

THE POLICY-MAKING DYNAMICS IN INTERGOVERNMENTAL  
ORGANIZATIONS: A COMMENT ON THE REMARKS OF  
GEOFFREY YU

COENRAAD VISSER\*

For the sake of brevity, and in line with Mr. Yu's remarks, I shall comment here only on the intellectual property norm-setting and policy-making dynamics within the World Intellectual Property Organization ("WIPO"). Also, given the theme of this conference as accommodating and reconciling different national levels of protection, I shall present a perspective from the South—from the developing countries.

Whether one sees the international intellectual property norm-setting process as democracy in action or as a multiparty quasi-contractual negotiation, the process should ideally satisfy three conditions: (a) representivity—all interested parties must be represented in the negotiation of the intellectual property norms; (b) full information—all those involved in the negotiation must have full information about the consequences of various possible outcomes; and (c) non-coercion—one party must not coerce the others.<sup>1</sup>

It is conventional wisdom by now that the TRIPS Agreement<sup>2</sup> fell far short of satisfying these three conditions, and some would argue that negotiations at the World Trade Organization ("WTO") continue to be flawed in this way.<sup>3</sup> Be that as it may, I think that the lasting effect of the "convergence of processes"<sup>4</sup> that produced the TRIPS Agreement and of the burdensome economic impact of the implementation of the Agreement on developing countries<sup>5</sup> has been to alert these countries to the need for en-

\* Professor of Intellectual Property Law and Head of the Department of Mercantile Law, University of South Africa, Pretoria.

1. See PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 14, 190–91 (2002).

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

3. For an account of the negotiations at the Fourth WTO Ministerial Conference in Doha, see, for example, FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS (2003).

4. DRAHOS WITH BRAITHWAITE, *supra* note 1, at 134.

5. J. Michael Finger, *Introduction and Overview*, in POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 1, 4 (J. Michael Finger & Philip Schuler eds.,

sure compliance with the above three conditions by any future intellectual property norm-setting or policy-making exercise.

### I. REPRESENTIVITY

WIPO is by nature a specialized agency of the United Nations, established by convention.<sup>6</sup> Its membership is open to any state that is a member of the Berne Union or the Paris Union.<sup>7</sup> Norm setting at WIPO accordingly functions on the basic premise that states, through their governments, represent all interested parties. Governments *of* the people are governments *for* the people.

As WIPO functions on the “one state, one vote” principle,<sup>8</sup> there is at least formal compliance with the condition of representivity. Substantively, however, it is a different story.

The preparatory work for any new international intellectual property instrument is carried out in any one of the standing committees—currently, the Standing Committee on the Law of Patents (“SCP”); the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications; the Standing Committee on Copyright and Related Rights (“SCCR”); and the Standing Committee on Information Technologies (“SCIT”).<sup>9</sup> Once one of these committees determines that sufficient progress has been made toward treaty adoption, the WIPO General Assembly can decide to convene a diplomatic conference.<sup>10</sup> For example, at its last session the Assembly approved the convening of the Diplomatic Conference on the Protection of the Rights of Broadcasting Organizations, from November 19 to December 7, 2007.<sup>11</sup>

2004) (“For developing countries, the IP issue that TRIPS brings forward is how to pay the US\$60 billion a year and how to ensure that they, the developing countries, derive the maximum of foreign investment.”).

6. See Convention Establishing the World Intellectual Property Organization art. 1, July 14, 1967, 21 U.S.T. 1770 [hereinafter WIPO Convention].

7. See *id.* art. 5. The Berne Union was established by the Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 222, and the Paris Union by the Paris Convention for the Protection of Industrial Property art. 1, Mar. 20, 1883, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

8. See WIPO Convention, *supra* note 6, art. 6(3)(a).

9. These committees were created in 1998 by the WIPO Assemblies. See *Draft Program and Budget 1998-1999*, WIPO Doc. A/32/2-WO/BC/18/2, Main Program 09 at 87, Main Program 10 at 95, Sub-program 12.3 at 119–20 (Feb. 9, 1998), approved *General Report of the Assemblies of the Member States*, WIPO Doc. A/32/7, ¶¶ 93, 116(ii) (Mar. 27, 1998).

10. See WIPO, Decision-Making Bodies, [http://www.wipo.int/members/en/decision\\_bodies.html](http://www.wipo.int/members/en/decision_bodies.html) (last visited Mar. 15, 2007).

11. WIPO General Assembly, *Report Adopted by the General Assembly*, WIPO Doc. WO/GA/33/10, ¶ 107(i) (Oct. 3, 2006) [hereinafter WIPO 2006 Report] (acting on recommenda-

It is in the technical Standing Committees, then, that most of the groundwork for new intellectual property norms is done. For the condition of representivity to be met, all interested parties should be present. Given that only states (read, governments) can be members of WIPO, there is again, at best, formal compliance with this condition. For developing countries, the problem is often that the cost for an expert from home to attend these meetings in Geneva is prohibitive, and instead a lowly official from the diplomatic mission in Geneva attends. WIPO is aware of this problem and thus sponsors a certain number of delegates from developing countries to attend these meetings.<sup>12</sup> But the truth remains that most of the delegates from developing countries attending Standing Committee meetings are members of the diplomat corps and are not versed in intellectual property. Compare these delegations to the well-resourced and technically proficient delegations of developed countries, such as the United States.

This problem—that members of the diplomatic corps represent developing countries at Standing Committee meetings—is exacerbated by the fact that civil society (especially in the guise of nongovernmental organizations (“NGOs”)) can attend these meetings only as observers.<sup>13</sup> Given that delegations from developing countries generally have very few resources, NGOs must often give a voice to those intellectual property users directly affected by proposed new intellectual property norms and policy.

It is against this background that part of what has become known as the WIPO Development Agenda must be seen.

At its Thirty-First (Fifteenth Extraordinary) Session in September 2004, the WIPO General Assembly considered a proposal by Brazil and Argentina,<sup>14</sup> supported by Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela,<sup>15</sup> for the establishment of a development agenda for WIPO. Subsequently, three Inter-sessional Intergovernmental Meetings (“IIMs”) were

tion of the Standing Committee on Copyright and Related Rights, *Draft Report*, WIPO Doc. SCCR/15/6 Prov. (Dec. 15, 2006)).

12. The funding was provided for in its biennial program and budget. Memorandum of the Director General, *Proposed Program and Budget 2006–2007*, WIPO Doc. A/41/4 (July 20, 2005).

13. For the criteria for admission as an observer, see WIPO, Observers, NGOs, IGOs, <http://www.wipo.int/members/en/admission/observers.html> (last visited Mar. 15, 2007). For a list of observers, see WIPO, Intergovernmental Organizations Admitted as Observers to the Meetings of the Assemblies of the Member States, <http://www.wipo.int/members/en/admission/pdf/observers.pdf> (last visited Mar. 15, 2007).

14. WIPO Secretariat, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO Doc. WO/GA/31/11 (Aug. 27, 2004).

15. WIPO Secretariat, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WIPO Doc. WO/GA/31/11 ADD (Oct. 4, 2004).

convened to consider a number of proposals.<sup>16</sup> In September to October 2005, the WIPO General Assembly decided to “constitute a Provisional Committee to take forward the IIM process to accelerate and complete the discussions on proposals relating to a WIPO Development Agenda.”<sup>17</sup> The first session of the Provisional Committee on Proposals Related to a WIPO Development Agenda (“PCDA”), was held from February 20–24, 2006;<sup>18</sup> the second session, from June 26–30, 2006.<sup>19</sup> In all, some 111 proposals were tabled.<sup>20</sup> After the first PCDA meeting, the proposals were clustered for future discussion.<sup>21</sup> These clusters will be discussed at two meetings in 2007.<sup>22</sup>

One of the clustered items recognizes the importance of the representation of civil society at the negotiating table. It calls upon WIPO to ensure wider participation of civil society and public interest groups in WIPO’s activities.<sup>23</sup>

An example of what could be done to extend representivity can be found in the context of the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”), established by the WIPO General Assembly at its Twenty-Sixth Session.<sup>24</sup> This is effectively a forum for international policy debate and the development of legal mechanisms and practical tools concerning the protection of traditional knowledge and traditional cultural expressions (folklore), and the intellectual property aspects of access to and benefit sharing in genetic resources. Since its inception the Committee has consulted widely, and, in 2005, it successfully sought the establishment of

16. These meetings were held in Geneva from April 11 to 13, 2005, WIPO, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, First Session, Geneva, Apr. 11–13, 2005, *Report*, WIPO Doc. IIM/1/6 (Aug. 18, 2005); from June 20 to 22, 2005, WIPO, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, Second Session, Geneva, June 20–22, 2005, *Report*, WIPO Doc. IIM/2/10 (Sept. 1, 2005); and from July 20 to 22, 2005, WIPO, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, Third Session, Geneva, July 20–22, 2005, *Report*, WIPO Doc. IIM/3/3 (Sept. 16, 2005).

17. WIPO General Assembly, *Report Adopted by the General Assembly*, ¶ 146, WIPO Doc. WO/GA/32/13 (Oct. 5, 2005) [hereinafter WIPO 2005 Report].

18. See WIPO, Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), First Session, Geneva, Feb. 20–24, 2006, *Report Adopted by the Meeting*, WIPO Doc. PCDA/1/6 (July 3, 2006) [hereinafter WIPO PCDA (1) Report].

19. See WIPO, Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), Second Session, Geneva, June 26–30, 2006, *Report Adopted by the Meeting*, WIPO Doc. PCDA/2/4 (Sept. 18, 2006).

20. See WIPO PCDA (1) Report, *supra* note 18, Annex I.

21. See *id.*

22. See WIPO 2006 Report, *supra* note 11, ¶ 66.

23. See *id.* Annex A, ¶ 38.

24. See WIPO General Assembly, *Report Adopted by the Assembly*, ¶ 71, WIPO Doc. WO/GA/26/10 (Oct. 3, 2000) [hereinafter WIPO 2000 Report].

the Voluntary Contribution Fund for Accredited Indigenous and Local Communities to further facilitate the participation of indigenous and local communities in the work of the Committee.<sup>25</sup>

## II. FULL INFORMATION

The condition of full information, then, requires that all those involved in the negotiation have full information about the consequences of various possible outcomes.

Given the fact that delegations from developing countries are more often than not under resourced, it almost goes without saying that these countries find it difficult to determine the possible economic and social impact of new intellectual property norms and policies. Again, the assistance of civil society (especially NGOs and intergovernmental organizations, such as the United Nations Scientific, Cultural and Education Organization and the World Health Organization) for developing countries in the provision of such information is indispensable.

At the third IIM, the African Group submitted a proposal that further touches upon this issue.<sup>26</sup> The Group proposed, *inter alia*, the use of impact assessments as part of the technical assistance rendered to developing countries<sup>27</sup> and “studies to determine the tangible costs and benefits of IP protection.”<sup>28</sup>

Some of the clustered items for discussion in 2007 relate directly to the condition of full information. For example, Cluster B (Norm Setting, Flexibilities, Public Policy, and Public Domain) includes a proposal that “norm-setting activities recognize the different levels of development of Member States and reflect a balance between benefits and costs of any initiative for developed and developing countries,”<sup>29</sup> and that WIPO, through its Advisory Committee on Enforcement, “conduct analyses of the relationship between high rates of counterfeiting and intellectual property piracy and technology transfer, foreign direct investment and economic growth.”<sup>30</sup> Likewise, Cluster D (Assessments, Evaluation and Impact Studies) includes requests that WIPO undertake studies to demonstrate the economic, social, and cultural impact of the use of intellectual property

25. See WIPO 2005 Report, *supra* note 17, ¶ 168.

26. See WIPO Secretariat, *Proposal by Morocco on Behalf of the African Group Entitled “The African Proposal for the Establishment of a Development Agenda for WIPO,”* WIPO Doc. IIM/3/2 Rev. (July 31, 2005).

27. See *id.* Annex, at 4.

28. *Id.* Annex, at 5.

29. WIPO 2006 Report, *supra* note 11, Annex A, ¶ 19.

30. *Id.* Annex B, ¶ 22.

systems in Member States<sup>31</sup> and to “deepen the analysis of the implications and benefits of a rich and accessible public domain.”<sup>32</sup> Also, there are proposals for WIPO “[t]o establish an independent development impact assessment with respect to technical assistance, technology transfer, and norm-setting on developing and least developed countries (LDCs),”<sup>33</sup> “[t]o undertake independent, evidence-based ‘Development Impact Assessments’” with respect to the organization’s norm-setting activities,<sup>34</sup> and to “compile empirical evidence and carry out cost-benefit [analyses] that consider, *inter alia*, alternatives within and outside the IP system.”<sup>35</sup>

The request for impact assessment studies as part of information gathering during the negotiating process for new international intellectual property norms is not without precedent. At its first session, in the course of its discussion of a possible international instrument for the protection of nonoriginal databases,<sup>36</sup> SCCR recommended that the International Bureau of WIPO commission a study on the economic impact of the protection of databases on developing countries, especially LDCs.<sup>37</sup> Three years later,<sup>38</sup> in 2001, WIPO commissioned five studies on such impact on developing countries and the so-called countries in transition. These studies were presented to the SCCR in May of 2002.<sup>39</sup>

31. *Id.* Annex A, ¶ 31.

32. *Id.* Annex A, ¶ 32.

33. *Id.* Annex B, ¶ 54.

34. *Id.* Annex B, ¶ 61.

35. *Id.* Annex B, ¶ 62.

36. See WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, *Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/6 (Aug. 30, 1996); WIPO, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, *Recommendation Concerning Databases*, WIPO Doc. CRNR/DC/100 (Dec. 23, 1996); Memorandum of the Director General, *Preparatory Work on a Treaty Concerning Intellectual Property in Databases*, ¶ 3, WIPO Doc. AB/XXX/3 (Jan. 20, 1997).

37. See Standing Committee on Copyright and Related Rights, *Report Adopted by the Standing Committee*, ¶ 204(b)(ii), WIPO Doc. SCCR/1/9 (Nov. 10, 1998).

38. Ghana, for example, had already expressed concern at the slow progress made with commissioning the study. Standing Committee on Copyright and Related Rights, *Report Adopted by the Standing Committee*, ¶¶ 76–77, WIPO Doc. SCCR/1/9 (Dec. 1, 1999). According to the WIPO Secretariat, “[c]ommissioning the study had turned out to be a difficult issue, especially regarding a well-balanced selection of appropriate institutions and/or experts.” *Id.* ¶ 77.

39. See Standing Committee on Copyright and Related Rights, *Economic Impact of Database Protection in Developing Countries and Countries in Transition*, WIPO Doc. SCCR/7/2 (Apr. 4, 2002) (prepared by Yale M. Braunstein) (study tabled at the Seventh Session of the Standing Committee on Copyright and Related Rights, Geneva, May 13–17, 2002); Standing Committee on Copyright and Related Rights, *Study on the Protection of Unoriginal Databases*, WIPO Doc. SCCR/7/3 (Apr. 4, 2002) (prepared by Sherif El-Kassas) (tabled at the Seventh Session of the Standing Committee on Copyright and Related Rights, Geneva, May 13–17, 2002); Standing Committee on Copyright and Related Rights, *Economic Impact of the Protection of Unoriginal Databases in Developing Countries and Countries in Transition*, WIPO Doc. SCCR/7/4 (Apr. 4, 2002) (prepared by Thomas Riis) (study tabled at the Seventh Session of the Standing Committee on Copyright and Related Rights, Geneva, May 13–17, 2002);

### III. NON-COERCION

The condition of non-coercion simply means that one party should not coerce any other party into agreeing to new international intellectual property norms. Coercion is the opposite of negotiation, of course.

The condition of non-coercion has various facets.

*Sufficient consensus as to entry into force:* The number of countries required to have ratified a new international intellectual property instrument in order for it to enter into force has become an important device to ensure a second level (round) of consensus—sufficient international consensus that a new instrument should enter into force. The 1996 WIPO “Internet treaties” both set a fairly high number—they entered into force only after thirty instruments of ratification had been deposited with the Director General.<sup>40</sup> At the Diplomatic Conference, the political (non-coercion) argument advanced by developing countries was that these treaties should enter into force only when there was sufficient consensus (in the sense of consensus between a fair mix of developed and developing countries) that they should do so.<sup>41</sup> If the figure were set too low, developed countries could swiftly have brought these treaties into force.

*Regime shifting:* While it is true that developing countries have recently seen regime shifting “as a bulwark against the established power balance in international lawmaking,”<sup>42</sup> at WIPO developed countries have on occasion used regime shifting to remove from the treaty-making process developing countries’ proposals that threaten industrial interests of developed countries.<sup>43</sup> In this sense, regime shifting strains against the condition

Standing Committee on Copyright and Related Rights, *A Study on the Impact of Protection of Unoriginal Databases on Developing Countries: Indian Experience*, WIPO Doc. SCCR/7/5 (Apr. 4, 2002) (prepared by Phiroz Vandrevalla) (tabled at the Seventh Session of the Standing Committee on Copyright and Related Rights, Geneva, May 13–17, 2002); Standing Committee on Copyright and Related Rights, *The Economic Impact of the Protection of Database in China*, WIPO Doc. SCCR/7/6 (Apr. 22, 2002) (prepared by Zheng Shengli) (study tabled at the Seventh Session of the Standing Committee on Copyright and Related Rights, Geneva, May 13–17, 2002).

40. See World Intellectual Property Organization Copyright Treaty art. 20, Dec. 20, 1996, S. TREATY DOC. 105-17, 36 I.L.M. 65 (1997) [hereinafter WCT] (entered into force on Mar. 6, 2002); World Intellectual Property Organization Performances and Phonograms Treaty art. 29, Dec. 20, 1996, S. TREATY DOC. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT] (entered into force on May 20, 2002).

41. See WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, Dec. 2–20, 1996, ¶¶ 57–75, WIPO Doc. CRNR/DC/103 (Aug. 26, 1997).

42. Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT’L L. 95, 121 (2004); accord Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 13–18 (2004).

43. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 565 (2000) (“Forum-shifting is a strategy that only the powerful . . . can use.”).

of non-coercion. A pertinent example: at the third session of the SCP, Colombia proposed the insertion into the draft Patent Law Treaty<sup>44</sup> of a prior informed consent notification requirement with respect to biological and genetic resources.<sup>45</sup> The developed countries (notably the United States, the European Commission, Japan, and South Korea) were fiercely opposed to the proposal, which was seen as a potential “treaty breaker.”<sup>46</sup> The issue of biopiracy<sup>47</sup> was moved to another forum,<sup>48</sup> where there was no danger of an informed consent notification requirement finding its way into the treaty. This issue eventually ended up on the agenda of the IGC.<sup>49</sup> Despite initial enthusiasm for the IGC,<sup>50</sup> and commendable activities undertaken by the committee in connection with the protection of genetic resources and traditional knowledge, it remains little more than a “talk shop,” from which anything resembling treaty language still has to emerge. The speed with which broadcasters’ rights have moved in the SCCR to a diplomatic conference, when compared with the pace of norm setting in the IGC, tells the story.

*Tradeoffs:* International intellectual property norm setting invariably involves a process of tradeoffs—of give and take—between interest groups, and between countries, often driven by interest groups. Developed countries, generally net exporters of intellectual property, are often mindful mainly of the interests of intellectual property holders. Developing coun-

44. The treaty was adopted by the Diplomatic Conference on the Adoption of the Patent Law Treaty, held in Geneva from May 11 to June 2, 2000. Memorandum of the WIPO International Bureau, *Report on the Outcome of the Diplomatic Conference on the Adoption of the Patent Law Treaty*, ¶ 4, WIPO Doc. A/35/12 (Aug. 7, 2000).

45. See Standing Committee on the Law of Patents, *Protection of Biological and Genetic Resources Proposal by the Delegation of Colombia*, ¶ 2, WIPO Doc. SCP/3/10 (Sept. 8, 1999).

46. See Standing Committee on the Law of Patents, *Report Adopted by the Standing Committee*, ¶ 205, WIPO Doc. SCP/3/11 (Sept. 14, 1999) [hereinafter SCP 1999 Report]. Thirteen developing countries spoke in favor of the Colombian proposal. See *id.*

47. The term “biopiracy,” generally, refers either to “the unauthorized commercial use of biological resources and/or associated [traditional knowledge] from developing countries, or to the patenting of spurious inventions based on such knowledge or resources without compensation.” Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 237 n.16 (2001).

48. The Standing Committee on the Law of Patents agreed to the following:  
Recognizing the importance of biological and genetic resources, the SCP invites the International Bureau to include on the agenda of the Working Group on Biotechnological Inventions, to be convened at WIPO in November, 1999, the issue of protection of biological and genetic resources. The SCP further invites the International Bureau to take steps to convene a separate meeting involving a larger number of Member States early in 2000, to consider that issue.  
SCP 1999 Report, *supra* note 46, ¶ 208.

49. Further on this process, see Helfer, *supra* note 42, at 69–70.

50. See WIPO 2000 Report, *supra* note 24, ¶¶ 28–69. Forty developing countries and developed countries such as France (speaking on behalf of the members of the European Union) and Japan (speaking on behalf of Group B) supported the new committee. See *id.*

tries, generally net importers of intellectual property, are generally mindful mainly of the interests of intellectual property users.

In the WIPO context, tradeoffs take mainly two forms.<sup>51</sup>

With *intra-regime* tradeoffs, the new international instrument provides for both the enhancement of intellectual property protection (for example, by the creation of new rights for intellectual property holders) and the limitation of such protection in certain instances (usually by providing for exceptions and limitations to these rights). The problem for developing countries is that the exceptions and limitations are usually made subject to the three-step test of Article 9(2) of the Berne Convention.<sup>52</sup> Thus, the major extension of the rights of intellectual property holders, usually by the creation of new exclusive rights of authorization, is hardly balanced by the narrowly circumscribed exceptions allowed by the three-step test. As a result, the already precarious balance of intellectual property interests is usually skewed further in favor of the exporters of intellectual property—the developed countries.

With *inter-regime* tradeoffs, one typically deals with linkages between various regimes. The effect of these tradeoffs or linkages is usually to advance the interests of different groups at the same time; the advancement of the interests of one group is made conditional upon the advancement of the interests of the other. Conversely, the absence of such a tradeoff or linkage may deprive an interest group of the leverage necessary to induce another interest group into agreeing to norms that advance the interests of the former. The relationship between the groups may be immediate or remote.

An example of the effect of the absence of a tradeoff between immediate interest groups: the failure of the Diplomatic Conference on the Protection of Audiovisual Performances<sup>53</sup> to reach agreement on the text of a treaty<sup>54</sup> to enhance the protection of audiovisual performers can perhaps

51. This classification is an adaptation of part of the classification of tradeoffs at the national lawmaking level proposed by Dinwoodie & Dreyfuss, *supra* note 42, at 104–09.

52. See TRIPS Agreement, *supra* note 2, art. 13; WCT, *supra* note 40, art. 10; WPPT, *supra* note 40, art. 16. For a succinct analysis of this test, see, for example, MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION, paras. 5.55–5.57 (2002); Standing Committee on Copyright and Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Doc. SCCR/9/7 (Apr. 5, 2003) (prepared by Sam Ricketson).

53. The Conference was convened by WIPO in Geneva from December 7 to 20, 2000. Memorandum of the Director General, *Diplomatic Conference on the Protection of Audiovisual Performances*, WIPO Doc. A/36/9 (June 18, 2001) [hereinafter WIPO 2001 Memorandum].

54. Diplomatic Conference on the Protection of Audiovisual Performances, Geneva, Dec. 7–20, 2000, *Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to Be Considered by the Diplomatic Conference*, WIPO Doc. IAVP/DC/3 (Aug. 1, 2000). The treaty breaker was the proposed Article 12 on ownership and transfer of rights. WIPO 2001 Memorandum, *supra* note 53, ¶ 2.

best be explained by the fact that in the WIPO Copyright Treaty audiovisual producers had already received extended copyright protection.<sup>55</sup> Thus, the audiovisual performers had nothing to trade for their own extended protection.

An example of the effect of the presence of a tradeoff (more properly, a linkage) between remote interest groups: the African Group has sought to link the protection of nonoriginal databases and the protection of traditional knowledge and folklore.<sup>56</sup> While this link is perplexing when one thinks only in terms of subject matter, it makes sense on an economic level, given the relative importance of the subject matter to developed and developing countries. Although, ideally, each new intellectual property norm-setting or policy-making initiative should be judged on its own merits, the *realpolitik* is that developing countries often have no choice but to resort to this type of tradeoff to advance their own intellectual property interests.

#### CONCLUSION

Although intellectual property norm setting and policy-making at WIPO at first blush meets the conditions of representivity, full information, and non-coercion, the reality is different. As a result of systemic limitations inherent in the nature of the organization and the way it functions, and of economic and political realities, the norm-setting and policy-making process at WIPO is skewed in favor of developed countries. It is against this background that the WIPO Development Agenda must be seen—it is an attempt to extend the organization's compliance with these three above-mentioned conditions. If the Agenda were to succeed, developing countries could look forward to participating one day in a process where they are substantively equal partners of the developed countries.

55. See WCT, *supra* note 40, arts. 8, 10–12, n.1 (Agreed statement concerning Article 1(4)).

56. Standing Committee on Copyright and Related Rights, *Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, Held in Cotonou, from June 22 to 24, 1999*, ¶ 7, WIPO Doc. SCCR/3/2 (July 30, 1999); Standing Committee on Copyright and Related Rights, *Report Adopted by the Standing Committee*, ¶ 76, WIPO Doc. SCCR/3/11 (Dec. 1, 1999).