil society advocates they need to be willing to highlight cases of bad procedure and conduct and to stand their ground on all procedural matters;
- coalitions will need to share and delegate responsibility for following all of the technical but politically significant aspects of WIPO's work (including WIPO's program and budget process and its new audit procedures); and
- Member States need to take up their own responsibilities and commit to engaging in an attentive, constructive, and probing manner in all aspects of their organization's work.

Finally, in the coming year, a key priority for all those interested in advancing the development agenda will be to engage on issues of substance on least three fronts: the development agenda,

⁵ Such as the UN Human Rights Commission, the UN Commission on Economic, Social and Cultural Rights (CESCR), the FAO International Treaty (Material Transfer Agreement negotiations ongoing), the WHO and its Commission on Innovation and Public Health World Health Assembly, the Convention on Biological Diversity (Access and Benefit Sharing) + Cartagena Protocol (labelling and liability), the UNESCO draft Convention on Cultural Diversity, the World Customs Union and Interpol.

ongoing WIPO norm-setting, and the further elaboration of elements of a positive multilateral agenda. Each of these is discussed in turn below.

(v) Lead substantive discussion of Development Agenda proposals

Having addressed the contentious question of *how* and *where* to proceed with discussion of the Development Agenda in the coming year, attention can and must now move to substantive debate on the many proposals on the table.

Critically, while discussions over the past year have surfaced mutual understanding on some issues, the Development Agenda calls for a more sophisticated dialogue on the various aspects of the relationship between IP and development than has occurred thus far. All WIPO Member States concur that IP *can* be a tool for development. None dispute that WIPO has devoted considerable resources to the administration and implementation of IP policies and many developing country Member States have been grateful for the assistance. While the confidence established by convergence on these preliminary issues prepares the ground for dialogue, all actors will need to move beyond oversimplification (e.g., IP=always good for development, IP=always bad for developing countries, IP technical assistance=always good for development, more IP protection=always better). Moreover, Member States must all desist from alluding to ‘development’ as though it were a single indicator and end-point to be advanced toward rather than a multi-faceted concept comprising multiple public policy objectives (e.g., An IP policy that is good for one aspect of development may compromise the achievement of another. An IP policy that works at one point in time of development may provide a constraint at others).

Key substantive priorities for advocates of the Development Agenda in the coming year include:

- reaching concrete decisions in advance of the next Assemblies on several Development Agenda proposals that already attract broad-ranging support (e.g., on mechanisms to ensure more demand-driven and effective technical assistance, stronger evaluation, improved internal management and oversight, and the adoption of a Code of Ethics for providers of IP technical assistance). Equal effort must also, however, be devoted to grappling with the more contentious underlying issues.
- leading discussion on ways to ensure WIPO’s norm-setting activities respond to development concerns—both in terms of the process and subject of norm-setting. Countries and advocates should, for example, prepare substantive documents, evidence and draft texts for consideration with respect to many proposals already under discussion (e.g., for a treaty on access to knowledge, for discussion of copyright limitations and exceptions, for a new initiative to protect the public domain, for international principles to protect against the misappropriation of traditional knowledge, for the defense of open standards in areas such as software, and for new approaches to stimulating and rewarding innovation—such as a treaty on medical R&D). They should also lead discussions on an appropriate methodology for assessing the development-impacts of new and existing international IP norms;
- devising the institutional mechanisms and processes to make certain that development retains the organizational priority it deserves. Here, lessons—good and bad—from the experience of other international organizations in ‘mainstreaming’ cross-cutting objectives into their work may be instructive—whether development in the WTO context, gender at the World Bank, or poverty alleviation at the IMF; and
- exploring concrete options and mechanisms for improving the consistency of WIPO’s work with its mandate as a UN specialized agency and to promote coherence of its activities with other UN agencies with objectives related to innovation, technological development, creativity and development. In so doing, there should be an examination of the ways in which other international organizations have undertaken similar tasks.

(vi) Take advantage of the slowdown in WIPO treaty discussions

The decision at the recent Assemblies to postpone diplomatic negotiations on the proposed Broadcasting Treaty and Substantive Patent Law Treaty (SPLT) provides opportunities to move ahead with efforts to integrate the development dimension into WIPO's norm-setting activities. Amidst the controversies about each treaty, the decision is also good news for WIPO itself. It highlights the seriousness with which Member States want to consider the issues at stake, their interest in substantive engagement, and their desire to handle norm-setting issues responsibly—all of which serve to build the long-term credibility and legitimacy of the multilateral approach to IP policymaking which WIPO offers.

A sound negotiation process calls for information gathering and consultation with key stakeholders (national and international), adequate time for stakeholders to reflect on the issues at hand, evidence-based decision-making, and a fair, predictable negotiation process. In this context, the decision to hold a three-day informal open forum on all issues related to the SPLT is welcome. Interestingly, this approach implements one of the recommendations of the elaborated Development Agenda proposal - for public consultation on WIPO's norm-setting activities.

Priority actions for moving a development-oriented approach forward should include:

- using the informal open forum on the SPLT to ensure substantive discussion of the merits and pitfalls of proposed norms, devise an approach that accounts for the interests of all Members, review the core challenges to be addressed, and assess the impacts of different proposals and options;
- taking advantage of the slowdown in the broadcasting negotiations to promote greater reflection by Members in their capitals and in Geneva. Particularly important will be public and industry pressure at the domestic level in key developed countries to prompt their negotiators to reconsider their positions on this issue;
- assuring the WIPO Secretariat that its relevance and role does not rely on constant promulgation of new standards. It already hosts and administers an important set of international agreements. Members will continue to rely on its expertise to implement them; and
- promoting alternative norm-setting proposals (e.g., for a treaty on access to knowledge, for international principles to protect against the misappropriation of traditional knowledge, for new approaches to stimulating and rewarding medical R&D) which touch directly on WIPO's core concerns (innovation, creativity, technological transfer, diffusion and technological capacity building) and to which WIPO could bring its resources, experience and skill to bear.

(vii) Promote a Positive Multilateral Agenda

To advance a development-oriented IP agenda, advocates need to provide leadership on the kind of international systems and public policies they believe could stimulate innovation, technology transfer, deliver global public goods, and ensure access to knowledge. Already, several important proposals and initiatives are on the table. Deepening the analysis, awareness and constituency to back these proposals is the vital next step. In particular, there is a need for concrete information and dialogue on how different proposals might work and on the real-world impacts and opportunities they would generate.

Priority areas for action and analysis to promote a positive agenda include the following:

- promoting new international frameworks and principles, including work to advance proposals such as the Access to Knowledge treaty and the Medical R&D treaty, and stronger international protection of the public domain. This should also include efforts to reform

existing laws and policy instruments to better promote innovation and creativity along with related development goals such as ensuring affordable access to educational materials, cultural life and medical technologies. Examples could include more effective provisions on copyright limitations and exceptions and stronger provisions for disclosure of origin in patents laws;⁶

- moving ahead with practical models for rewarding and stimulating creativity and innovation, sharing of knowledge and promoting technology transfer (including open scientific and publishing models, open source software systems, legal tools such as Creative Commons licenses, and compensatory liability regimes);
- highlighting complementary innovation, competition, and regulatory policies at the national level; and
- harnessing non-WIPO multilateral processes and opportunities to promote a development-oriented perspective. Efforts to bolster multilateral processes could simultaneously help governments to manage bilateral and unilateral pressures for excessive IP protection. Options include the use of human right treaty bodies (e.g., alerting countries to international human rights obligations in the context of bilateral FTAs)⁷ and the WTO's committee processes. At the WTO, one proposal is to draw attention to excessive IP regimes as barriers to trade, with undesirable anti-competitive and monopoly effects.⁸ On this basis, WTO Members could call on the TRIPS Council to review excessive IP provisions in bilateral agreements, poor quality patents and particular patent provisions—as potential barriers to trade as well as for their impact on critical public policy objectives.⁹

II. NON-GOVERNMENT PLAYERS, STAKEHOLDERS AND STRATEGIC ALLIANCES

This section sets out some suggested actions that specific stakeholders could take to help advance a development-oriented approach to IP policymaking. The suggestions are not intended to be exhaustive but rather to highlight some key gaps and priorities.

(i) *Non-government actors (NGOs, industry and media)*

The success of the push for a development agenda will rely on increased public awareness of the importance of IP policymaking to a range of public policy goals, the growth and diversification of public interest networks in both developed and developing countries interested in IP policymaking, and greater engagement in IP policymaking by industries whose economic interests diverge from those of traditional IP-holders. Greater use of the national and international media could help generate the public awareness and engagement necessary to defend and extend progressive IP policies, particularly in key strategic countries. In many instances, the faultline in IP policymaking is not a North-South one, but rather a divide between the interests of monopolies with a logical interest in maintaining their capacity to extract rents through ever stronger IP protection, and the broader public interest in innovation and access to technologies—which may not always be best served by the former.

Key actions should include:

- devising core messages and metaphors to counter the conventional wisdom propagated by those in favour of stronger international IP standards. A core lesson of the past few years is

⁶ See, for example, paper prepared for this Bellagio meeting by Carlos Correa (2005) “A Positive Agenda for Patent Reform and Harmonization for Developing Countries”.

⁷ See, for example, work conducted by 3D Trade-Human Rights-Equitable Economy (www.3dthree.org).

⁸ Note the China has recently tabled a paper asking the WTO Committee on Technical Barriers to Trade (TBT) to address ways in which IP rights can serve as barriers to trade—particularly where patent information is not well disclosed—making it difficult for countries to determine whether products comply with standards.

⁹ This proposal was put forward by James Love of the Consumer Project on Technology at a panel entitled “WTO, TRIPS and the Development Agenda—Access to medicines and knowledge”, at a Conference hosted by Consumers International, *Putting Consumers at the Heart of Trade*, on Wednesday 21 September 2005 in Geneva.

that ethical framing of IP policy issues has worked to the advantage of public interest groups; it helps to focus IP policy debates on core issues of concern to constituencies in specific countries—whether human rights, local industry development, freedom of expression, consumer safety, national sovereignty, the affordability of life saving drugs, access to educational materials, or international fairness. It is also important that the pro-development message is pro-innovation, pro-science and pro-business. On a number of fronts, the scientific interests of researchers and the economic interests of industry groups align with public interest objectives. It will also be important message to counter the notion that it is developing countries that must pay (though, for example, trade concessions) for their efforts to promote a more development-oriented IP system when such a system may provide more benefits to the public everywhere;

- engaging more lobbyists, advocates, campaigners and activists. At present, the broad pro-development agenda is supported at the international level more by analysts than by campaigners. Most activists are focused on issue-specific campaigns. The challenge is to support the growing range of sector- and constituency-specific campaigns¹⁰ while harnessing shared interests to advance a broader IP campaign that focuses on the broad global public interest, global public goods and the specific concerns of developing countries. This should also include working to persuade leading international development NGOs to re-engage with IP issues in a high profile manner;
- identifying and cultivating allies within industry, parliaments, the WIPO Secretariat, academia, and other multilateral organizations—and promoting awareness of alternative IP policies and models; and
- confronting and delegitimising the arguments, evidence and strategies of those IP rights holders opposed to a development-oriented IP agenda—in particular by using media coverage to promote transparency.

(ii) WIPO Secretariat

The Development Agenda provides the WIPO Secretariat an opportunity to increase its relevance and basis for support. WIPO's relevance is not defined by its success in pushing through new treaties but rather by its effectiveness at helping countries achieve national policy goals while implementing international obligations. WIPO should seize the chance to bolster its reputation as a key contributor to dialogue on global economic management—the Secretariat can bring expertise to bear on a range of policy issues related to the future of innovation, creativity technology transfer, access to knowledge and sustainable development. Together with the recent admission of a new range of NGOs as WIPO observers, WIPO has a new set of allies for more creative, forward-thinking work.

Among other actions, the WIPO Secretariat should:

- grasp the chance to broaden its constituency;
- welcome increased engagement by developing country Member States as vital to the organisation's vitality;
- focus on the future. This should include acknowledging the complexity of issues at stake in international IP policymaking and the need for nuanced approaches, grappling with the most dynamic aspects of the world's economy, offering the most responsive technical assistance, linking law to policy and to changing business realities, connecting expertise to the practical challenges faced by developing countries, and taking up cutting-edge conceptual issues; and
- look to other UN agencies for best practices for soliciting external input and increasing the quality of its engagement with the full range of stakeholders—including improved communications, more opportunities for dialogue, greater opportunities for stakeholders to

¹⁰ The topics of specific campaigns now range from concerns about public health, free speech, privatization of public space, libraries interested in fair use, the 'publicness' of culture, patents on life forms, the sharing of seeds, and the theft of traditional knowledge.

make materials available to Member States at its meetings, and increased use of expertise from a diverse range of perspectives.

(iii) *Academic community and research networks*

The success and credibility of the effort to devise an international IP framework that fosters innovation, creativity and development will depend on rigorous analysis and empirical evidence. The academic community can serve as the primary driver of the push for empirically-informed public policy discussion. It can bring evidence to political and conceptual debates about the kinds of policies that would best harness the creative potential upon which all economies depend.

In particular, scholarly communities should:

- develop international networks of researchers from both developing and developed countries to promote more systematic interaction and integration across the range of disciplines and fields related to IP policy—from investment, innovation, development, science and technology to economics, law, political science, technology management and international relations;¹¹
- integrate academic work with input from a range of different actors—academic researchers, policy makers, international negotiators, and civil society organizations; and
- help countries design creative, concrete and positive national IP policy strategies that advance development goals. In particular, they could:
 - provide advice regarding implementation of existing international commitments—particularly in designing, administering and making use of IP policies in ways that advance their development;
 - devise analytical frameworks for assessing issues such as the relationship between IP policies and national development indicators, piracy and the development impact of new proposed laws and international norms;
 - propose options and best practices for managing the administration and enforcement of IP laws, engagement in IP-related dispute settlement in WIPO and TRIPS, and participating in IP-related litigation¹²; and
 - generate country-specific empirical data to aid countries in assessing the development impacts of proposed policies and international treaties.

¹¹ This recommendation also emerged from an international seminar, *Contributions to the Development Agenda on Intellectual Property Rights* that took place at the United Nations University (UNU-INTECH), in Maastricht, on September 23 and 24, 2005. See

http://www.intech.unu.edu/events/workshops/WIPO%20meeting_sep2005/WIPOpressrelease_final.doc

¹² Ongoing patent and copyright litigation is often under-appreciated as a dimension of the global policy landscape, noting difficulties faced by developing countries in participating in such litigation. Similarly, possible investor-state disputes in the area of IP under the terms of bilateral investment agreements are also worthy of greater consideration.