

The World Intellectual Property Organisation and the Development Agenda

abstract

In this paper the current political debates at the WIPO relating to the proposed 'development agenda' are set out and contextualised. Central to the proposal for the WIPO DA is the need to make the link to the United Nations (of which the WIPO is a specialised agency) actually mean something. Thus, at the centre of the WIPO DA is an engagement with the hitherto accepted mission of the organisation to 'promote' IPRs. The paper discusses the main components of the WIPO DA and the discussion to date regarding their adoption and modification by the WIPO.

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Although until recently it was a relatively under noted fact, for over thirty years the World Intellectual Property Organisation (WIPO) has been a specialised agency of the United Nations. As a specialised agency, the WIPO is meant to reflect and respond to the priorities that are set in the UN General Assembly. These priorities have often been established in response to arguments for the promotion of economic development in the poorer country members of the UN, and are part of the mandate of a number of other, development-oriented, specialised agencies. However, the WIPO is an organisation that takes a specific (and idiosyncratic) view of development; its documents and activities revolve around the argument that development is best served by a strong intellectual property regime. However, while this is a position that is strongly held by the negotiators and representatives of the richest and most developed members of the WIPO, it is a position that is by no means universal among the organisation's wider membership. Hence, in September 2004 a number of the WIPO's members set out a new Development Agenda; the title being a direct response to the WIPO's own Patent Agenda which had been established by the organisation a couple of years before.

In this paper I seek to contextualise and explore some of the main issues in this attempt to change the priorities of the WIPO and reorient it towards a different perception of the role of intellectual property in economic development. Currently the discussions around the Development Agenda have stalled, but the project to establish this different set of organisational priorities for the WIPO, is itself an interesting development in global politics. I start by briefly setting out the historical development of the WIPO as an international organisation, before setting out the main elements of the Development Agenda itself. This leads me to focus on the political issues that surround the question of the organisation's status as a specialised agency of the UN, before concluding that the pressures brought to bear on the WIPO by the development agenda may prompt a further proliferation of forums where the global politics of intellectual property regulation are likely to take place.

A brief history of the World Intellectual Property Organisation

The roots of the World Intellectual Property Organisation stretch back into the nineteenth century, with the 1883 Paris Convention for the Protection of Industrial Property (for patents, trademarks, and industrial designs), and the 1886 Berne Convention for the Protection of Literary and Artistic Works (for copyrights). The conventions' member states' governments quickly realised that there were significant commonalities between the treaties, and that this suggested a joint secretariat would be both sensible and also more efficient. This new joint secretariat was established in 1893, and placed under supervision of the Swiss government with offices in Berne (moving to Geneva in 1960). During the first decades the organisation oversaw the slow development of further international treaties attending to various elements of the (international) regulation of intellectual property.¹

As new states gained independence during the post-1945 period of accelerated decolonisation, some joined the *Bureaux Internationaux reunis pour la protection de la propriete intellectuelle* (BIRPI), by signing onto one or other of the treaties it oversaw. While expanding the potential international reach of intellectual property, when these new members attended conferences organised by the BIRPI their delegations were often sharply critical of the manner in which patents and other

intellectual properties were being utilised in the international system. Indeed, criticisms from developing countries would repeatedly surface, and be effectively sidelined for the next thirty years. However, it is important to note that once the membership started to expand, the happy (relative) consensus of the early years was not only more often challenged, but the BIRPI (like the WIPO after its establishment) needed to spend more resources and effort maintaining the semblance of consensus over the regulation and further extension of regulation of intellectual property.

Until the 1960s although the *Bureaux* was an international agency, its operations was the responsibility of one member (the Swiss government). Recognising this anomaly, a new convention consolidating the previous governance arrangements into a formal international organisation was adopted in 1967 at the BIRPI's Stockholm Conference. This effectively facilitated the establishment of the WIPO, as the responsibility for the budget, programme and activities of the organisation was formally assumed by its initial twenty members,² removing this responsibility from the Swiss.

This process of institutional development was driven by Arpad Bogsch, first as Deputy Director of the BIRPI from 1963, then as Deputy Director General of the WIPO on its formation, and finally as Director General from 1973 to his retirement in 1997. Bogsch strove to establish the WIPO as a universal organisation for the protection of IPRs and believed the link with the UN was crucial to this end; his first major move as the new Director General was to initiate proceedings to gain specialised agency status. Indeed, the organisational structure of the WIPO was established so that it already resembled a UN specialised agency, making the assumption of this status in 1974 easy to complete.³ The *Bureaux* and specifically Bogsch believed that working inside the UN system would also encourage more developing countries to join the organisation, and would enable the internal administration of the organisation to benefit from the advantages available to UN agencies.⁴ However, widening the membership prompted some concerns among the European, United States' and Japanese delegations as they (rightly as it turned out) were worried that these new members might question the key *promotional* aspects of the WIPO's activities.

Nevertheless, the link with the United Nations strengthened the WIPO's international position: it was able to gain both diplomatic advantage from being a member of the UN system, and demonstrate its central role in the realm of global economic governance. On becoming a specialised agency of the UN the WIPO had already nearly doubled its membership to thirty-six signatories of its establishing Convention; in the next decade this rose to a total of 104 members. Unlike other UN organisations, the WIPO is largely funded by fees that the private sector pays for the use of the Patent Co-operation Treaty, freeing it from many of the budget related pressures that shape and sometimes constrain other UN agencies. While the member countries do make a small contribution to the running costs of the organisation this is minimal compared to the fee and administration income.

The formal agreement with the UN set out how the two organisations would co-ordinate their activities and co-operate over their strategic direction (article 2), with an obligation by the WIPO to follow any recommendations of the UN and work with other agencies to develop resources to tackle problems identified by the WIPO and the other specialised agencies (article 5).⁵ Other commitments related to information

and documents (article 6), the provision of statistics (article 7) and technical assistance (article 9), as well as setting out its diplomatic status within the UN (article 17) that extended to the organisation's staff considerable diplomatic benefits.

Importantly, the WIPO was explicitly obliged to work with the UN Conference on Trade and Development (UNCTAD), the UN Development Programme (UNDP) and the UN Industrial Development Organisation (UNIDO) to promote and facilitate 'the transfer of technology to developing countries in such a manner as to assist these countries in attaining *their* objectives in the fields of science and technology and trade and development' (article 10, emphasis added). The question of how the WIPO's activities have interacted with, and have reflected (or have not reflected), developing countries' priorities will be returned to below as it has become a major element of the criticisms levelled at the WIPO.

Prior to the establishment of the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement as part of the new World Trade Organisation in 1995 at the end of the Uruguay Round of multilateral trade negotiations, the WIPO had been responsible for both the negotiation and oversight of international treaties on intellectual property. However, the organisation's relative ineffectiveness in enforcing the various treaties it hosted led to significant pressure for the private sector to include intellectual property under the new multilateral trade organisation established at the WTO.⁶

Since the conclusion of the Uruguay Round, and the shifting of responsibility for enforcement, the WIPO's three principal areas of operation are: registration; technical support; and development of further governance measures.⁷ The first of these activities is primarily concerned with the administration of the Patent Co-operation Treaty (PCT); this involves the processing of applications under the PCT and as such is a direct service to owners of, and applicants for, patents in various jurisdictions. Alongside this PCT-related activity the WIPO also processes the international registration of trademarks (under the Madrid System), acts as a depository for internationally deployed industrial designs (under the Hague Agreement) and acts as a registry for applications for appellations of origin (under the Lisbon Agreement). These activities provide the majority of the funds for the rest of the WIPO's undertakings, and has allowed the WIPO to maintain a relative independence.

The second area of activities concerns technical support and assistance to help members build the capacity to manage the protection and regulation of IPRs, to fulfil their international obligations due to membership of the WTO or where particular members of the WIPO have agreed bilateral trade or investment treaties that involve undertakings regarding the protection of intellectual property. This support ranges from information dissemination activities, including collections of members' existing laws for guidance to policy makers developing new legislation, to a wide ranging education and training program. Indeed, since 1993 the WIPO's own Academy in Geneva has offered a diverse range of residential courses and more recently has developed an extensive on-line learning program. This is intended to "enable the participants after returning to their respective countries, to become active in the formulation of government policies on intellectual property questions".⁸ The third area of the WIPO's activities involves the promotion of compliance with existing treaties, including those now encompassed by the TRIPs agreement, as well as the updating and revision of these treaties in response to members requirements, and the

organisation of negotiations towards the development of new treaties in the realm of intellectual property. Most obviously this aspect of the organisation's current activities has been taken up with its multifaceted response to the increasingly global reach of digitised communication.

Therefore although it no longer has any significant role in the enforcement of treaty compliance, the WIPO still plays a major role in the regulation and recognition of globalised intellectual property rights. While it is now joined by the World Trade Organisation, which has its own TRIPS Council as a venue for political discussion and deliberation about the global regulation of intellectual property, the WIPO remains an important element in global intellectual property politics. And it is a recognition of this continued importance that prompted a number of its members to seek to shift its priorities in the new millennium.

The Proposed Development Agenda

At the beginning of September 2004, Argentina and Brazil informally circulated to the members of the WIPO a proposal to be discussed in the then imminent WIPO General Assembly; this would become the proposal to establish a Development Agenda for the WIPO.⁹ Although there had been some discussion of the developmental dimension of intellectual property at previous General Assemblies, this was the first time since the WIPO's establishment that a formal agenda had been proposed, rather than merely a fragmented set of measures raised during Assembly meetings. This more formal proposal reflected a number of NGO-facilitated seminars and research reports, including the influential report from the UK Commission on Intellectual Property Rights,¹⁰ with its linked workshops and final conference, where the position articulated in the Development Agenda itself had started to be explored, as well as the 'Future of the WIPO' conference organised by the TransAtlantic Consumer Dialogue at the time that the Development Agenda was being finalised. The Development Agenda is supported by a number of public interest non-governmental organisations and represents a reflection of their ongoing critique of the manner in which the role of intellectual property in development has been presented in the post-TRIPs period.¹¹ Almost immediately upon presentation, the proposed Development Agenda gathered another eleven developing country co-sponsors (Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Sierra Leone, South Africa, Tanzania and Venezuela) and became the focus for developing country negotiations at the WIPO, led by the 'Group of Friends of Development'.

The proposed Development Agenda focuses on the assertion that has been central to the WIPO's practices; that the WIPO exists to 'promote intellectual property'. The proposal calls into question the compatibility of this goal with the expected objectives of an agency associated with the UN. During the October 2004 WIPO General Assembly it was unanimously agreed that this therefore meant that intellectual property could only be 'promoted' to the extent that such promotion also served the developmental aims of the wider UN system.¹² Furthermore, the proposal also represented the views of a wide range of academics and non-governmental organisations that had recently signed the Geneva Declaration on the Future of the WIPO, likewise arguing for a more clearly defined set of developmental priorities for the organisation.¹³ However, while the developing country sponsors of the Development Agenda saw this as a wide-ranging set of issues that should help

(re)shape the WIPO's overall approach to the question of intellectual property, perhaps unsurprisingly, many of the developed country representatives at the Assembly, while willing to acknowledge the role of IPRs in development, also wished to limit the scope of discussion to the question of technical assistance.

The WIPO Development Agenda itself starts by quoting a paragraph from the Doha Development Agenda that was launched during the WTO's fourth Ministerial Conference (in November 2001). This acts to link the Development Agenda to a wider range of proposals and actions that have "all placed development at the heart of their concerns".¹⁴ This initial statement was then followed by seven agenda items:

1. The 'development dimension' has been increasingly recognised across the institutions of global governance, and through the Doha Development Agenda has specifically been introduced into the realm of the global governance of IPRs;
2. As the WIPO is a specialised agency of the UN it is already mandated to "take into account the broader development goals that the UN has set for itself, in particular the Millennium Development Goals" and this should be reflected more clearly in the perspectives and practices of the WIPO itself;
3. Recognising the crucial norm setting activities of the WIPO, as related to the negotiations towards the Substantive Patent Law Treaty, for instance, the WIPO must recognise and include not merely the need for national flexibilities in supporting developmental aims, but also must better recognise the public-regarding dimension of intellectual property;
4. Because technological transfer is a key element to development, and because, despite claims to the contrary, the international IPR-system has not fostered extensive transfers of technology, a new subsidiary body of the WIPO needs to be established to look at what measures could be taken to reduce the barriers to transfer of both technology and scientific research;
5. One of the key areas that has concerned developing countries has been enforcement, and thus the Advisory Committee on Enforcement, set up by the WIPO in 2002, 'should be guided by a balanced approach to intellectual property enforcement' and not merely focus on the interests of rights' holders and curbing infringement. Rather, equity and the issue of anti-competitive practices must be included in the committee's work;
6. Technical assistance needs to be better tailored to individual country's needs and also needs to more focussed on balancing the costs and benefits of protecting intellectual property; such support must also focus on how developing countries can maximise the benefits of the existing flexibilities in the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement;
7. The WIPO itself must serve all sectors of society, as well as the interests of all its members. Too often the WIPO has conflated user-groups and other NGOs, and thus has not fully recognised the public-regarding dimension of the protection of IPRs, but rather has emphasised the interests of private and commercial rightholders.

These issues represent a cross section of criticisms that have been made of the WIPO over its history, although seldom have they been articulated together, nor formed a formal proposal for reform of the organisation's practices and activities.

During the General Assembly's initial discussions the US representative asserted that the Development Agenda "appeared to be premised on the misconception that strong intellectual property protection might be detrimental to global development goals and

that the WIPO had disregarded development concerns”, and stressed that the “thought that weakening intellectual property would further development was as flawed as the idea that an intellectual property system alone could bring about development”.¹⁵ However, this largely misrepresented the proposal; it sought neither to generally reduce the protection for IPRs, nor to suggest that intellectual property was the only problem. Rather the Development Agenda seeks a re-orientation of the WIPO towards a more developmental set of concerns, and sets out the argument that the protection and enforcement of IPRs cannot be seen as an end in itself.

These sorts of misunderstandings led the Group of Friends of Development to refine and further develop the proposed Development Agenda.¹⁶ This work also prompted a formal proposal from the US Government, suggesting the establishment of a Partnership Program for the WIPO reflecting its existing and sufficient development orientation.¹⁷ The US proposal aimed to rework some of the technical assistance programs already delivered by the WIPO, but argued at some length that the wholesale reorientation of the WIPO is not required as it is already (potentially) able to fulfil the role the Development Agenda envisages for the organisation. Indeed, it is apparent that similar forces that were able to sideline a (in many ways quite similar) Brazilian UN resolution on IPRs from 1961 are moving to attempt to likewise stifle and limit the impact of the WIPO Development Agenda, although this time the political context in which these debates are played out is different.¹⁸ Indeed, the relatively recent heightened awareness of the role of intellectual property in the global system (reflecting the claims for an information age, and informational development) alongside the manner in which the TRIPs agreement was included in the establishment of the WTO, have prompted a more detailed critical engagement with the mechanisms of regulation around intellectual property.

Both the staff of the WIPO’s International Bureau, and the representatives of the developed countries have recognised that the dispute concerns the normative underpinning of the governance of intellectual property itself. The key demand of the Development Agenda is to re-establish, at the global level, the traditional public policy aspects of intellectual property, and specifically how public policy ends can be related to IPRs. This goes against the privileging of private rights that has informed most IPR-related global governance since the establishment of the TRIPs agreement.¹⁹ The underlying logic of the Development Agenda, therefore is perhaps best understood as an attempt to ‘mainstream development’ at the WIPO. Most importantly its supporters stress that contrary to the position adopted by the US delegation, the Agenda impacts on all the various elements of the WIPO’s activities, including the expansion of differential treatment among the members, directly related to their levels of development. It is here that very clearly the developing and developed country members of the WIPO disagree: mainstreaming development for the Group of Friends of Development, and their supporters, is much more than merely adding new ‘tools’ to the technical assistance program.

Furthermore, the Group has become more strident in arguing that the WIPO must be seen as a membership organisation, and as an intergovernmental institution intended to serve its state members. The WIPO should not be regarded in any way as dependent on, or subservient to the private rightsholders who use its services. As one of the Group’s statements sets out: the WIPO

is answerable to its member states and its existence depends on its Members only. The global protection systems which contribute significantly to WIPO's income are systems that have been created by Member States. Rightholders must not lose sight of the central role played by Member States in the establishment of these services. Consequently, as much as the International Bureau should strive to provide efficient services as mandated by Members, payment for these services by rightholders should in no way provide the basis for anyone to claim that the users of these protection systems have the right to determine the agenda or priorities of the Organisation.²⁰

However, given that these corporations also have significant leverage with many of the members of the WIPO, it is not clear that this influence can so easily be restrained or limited. Indeed, *Intellectual Property Watch* reported that one industry representative claimed that they were in Geneva, for the October 2005 WIPO General Assembly, to follow an 'anti-development agenda'.²¹

Since being first presented to, and welcomed by, the WIPO's General Assembly the Development Agenda has been the subject of three Inter-Sessional Intergovernmental Meetings (IIM) in 2005. Once certain technical issues about the capacity of the IIM to discuss reform had been settled, during these meetings the Agenda prompted a wide range of further proposals; these ranged from a number of representations from developed country members of the WIPO and their supporters that suggested there should be either no, or only minimal, reform, to proposals from other members of the WIPO that proposed a more radical reorientation and restructuring of the organisation as the only way it could be made to serve the developmental needs of the majority of its members.²² However, not all developing country members of the WIPO fully support the proposal, with the group that does depicted by some commentators as merely seeking to reduce the input costs for their emergent industries, rather than being interested in development more widely.²³

The proposals that are most critical of the organisation recognise that while the WIPO has performed relatively well as regards service provision (e.g. the Patent Co-operation Treaty) and dispute settlement (e.g. the Uniform Domain Name Dispute Resolution Policy), it has been less successful in serving the interests of its developing country members in its negotiations over new treaties and agreements, has failed to fully establish evidential links between development and intellectual property, and has also failed to appreciate or properly assess the actual impact on countries of the rules it supports and the technical assistance it delivers.²⁴ However, because many of the developed country members' representatives in Geneva do not accept the criticisms levelled at the WIPO and its practices, there has been little agreement on how to take the agenda forward.

While there has been some discussion of the establishment of a specialised Standing Committee on Intellectual Property and Development, many developing countries' representatives see this as a mechanism by which the WIPO secretariat and the developed countries can effectively (again) sideline developmental concerns.²⁵ As before, these debates have mostly pitched the developing countries against the developed country members of the WIPO. A number of the developed countries have argued that the scope of the existing Permanent Committee on Co-operation for Development Related to Intellectual Property could be expanded to deal with the

developmental issues raised by the Development Agenda. For many of the Agenda's supporters, as this committee had failed to expand the developmental dimension at the WIPO in the past, this could be no solution, and after the third IIM, the General Assembly agreed to its abolition; the first shift in procedures prompted by the Development Agenda, albeit a relatively minor victory.²⁶

At the centre of the Development Agenda debate are differing assessments of the scope and previous success of the WIPO's activities. For the rich developed countries the UN does not need another development agency, and the representatives suggest both United Nations Development Program (UNDP) and the United Nations Conference of Trade and Development (UNCTAD) are suitable forums for dealing with developmental issues, not the WIPO which should remain a technical agency. Ironically, UNCTAD for many years was very active as regards intellectual property issues, specifically linked to the transfer of technology, but was effectively marginalised during the Uruguay Round of multilateral trade negotiations, and has not recovered its influence on the global governance of intellectual property since.²⁷

For the developed countries, the promotion of development issues at the WIPO is essentially a matter of technical assistance to bring countries into compliance with their TRIPs-related commitments, from which the developmental benefits will then flow by definition. This limited view of the scope of the WIPO's activities is contested by the developing countries' representatives: firstly on the grounds that actually the WIPO is already more a norm-generating organisation than merely a supplier of technical support; and secondly, the WIPO must integrate developmental concerns into its workings because the use and extension of IPRs actually has considerable, and often (quite immediate) detrimental effects on developing countries developmental paths.

This division has also been reflected in the views of a number of interested non-state parties. Thus, civil society organisations have mostly lined up on the side of the Friends of Development, while industry organisations have supported the position against reform adopted by the US, the EU and other developed countries' representatives.²⁸ However, while the debates around the Brazilian UN resolution some forty years ago were notable for the major involvement of private commercial groups, in the recent debates non-governmental groups have also been actively involved, supporting the developing countries both politically and with well developed research.²⁹ There has also been some divergence between the developed countries positions, with the EU (under the leadership of the UK in the second half of 2005) seeking to extend the discussions while also 'harvesting' those proposals from the agenda that already have wider support.³⁰ Even so, the most widely supported proposals are those linked to technical assistance, and therefore the Development Agenda's wider concerns and dynamic remain at present frustrated by resistance of the WIPO's most powerful members.

Although clearly the proposals that form the Development Agenda are still being discussed, it seems unlikely that there will be any immediate change at the WIPO. The Provisional Committee that was been empowered to examine the issues around the WIPO Development Agenda, is an unprecedented form of deliberation at the WIPO and thus its ability to fulfil its mandate is currently unknown.³¹ The danger is that without a formal existence, and despite comments by members of the WIPO staff

that it might be considered a 'stepping stone' to a permanent committee, the deliberations and conclusions of the Provisional Committee may be relatively easily ignored. However, as it has turned out the provisional committee in its first set of meetings was unable to produce a set of recommendations for the WIPO General Assembly on how to progress the Development Agenda. Perhaps unsurprisingly, the 'Friends of Development' group and the Developed Countries group (referred to as 'Group B') hold seemingly unresolvable positions over some of the elements of the Development Agenda proposals. Having taken informal soundings that indicated that there were some proposals that members of the developed country group could not accept as a basis of discussion, the chair of Provisional Committee, Gauto Vielman, put forward a Chair's text that included only such proposals where he felt it *would* be possible to construct a consensus.³²

This chair's text organised proposals into five categories: technical assistance and capacity building; norm-setting and flexibilities; public policy and public domain, technology transfer; information and communications technologies and access to knowledge issues; and assessment, evaluation and impact studies, bringing together around 100 proposals relating to various aspects of the original Development Agenda. However, by its very character such a Chair's text did not include the more contentious proposals that were at the heart of the political project that the Development Agenda represents. Thus, despite gaining support from the major developed countries, and a number of less-developed country members, delegates and representatives from the original proposing countries saw this manoeuvre as typical and exemplary of the political behaviour that the Development Agenda was formulated to halt.³³ Indeed a Brazilian official stated after the negotiations had essentially collapsed (with the Chair's text joining a wide range of other proposals all of which needed to be forwarded to the General Assembly), the countries that had proposed the Development Agenda 'do not accept the downsizing of the agenda without real negotiation', arguing that the Chair's text was 'a negative filter' intended to remove those elements unacceptable to certain key developed countries.³⁴

The Development Agenda remains a proposal that will be examined and debated by the WIPO General Assembly in September 2006 in Geneva, but at the time of writing it seems unlikely that the WIPO's members will be any more likely to reach a consensus to progress the Development Agenda forward in this forum, than these previous attempts have been.³⁵ Although the negotiations around the Development Agenda have ground to a halt, the perspectives and practices of the WIPO remain a major political problem if, as many critics argue, the WIPO is to properly function as a specialised agency of the UN.

Making the link with the UN meaningful

A major element in the politics behind the Development Agenda has been the argument that the WIPO is not driven by any significant development concerns, but rather by the 'logic' of the benefits of establishing IPRs across the global system. This, as Sisule Musungu and Graham Dutfield have pointed out, sits in direct contrast to a wider reading of the WIPO's mandate and purpose based on the agreement that the organisation made with the United Nations in 1974. Musungu and Dutfield note that:

The Agreement clearly states that [the] WIPO's role is subject to the competence and responsibilities of the UN and its organs... Therefore, while [the] WIPO has a specialized competence on matters of intellectual property, the intention was clearly that its mandate should be constructed in the context of the development objectives of the specified UN agencies as well as the broader objectives of achieving international co-operation in solving problems of an economic, social, cultural and humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms.³⁶

The key point is that for an organisation to become, and continue to be a specialised agency of the UN, its purposes must be compatible with those of the other UN agencies and more generally with the UN's political perspective and stated priorities as expressed through the General Assembly. To critics of the WIPO's current practices this suggests that a key element in (re)establishing a public regarding aspect to global policy making in the realm of IPRs is to hold the WIPO to the undertakings it made when it was originally recognised as a UN specialised agency.

However, setting out exactly what this means in practice is a little more difficult. Those developed country representatives that have dismissed the Development Agenda's central concerns have argued that the WIPO does not have the resources to support wider developmental objectives, and in any case lacks the expertise in development that would be required to fulfil such demands. Underlying this position is the assumption that economic development is best served by rewarding the innovative and creative work of individuals, and this is best achieved through strong and enforceable intellectual property rights. If this does produce social costs these should be ameliorated through foreign aid and other developmental support, rather than through the procedures and activities of the WIPO itself, which should be reserved for its core mission of 'promoting' IPRs. The WIPO should only deal with technical issues; the political aspects of development can and should be separated from these issues, and dealt with elsewhere. However, for those that wish to see the WIPO more closely reflect the UN's developmental concerns, this is much too narrow a reading of the WIPO's mandate and much too simplistic an understanding of the manner in which the international enforcement of IPR effects, or may even constrain the developmental trajectories of many countries.

The agreement between the UN and the WIPO set out how the two organisations would co-ordinate their activities and co-operate over their strategic direction, with article five establishing a clear obligation for the WIPO to follow any recommendations of the UN, and work with a number of named agencies, including the UNCTAD, the UNDP and the UN Educational Scientific and Cultural Organization (UNESCO), to develop resources to tackle problems identified by the these specialised agencies in consultation with the WIPO. Where developmental problems linked to the enforcement of IPRs were raised by other agencies, the WIPO had a clear obligation to address these questions and suggest solutions to address the specific problems identified. In other words, while the WIPO may officially hold the views that it does about the relationship between economic development and the recognition of intellectual property, these must be tempered by the recognition of their actual social and economic costs. The position that development will automatically be furthered by the recognition of intellectual property rights, for all states in all developmental stages, is in the critical perspective unsustainable. Rather, the WIPO

must recognise that sequencing is important; only at a certain achieved level of development does the organisation's argument for establishing strong intellectual property rights actually become an accurate depiction of intellectual property's political economic impact.

Likewise, article ten of the agreement obliged the WIPO to work with the UNCTAD, the UNDP and the UN Industrial Development Organization (UNIDO) to promote and facilitate the transfer of technology and to thereby support these agencies' specific developmental objectives. Here, issues of non-working of patents and other anti-competitive practices have been at the forefront of the developing countries' concerns since well before the conclusion of the Uruguay Round. Hence, as Musungu and Dutfield have argued, it is not possible for the WIPO to legitimately limit its concerns to the narrower technical concerns of registration, dispute settlement and technical assistance (where this has merely involved the supply and support for the adoption of model laws based on developed country models), and remain a specialised agency of the UN.³⁷ Where the management of intellectual property may directly contradict the wider needs of developing countries, the WIPO has a duty to act to ameliorate these problems.

Despite the developed countries' representatives claims that there are other agencies better equipped to deal with the link between intellectual property and development, as noted before, the UNCTAD has been effectively marginalised within the WIPO's negotiations (and from the discussions about the further expansion of the TRIPs agreement at the WTO), despite being the agency with the most claim to competence in this area, and the one that has been the locus of much debate and policy discussion among developing countries. Furthermore, other UN agencies with significant interests in IPRs, from UNESCO to the UNDP, have also been effectively excluded from the policy deliberations at the WIPO and the WTO in the last decade. However, as an immediate response to the Development Agenda proposals, the WIPO's secretariat undertook to arrange meetings with a number of agencies of the UN, and other 'stakeholders', to discuss the issue of development and intellectual property,³⁸ a tacit admission that not enough had been undertaken in the past in this regard.

Whether this leads to any reorientation of the WIPO remains to be seen. And even if this does involve some shift in the WIPO's focus and/or mission, it is notable that where the organisation has had closer contact with UN agencies, such as its work with UNESCO on traditional knowledge, it is far from clear that the UN agencies have been able to modify the WIPO's orientation; rather on traditional knowledge, at least, UNESCO seems to have adopted the focus on IPRs as a solution to the problem of non-community exploitation, following the WIPO, not the other way round. In other words, contrary to the hopes of the supporters of the WIPO Development Agenda, the political influence has been in the opposite direction of that desired.

Conclusion

Therefore, while there seems to be a clear argument for linking the work of the WIPO to the wider concerns of the UN, as argued for by the Development Agenda, it is difficult to know how successful this might actually be. The WIPO's International Bureau openly accepts that as a specialised agency of the UN they are required to be cognisant of, and clearly consider, the views of other UN agencies. Thus, it is

incumbent on the developing countries working through these linked agencies to introduce the wider developmental dimension into the WIPO's deliberations.³⁹ These interactions are already clearly mandated by the WIPO's agreement with the UN and therefore may be the avenue through which the concerns of the Development Agenda can be brought into the heart of the WIPO's activities, even if they are resisted elsewhere in the organisation's operations.

Moreover, already the discussions and debates about the Development Agenda seem to have had some positive impact on the transparency of negotiations at the WIPO. For instance recent debates about the planned, but as yet unfinalised Substantive Patent Law Treaty have been subject to wider consultation and discussion in open forums than has been the case earlier in the negotiations' history.⁴⁰ This opening out of the WIPO has partly been a response by the organisation to the ever widening public coverage of intellectual property issues, with a much stronger NGO interest than in the past. However, even if halting, this increased openness has also encouraged various NGOs such as Médecins sans Frontières, Oxfam and Christian Aid to get more involved in the programmes already established by lower profile organisations like the UN Quaker Office or the Consumer Project on Technology. However, there is also a danger that this increased public interest and political pressure that has been prompted by the Development Agenda may produce a further change in global intellectual property politics.

The WIPO has spent some time fighting back from a partial marginalisation during the Uruguay Round of multilateral trade negotiations, and if the discussions at the WIPO have now (rightly) be re-politicised, there is a clear possibility that the developed countries, who favour strong protection of intellectual property throughout the global system will seek other ways of achieving their aims. To this end, it is perhaps no surprise that the use of bilateral investment treaties, and bilateral free trade agreements, that include strident intellectual property provisions are on the rise. This is not to argue against the Development Agenda, only to recognise that the perverse effect of making the WIPO more development oriented may be to push the most developed countries (the owners of the vast majority of intellectual property assets) into a different method to further their interests. Thus, if the Friends of Development can keep the developed countries on-side, even with a diluted Agenda, this may in the end be preferable to a compressive Development Agenda in a world of bilateral treaties. As so often the developing countries seem to be caught between a rock and hard place.

¹ Much of this section summarises material from Christopher May *The World Intellectual Property Organisation: Resurgence and the Development Agenda* (London: Routledge, 2006).

² Due to the time constraints none of the original members were able to ratify the Convention Establishing the World Intellectual Property Organisation before 1970, but in that year twenty states completed the process.

³ Arpad Bogsch, *The First Twenty-Five Years of the World Intellectual Property Organisation from 1967 to 1992* [WIPO Publication No. 881 (E)] (International Bureau of Intellectual Property 1992), 28.

⁴ Bogsch, *The First Twenty-Five Years of the WIPO*, 28

⁵ Agreement between the United Nations and the World Intellectual Property Organisation, available at <http://www.wipo.int/treaties/en/agreement> (19 December 2005).

⁶ Christopher May and Susan Sell, *Intellectual Property Rights: A critical history* (Boulder: Lynne Rienner Publishers, 2005), chapter seven.

⁷ World Intellectual Property Organisation, *Introduction to Intellectual Property Theory and Practice* (London: Kluwer Law International 1997), 30

⁸ WIPO, *Introduction to Intellectual Property Theory and Practice*, 42.

⁹ Much of this section draws on the work of Sisule Musungu (South Centre) and William New (IP Watch), both of whom have been keen observers of the political debates around the Development Agenda, and therefore in addition to the explicit citations in the text, I am grateful to both for their regular updates on this and related issues.

¹⁰ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: CIPR/Department for International Development, 2002).

¹¹ Viviana Munroz Tellez, 'The WIPO Development Agenda: The campaign to reform intellectual property policy-making' Intellectual Property and NGOs Project (London: Queen Mary Intellectual Property Research Institute, 2006)

[available at:

<http://www.ipngos.org/Ngo%20Briefings/the%20WIPO%20Development%20Agenda.pdf> (2 July 2006)

¹² Sisule F. Musungu, "The WIPO Assemblies 2004: A Review of the Outcomes" *South Bulletin* 89 (15 October 2004), 1-5.

¹³ Martin Khor, "Strong Support from Developing Countries for Development Agenda at WIPO Assembly" *Third World Network: Info Service on WTO and Trade Issues* (5 October 2004), available from <http://www.twinside.org.sg/title2/twninfo165.htm> (21 December 2005); The Geneva Declaration on the Future of WIPO was reproduced in the *South Bulletin* 88 (30 September 2004).

¹⁴ The WIPO Development Agenda was reproduced in the *South Bulletin* 88 (30 September 2004) and all quotes are taken from this source.

¹⁵ Quoted in: Sisule F. Musungu, "A Review of the Outcomes of WIPO Discussions on the Development Agenda Proposal" *Bridges* 8, 9 (October 2004): 21-22.

¹⁶ See the elaboration reproduced in *South Bulletin* 101 (15 April 2005).

¹⁷ See the proposal reproduced in *South Bulletin* 101 (15 April 2005).

¹⁸ Andréa Koury Menescal "Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective" *Journal of World Intellectual Property* 8, part 6 (2005) : 761-796.

¹⁹ May and Sell, *Intellectual Property Rights*, chapter seven.

²⁰ From paragraph 27 of the revised agenda published in *South Bulletin* 101 (15 April 2005).

²¹ Anonymous source quoted in William New, "Industry Concerned about Development Agenda at WIPO" *Intellectual Property Watch* (2005), available from <http://www.ip-watch.org/weblog/wp-trackback.php/125> (8 November 2005).

²² Space precludes a full discussion of all the various proposals, but an overview can be found in Sisule F. Musungu, *Rethinking innovation, development and intellectual property in the UN: WIPO and beyond* (TRIPS Issues Papers: 5) (Geneva: Quaker United Nations Office, 2005), section 3.2.1.

²³ This author's personal conversation with F.Scott Kieff (Florence, October 2005); Eric Smith, International Intellectual Property Alliance, quoted in New, "Industry Concerned about Development Agenda at WIPO".

²⁴ Musungu, *Rethinking innovation, development and intellectual property in the UN*, 8.

²⁵ William New, "Debate Heats Up Over WIPO Development Agenda" *Intellectual Property Watch* (2005), available from <http://www.ip-watch.org/weblog/wp-trackback.php/39> (1 April 2005).

²⁶ William New, "Reform Debate Trips Up WIPO Development Aid Meeting" *Intellectual Property Watch* (2005) available from <http://www.ip-watch.org/weblog/wp-trackback.php/45> (15 April 2005); World Intellectual Property Organisation, "Results of the 2005 Assemblies of WIPO member states" *WIPO Magazine* (November-December 2005), 2-5, at 3.

²⁷ Sisule F. Musungu and Graham Dutfield, *Multilateral agreements and a TRIPS-plus world: The World Intellectual Property Organisation* (TRIPS Issue Papers: 3) (Geneva: Quaker United Nations Office, 2003), 19.

²⁸ William New, "Non-Profits, Industry Offers Views On WIPO Development Agenda" *Intellectual Property Watch* (2005) available from <http://www.ip-watch.org/weblog/wp-trackback.php/44> (14 April 2005).

²⁹ Menescal "Changing WIPO's Ways?".

³⁰ William New, "Europe Calls for Continuation Of The WIPO Development Agenda Talks" *Intellectual Property Watch* (2005) available from <http://www.ip-watch.org/weblog/wp-trackback.php/82> (27 July 2005).

³¹ William New, “New Committee for WIPO Development Agenda; Patents Reinvigorated” *Intellectual Property Watch* (2005) available from <http://www.ip-watch.org/weblog/wp-trackback.php/97> (4 October 2005).

³² William New, ‘WIPO Development Agenda Talks End With No Agreement For Now’ *Intellectual Property Watch* (2006) available from <http://www.ip-watch.org/weblog/wp-trackback.php?p=346> (3 July 2006)

³³ ‘WIPO Development Agenda Meeting Breaks Down Over Chair’s Text’ *BRIDGES Weekly Trade News Digest* Vol. 10, No. 24 (5 July 2006).

³⁴ New, ‘WIPO Development Agenda Talks End With No Agreement For Now’

³⁵ This section reflects the situation at the beginning of August 2006.

³⁶ Musungu and Dutfield, *Multilateral agreements and a TRIPs-plus world*, 19.

³⁷ Musungu and Dutfield, *Multilateral agreements and a TRIPs-plus world*, 19-20.

³⁸ Musungu, “The WIPO Assemblies 2004”

³⁹ Musungu and Dutfield, *Multilateral agreements and a TRIPs-plus world*, 20.

⁴⁰ Tellez, *The WIPO Development Agenda*