

What Next for the Development Agenda at WIPO? Priorities for 2006

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In February 2006, WIPO's Provisional Committee on Proposals Related to a WIPO Development Agenda meets for the first time. In launching the Development Agenda discussions in 2004, WIPO's members recognised that intellectual property policies and laws raise a complex set of development considerations and that efforts should be made to ensure WIPO's work properly addressed this challenge.

In the first year's discussion, however, little substantive progress was made. Often submerged in procedural debate, many members became frustrated and the space for dialogue diminished. Betraying the importance of the issues at stake, detractors pushed the idea that the Agenda was a purely political exercise driven by a select group of countries. This year, the Development Agenda must be accorded the respect and serious engagement that the issues it raises deserve.

Charged with presenting concrete decisions for consideration at the 2006 General Assemblies, the Provisional Committee has just three meetings and less than eight months to fulfill its mandate. With the question of *how* and *where* to proceed with discussion of the Development Agenda resolved, what are the core priorities for getting the Committee's discussion off on the right track?

Substantive Discussion of Development Agenda Proposals

Attention this year must focus on substantive debate on existing and new proposals. Concrete decisions should be made on those proposals that already attract broad-ranging interest or support, such as proposals for mechanisms to ensure more demand-driven and effective technical assistance, stronger evaluation of WIPO programmes and activities, improved internal management and oversight, and a code of ethics for staff and providers of WIPO's technical assistance. Equally, there must be serious engagement with the more contentious proposals; this in turn will demand a far more sophisticated dialogue on the relationship between IP and development than has occurred thus far.

In the 2005 discussions of the Development Agenda, a good deal of time was spent dispelling misunderstandings and building

mutual understanding on some of the basics (for instance, none dispute that IP *can* be a tool for development; none deny that WIPO has devoted considerable resources to the administration and implementation of IP policies and that many developing country member states have been grateful for the assistance). This year, all actors need to resist the temptation to spend any more time either on political posturing on these matters or on over-simplifications that erode the quality of discussion (i.e., IP is always good for development; IP is always bad for developing countries; IP technical assistance is always good for development; or, more IP protection is always better).

We know that development is a multi-faceted concept that comprises multiple public policy objectives. In 2006, the starting point for discussion must be the acknowledgement that an IP policy that is good for one aspect of development may compromise the achievement of another, and an IP policy that works at one stage of development may at another point constitute a constraint. Only with this nuanced approach will there be scope for intelligent consideration of the most forward-looking proposals on the table, including calls for development impact assessments of proposed new international norms, and new strategies for promoting access to knowledge and protecting information in the public domain.

In 2006, WIPO member states will also need to engage substantively with proposals for institutional mechanisms that ensure development retains the organisational priority it deserves on a systematic, long-term basis. Here, lessons – good and bad – from the experience of other international organisations 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.

Build Cross-regional Coalitions and Alliances at the Multilateral Level

Advancing the WIPO Development Agenda will demand greater effort among all stakeholders to understand different perspectives, solve problems and build consensus where possible. In 2006, the supporters of the Development Agenda – among them both developing and some developed countries – must devote more energy to bolstering and expanding their coalitions and looking for alliances among industry, civil society and countries that share particular interests.

With billions of dollars on the table, the determination of the most powerful states to defend and advance their share of the global knowledge economy for commercial interest groups will continue to translate into intense pressures on developing countries to defect from coalitions and/or adopt positions preferred by key developed countries and industries – ranging from promises of more aid, letters to presidents, and efforts to sideline Geneva diplomats in favour of less politically-aware officials in capitals. These forces are most difficult to resist for those countries most dependent on WIPO and others for development financing. In this context, it is imperative that the more active and better-equipped developing countries and development advocates devote greater attention throughout the year to talking with, listening to and exchanging views with a broad range of members – from the poorest to the richest.

Monitor and Transform Procedural Matters at WIPO

Procedural challenges at WIPO can be expected to continue over the coming year. Reflecting on the 2005 WIPO Assemblies, one delegate likened WIPO to a DisneyWorld – a virtual

reality in which things are never quite as they seem. Although the Secretariat keeps assuring countries that WIPO is indeed the member-driven organisation they expect, even the most sanguine observers concur that the WIPO Secretariat has a distinctive organisational culture. In the past year, closer scrutiny of WIPO's activities by members and external observers has brought to the public's attention a pattern of exceptional and sometimes undue influence on the intergovernmental processes which are supposed to govern its workplan and norm-setting activities (evidence of a series of financial and management irregularities has also emerged).

Fairer, more transparent processes will require action from members and also from the Secretariat. The accountability of WIPO and its member-driven character relies on the commitment of member states to attentive, constructive and probing engagement in its work. Geneva-based negotiators need to keep their capital-based colleagues within and beyond the IP office better-informed of the range of issues and processes in play – and to stand their ground on matters of process. Where resources are limited, developing countries will need to share and delegate responsibility for following the technical but politically significant aspects of WIPO's work (including the organisation's programme and budget process and its new audit procedures).

To guard against pressures from commercial interests and powerful members that might prejudice the Secretariat's neutrality, the membership needs to consider institutional reforms that promote greater transparency and clarify procedures. It also needs to devise mechanisms to ensure the Secretariat consults with a broader range of external stakeholders than its traditional constituency of IP holders. To this end, the Committee could call for an exploration of the best practices of other UN agencies 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 to make materials available to WIPO member states and greater use of expertise from a diverse range of perspectives.

Harness Public Interest and Expertise in Multilateral and National Policy-making Processes

Finally, the Development Agenda discussion will benefit from intensified efforts to harness public interest, expertise and support both at WIPO and at the national level. Across the international system, consultation with key stakeholders is now considered a basic requisite for evidence-based, fair and predictable international processes. In 2006, the three-day informal open forum on all issues related to the proposed Substantive Patent Law Treaty provides an opportunity to test one of the recommendations of the elaborated Development Agenda proposal: public consultation on WIPO's norm-setting activities. To achieve success, the forum will have to enable member states to properly weigh the merits and pitfalls of proposed norms, consider different options and hear from the diversity of perspectives necessary to devising a balanced approach. Non-governmental observers, for their part, should take up the opportunity to provide substantive inputs, and to elaborate and evaluate the various proposals.

The quality of discussions in WIPO will also depend on the commitment of member states to consultative national level policy-making processes that engage the full range of relevant domestic ministries and key non-government stakeholders from industry, civil society and academia. More effective and better-informed domestic processes will help all countries develop more coherent domestic IP policy strategies, ensure that international positions reflect the broad range of national interests and maintain consistent international strategies. More systematic interaction and linkages between analysts in the fields of IP, investment, innovation, development, and science and technology is one necessary step. In developed countries, industry, academics and civil society groups need to continue to push for both domestic IP policies and international IP agendas that reflect and balance the diversity of industry interests, public concerns and international responsibilities.

A More Enabling Disposition from the WIPO Secretariat

It is no secret that the launch of the Development Agenda was not welcomed by all within the WIPO Secretariat. Many felt the call for the Development Agenda reflected a misunderstanding

or lack of appreciation for the organisation's work. Within the Secretariat, the more forward-looking staff believe that the organisation ought to be less defensive and instead embrace the Development Agenda as an opportunity to bolster WIPO's long-term relevance and credibility. They understand that increased engagement by developing country member states must be welcomed as crucial to the organisation's vitality and viability. In the coming year, the success of the Development Agenda will rely on those with such a vision to take greater leadership.

WIPO's greatest challenges emerge not, as staff at the Secretariat often appear to fear, because it is failing to generate higher IP standards quickly enough, but because it is yet to respond to the changing needs of many of its members, the growing public interest in its work, and the fact that its activities have a far more critical influence on the direction and outcomes of global economic activity and social welfare than ever before.

As the knowledge-economy expands, a growing number of government agencies, scientists, public-interest groups and industries – 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 new technologies and business models alter economic dynamics, the pressure to properly explore the range of possible options for promoting innovation, creativity and economic dynamism are here to stay – whether through altering the approach to IP policies, using such policies more creatively, or looking beyond them.

To be sure, many countries still need basic assistance, education and training on the implementation of international IP obligations, the options before them, and the costs and benefits of different approaches in light of their development goals. But they need advice that provides them access to the best available thinking. A sustainable long-term vision for WIPO thus must be one that focuses on broadening the Secretariat's expertise, taking up the most cutting-edge con-

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ceptual issues, acknowledging that there are no simple answers, reflecting on changing business realities, and engaging with innovative new ideas. This approach would open up the scope for WIPO to raise its international profile as a thoughtful player in global policy debates.

In moving toward this broader vision, the WIPO Secretariat will find that it attracts more enthusiasm and a broader constituency for its work. The recent admission of a range of NGOs as WIPO observers provides the Secretariat and membership with

a new set of allies for more creative, forward-thinking work. A broad array of industries – both IP holders and not – are showing a growing interest in WIPO's work and looking to it for an expanded vision. Many member states and stakeholders are signaling to the Secretariat that it can rely on their support were it to respond more positively to calls for more thinking on new international guidelines or norms on the public domain, on access to knowledge, and for new approaches to stimulating and rewarding medical R&D.

Taking seriously its mandate as a UN specialised agency, WIPO would also find allies in other international and regional organisations if it devoted more energy to collaborating with their efforts related to the future of innovation, creativity, technological development and access to technologies and information.

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Biological Resources Access Treaty a Step Closer

A possible framework is starting to emerge for accessing genetic resources and sharing the benefits arising from their use under the Convention on Biological Diversity (CBD).

After a tough meeting in early February 2006, the Ad Hoc Working Group on Access and Benefit-sharing agreed to send draft recommendations on an international regime on these controversial issues for the consideration of the parties to the CBD, which are to meet in Curitiba, Brazil on 20-31 March 2006.

The nature, sufficiency and methodology of certificates of origin, source or legal provenance, and whether such certificates should be linked to a mandatory disclosure requirement in patent applications, were at the centre of the working group's deliberations. Lack of agreement on whether the new regime should be legally binding led to the bracketing of substantial parts of the draft legal text. The term 'legally binding' was dropped from the title of the draft text sent to Curitiba.

The African Group, the Group of Like-minded Mega-diverse Countries and Latin American countries supported a Chair's text – which included language on objectives, scope, ownership, accessing genetic resources, accessing traditional knowledge, benefit-sharing, certificates of origin and other measures – as a good basis for negotiations on an international regime. Australia, New Zealand, Korea and the EU, however, said the text moved too fast in the direction of a legally-binding instru-

ment. Together with Switzerland, Canada, the US and Japan, they suggested that more research and studies were necessary, for example analysing gaps in the international governance of access and benefit-sharing and exploring what certificates of origin, source or legal provenance could entail. They stressed that while the Chair's draft could be used for discussion on an international regime, it should not be forwarded on to the CBD Conference of the Parties (COP) as a proposed protocol.

Difficult negotiations followed, during which Australia, the EU and Canada objected to a revised draft on the grounds that it still did not reflect the views they had expressed verbally and submitted in writing. In the end, delegates proceeded to bracket large parts of the text to signal lack of agreement on a number of key provisions. For example, the title of the section reading 'access to genetic resources' was placed within square brackets owing to developing country concerns that a section should not be committed to providing such access; rather, they suggested that references to access be embedded in measures to govern and regulate the means by which admission to use genetic resources is granted. Several developed countries, however, stressed that the regime was as much about ensuring access to biological resources as benefits.

Certificates Subject of Focused Talks

Many delegates suggested that the international regime could potentially add value by creating a system for internationally standardised certificates of origin and/or legality. A number of developing countries rich in genetic resources acknowledged that certificates of provenance could be useful, but argued that they would not make a real difference unless national intellectual property rights legislations were mandated to require such certificates as a means to disclose the origin of the resource, the existence of prior informed consent to access and benefit-sharing arrangements as prerequisites for the granting of patents.

The developed country group resisted demands to include a provision on disclosure requirements in patent applications in the text, defending its position on similar grounds it used at the WTO Hong Kong Ministerial Conference in December 2005 and at meetings at the Council for Trade-related Aspects of Intellectual Property Rights (TRIPS) on the TRIPS-CBD relationship. Some suggested that an amendment to WIPO's Patent Co-operation Treaty could allow for a requirement on disclosure of source in national legislation. Others, including the US – which is not party to the CBD – argued that intellectual property rights regulations should not be reformed at the international level. Developing countries' oft-stated conviction