ESF Exploratory Workshop on

The Future of Patent Governance in Europe

Summaries of the presentations

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Convened by:

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Introduction

The workshop was triggered by the realization that decision-making in intellectual property (IP) has become increasingly politicized and contested by a growing number of stakeholders. The upheavals in the patent system are ongoing, and fundamental reforms of the European patent system are under way. These shifts need to be assessed from an interdisciplinary perspective, combining legal, political and social science expertise, to grasp the nature of empirical changes, the interests of the stakeholders involved, and the structures of decision-making in the European multi-level system in its international context.

The format of the event was a closed workshop: the number of participants to the workshop was limited to twenty and only included participants who were also acting as speakers and discussants. Speakers consisted of a mix of, on the one hand, young, mid-career, and senior scholars with a background from law, political and social sciences, and, on the other hand, policymakers. Presentations were relatively short, followed by critical feedback by one discussant leaving ample opportunity for intense interaction and discussion with all the participants. The final program is included as an annex to this report.

The underlying objectives of the ESF workshop were threefold. First, it aimed at exploring important paradigm shifts in European patent governance induced by patent reforms, technological and socio-economic developments at the European ("inbound") and international level ("outbound"). Second, it provided an anticipatory impact assessment of the Unitary Patent Package. Third, it initiated a new debate on norms, criteria, and procedures for good governance in the patent system.

The first day of the workshop focused on (1) the evolution of the multilevel patent system in Europe, including the impact assessment of the recent European patent reforms, the Unitary Patent Package, and (2) the “inbound” dimension of European patent governance and increased patent integration through the work of the patent executive (national patent offices and the EPO), courts and policymakers. The second day of the workshop was devoted to the (3) the “outbound” dimension of European patent governance and concentrated on international harmonization by the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and by bilateral free trade agreements, and (4) the translation of “good governance” to the patent context with an analysis of “best practices” developed in Europe, the US, Japan and Korea.
Horizontal and Vertical Structures of the European Patent System:
Torn between Intergovernmentalism and Supranationalism

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This contribution explores the structures of the European patent system and the prospects of the current patent reforms (Unitary Patent Package UPP) in Europe through the lenses of political theory and integration theory. The analysis builds upon two major meta-theories: The neo-functionalist supranationalist school of European integration explains the cooperation between patent offices and the EU as triggered by external factors, such as the globalization of patent applications, economic integration and trade liberalization. These transnational processes would cause spill-over effects and finally result in supranational integration and the supremacy of supranational organisations. The liberal intergovernmentalist school, in contrast, points to the competition between states, including their patent offices, as a result of national self-interest, because states would act as guardians of national industrial policy interests or "techno nationalism". Therefore, nation states would act as veto players to "too much"supranational delegation.

The paper explores two hypotheses: The first thesis states that the European patent system has already anticipated many constellations and struggles with which the European integration project currently has to deal ('differentiated integration'). The second is a conclusion, derived from anticipatory impact assessment, and postulates that even though the Unitary Patent Package mainly rests on intergovernmental treaties and procedures, it will in the long term strengthen the supranational governance of the patent system – but probably largely outside of the democratic institutions and the constitutional framework of the European Union.

Tracing the evolution of the European patent system, it becomes clear that the birth failure of the EU Community patent created a path dependency in which, on the supranational level, a double pillar structure between the European Patent Organisation (EPOrg) and the EU emerged. As patent offices on the national level remained, parallel structures were created, which added to an overall complex, multi-level structure of patent governance.

The EPOrg system with its currently 38 contracting states of the European Patent Convention (EPC) is "running ahead" in European integration, compared with the European Union with its 28 member states. All EU members have also signed the EPC. The EPOrg is further widening its extension politics, also by validation agreements with 'extension states'.

As a result, it has become difficult to accomplish a unification of the European patent system in an overarching legal and political framework which could both accommodate the EPOrg and the EU. The Unitary patent package originally aimed at bridging and unifying the system but it is a vivid expression of contemporary tensions between the widening and the deepening of European integration. The Unitary Patent adds a third layer to the system, in addition to the national patent and the European bundle patent. As a political project, it is predicated upon an
optimistic premise of "differentiated integration", assuming that the core countries (EU25) will deepen their integration, to the benefit of administrative simplification, potential cost savings, and the single market, and it supposes that the other states will follow later, once they are capable and willing. A more pessimistic perspective on that matter assumes a widening gap between the center and the periphery, at the cost of the fragmentation of the system. A third scenario projects winners and losers on both sides, and new cleavages between states with high or low patent propensity and with strong or weak patent culture.

Because of myriad empirical uncertainties, predictions on how often the Unitary Patent will be used, are impossible to date. However, if the Unitary Patent succeeded, filing in small and medium sized National Patent Offices may decline and some National Patent Offices may ultimately become extinct. Crucial elements, such as the level of fees and renewal fees, and the distribution key for the unitary patent (UP) are as yet undecided. But the dilemma is clear: Fees too high will not provide an incentive to use the Unitary Patent, fees too low may threaten the EPO’s financial sustainability, and could incentivize a “patent bubble”.

The complex structure of the Unitary Patent Court has also raised concerns about a 'tunnel vision' of the judges and about possible forum shopping by patentees. An inherent pro-patent bias might become reinforced by the chosen procedure of Enhanced Cooperation for the Unitary Patent, and the intergovernmental treaty for the Unitary Patent Court. In effect, given the current rules and constellations, the European Court of Justice as a general court will get mostly sidelined, and thus will hardly be able to act as a counterweight to the specialised judiciary of the Unitary Patent Court, in contrast to what is the case for the Supreme Court in the US vis-a-vis the CAFC.

Therefore, even though the Enhanced Cooperation procedure and many more compromises prevented the Unitary Patent Package from another political failure, the price to be paid seems to be high. The European Commission has by and large disempowered itself, and suffers from another loss of steering capacity. The intergovernmental procedures are executive-driven, and largely exclude parliaments from active decision-making; hence they exacerbate the democratic deficits of both the EU and the EPOrg. Probable winners will be the European Patent Office and the judges of the Unitary Patent Court which will strengthen their influence on the governance of the European patent system.

The democratic risks associated with the UPP imply that the epistemic community of the patent system will prevail, and that the patent system as autopoietic functional system may become even more segregated from other societal systems. As a hermetic system which is only semi-permeable for interests of patentees, countervailing public interests and human rights concerns may suffer further disregard. Thus, the self-governance of the European patent system by technocratic experts and functional elites will lack institutional counterweights that could provide checks and balances for a more equilibrated outcome.

Ironically, as a conclusion, it must be stated that the Unitary Patent Package which seems to resort to intergovernmentalism, in the longer term will invigorate supranationalism but also weaken robust mechanisms of democratic control and accountability.
Enhanced cooperation for the unitary patent authorized by the Council in Decision 2011/167/EU was the original sin triggering the demise of the patent plans. It sent the first signal for choice of feasibility over coherence (or form over substance). Substantive coherence (one patent law for Europe through a single court) and territorial coherence (internal market and EPO states) were put behind. It prepared the mindset for a quick and dirty answer to the concerns voiced by the ECJ in its Opinion 1/09 against the EEUPC model and was proof of the political will to press ahead with a quick solution at all cost. Given that two EU states were already out after the shift of enhanced cooperation, kicking out the EPO states too in a ( misconceived) attempt to satisfy the ECJ’s legality concerns was just a short step further. Furthermore, the hole drilled into the project by the shift to enhanced cooperation prepared the mindset for reopening the 2009 package to lobbying and compromise in the preparation of the (current) follow-up model to the EEUPC.

Nonetheless, enhanced cooperation is not a justification for the awkward design of the unitary patent package. Much rather, the truncated design of the patent Regulation is simply in order to keep the ECJ out. The truncated court system in turn is due to the attempt to make it a MS court (supposedly, but falsely, in line with Opinion 1/09). Finally, the anachronistic nature of the substantive patent law is simply due to an uninspired EU approach.

In joined cases C-274/11 and C-295/11, Spain and Italy raised five kinds of pleas against Decision 2011/167/EU: First, the Council lacked competence to establish the enhanced cooperation. Second, the Council misused its powers. Third, the Decision had not been adopted as a last resort. Fourth, the Decision infringed Articles 20(1) TEU, 118 TEU, 326 TFEU and 327 TFEU. Fifth, the Decision disregards the judicial system of the Union.

In its judgment handed down in April 2013, the ECJ first of all dealt with the competence question. Art. 20 TEU states that enhanced cooperation may only occur “within the framework of the Union's non-exclusive competences”. Art. 2 TFEU clarifies that exclusive competence is where “only the Union may legislate and adopt legally binding acts”, whereas competence shared means that “the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.” The question at issue was whether Art. 118 TFEU as the legal basis for the patent cooperation states a shared or an exclusive competence. It reads: “In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements.”
The problem here is that member states can logically never legislate on “measures for the creation of European intellectual property rights to provide uniform protection”. So this suggests that it is necessarily an exclusive competence. Still, the ECJ (in paras. 20 et seq.) found otherwise. It took a purely formalistic approach by stating that Art. 118 TFEU is part of the internal market chapter. Art. 4 (2) TFEU states that the internal market is a shared competence. Consequently, Art. 118 TFEU was a shared competence too. This disregards the fact that the nature of the competence catalogue in Arts. 2 et seq. TFEU is only declaratory (Art. 2 (6) TFEU). The ECJ limited its many interpretative methods to just one, systematic interpretation, to achieve the desired result. The straightforward telos and history of the norm were disregarded, particularly the fact that the sui generis trademark, design and plant variety regimes were models for Art. 118 TFEU.

Next, on the issue of last resort and Union interest, Art. 20 TEU states that enhanced cooperation “shall aim to further the objectives of the Union, protect its interests and reinforce its integration process … The decision authorizing enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.” The open question here was what kind of disagreement justified to choose enhanced cooperation over continuing negotiations? In particular, a circumvention of Council procedures and quora by too easy recourse must be forestalled.

The ECJ (in paras. 33 et seq.) found that a “measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty … The Union’s interests and the process of integration would … not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole. … In consequence, … the expression ‘as a last resort’ highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorizing enhanced cooperation.”

Under this standard, the plaintiff encounters high threshold for the misuse of powers test. Also, only reduced ECJ review takes place: The test amounts to a mere requirement to state sufficient reasons (see also para. 54). It opens the door wide for enhanced cooperation. The ECJ’s answer thus highlights the political nature of the term “last resort” and allows use of enhanced cooperation as bargaining momentum in Council negotiations. This is also underscored by the following ECJ remark (para. 53): “The Council … is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future.”

Other issues in the judgment concern the effects of the cooperation in terms of an openness to all member states for later participation (i.e. non-preclusion) and the absence of negative
effects on functioning of the internal market (fragmentation, discrimination) and on cohesion in the EU. The open question was when these effects of the cooperation should best be checked – at the time of authorization or when the cooperation is under way?

The ECJ clarified that it intends to check such effects later as the cooperation is carried out. An example for this approach is incorporated in the following statement (para. 92, concerning the effects of the court system): “The Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question. The sole purpose of that decision was to authorize the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere”. Similarly in another context (paras. 76 et seq., concerning the effects of language arrangements on cohesion) the ECJ states that “the compatibility of those arrangements with Union law may not be examined in these actions … were … only at a preparatory stage when the contested decision was adopted and do not form a component part of the latter”.

This is a generally sensible approach: Legality should be checked on the go and non-participating states must accept some prejudice to their interests, e.g. measures under the cooperation, which they do not like (see also para. 82). But should that be the same for all effects? After all, certain cooperation features may entail a structural preclusion of openness, such as the language regime, which might be such a non-remediable structural element: If language concerns are the issue of dispute, how can cooperation that is launched to keep that language out, be deemed non-preclusive? Non-participating state will have to bow to terms of the cooperation by waiving its interests (which are, therefore, precluded). This is particularly so regarding the high status accorded to linguistic diversity in EU law (Arts. 22 CFR, 3 (2) TEU, 342 TFEU). Here, a de minimis test for prejudice of interests is needed.

Overall, joined cases C-274/11 and C-295/11 is an important judgment from the point of view of enhanced cooperation: It sets the framework for future cooperations (e.g. financial transactions tax) and thus cannot hide a clearly visible political element (e.g. from the weak competence argument). In doing so, it opens door wide for those future cooperations by taking a political approach to the issue of “last resort” and by stating a weak requirement to only cursorily describe the actual content of the cooperation in decision. This means that the criteria for enhanced cooperation in Arts. 20 TEU, 326-328 TFEU are more relevant for review of cooperation measures than for the cooperation as such. The ECJ also takes a dangerously lax approach to the non-preclusion test. That test lacks shape and therefore bite. the lax test may foster centripetal integrationist approach. From the point of view of patent law alone, the judgment is not so important: The key issues for the unitary patent system will be clarified in pending actions C-146/13 and C-147/13 against the two regulations adopted within the enhanced cooperation. The AG opinion for these cases is expected to be handed down on October 21, 2014.
Old and New Stakeholders, Forums and Arenas of Patent Governance in Europe

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This conference contribution looks into the multi-level landscape of patent governance in Europe. It traces briefly the history and the reasons for the current bifurcated regime of patenting in the European Union (EU) and the European Patent Organisation (EPO), and examines critically the ongoing efforts towards interlocking the two systems through the Unitary Patent Package (UP), featuring the European patent with unitary effects, and the Unified Patent Court (UCC).

The analysis builds on one particular string of institutional theory, namely the participation-centred comparative institutional approach as advanced by law and public policy scholar Neil Komesar (1994). The approach conceptualizes markets, political processes and courts as alternative institutions to which decision-making on important law and public policy issues can be (and typically is) allocated. The relative efficiency of these alternative decision-making arenas is assessed through comparing the possibilities for participation of affected actors; in markets through transactions, in political processes through voting and lobbying and in courts through litigation. The approach has been successfully applied in studies of international and supranational governance regimes, whereby an additional distinction is drawn between participation of state and non-state actors (Maduro, 1998; Shaffer, 2003). One of the important messages of the comparative institutional approach is to highlight the problem of ‘big numbers’, i.e. the difficulty of ensuring adequate representation and participation of broad public (majoritarian) interests across all institutional settings. This is in turn explained by high organisation and information costs and problems of collective action (Olson, 1965; Coase, 1960).

The contribution then proceeds to scrutinize - through the prism of participation - the institutional modalities of the EPO system of governance, with its legislative, rule-making and quasi-judicial bodies. Various deficiencies in the EPO governance framework are pointed out, for instance the heavy-handedness of the international legislative process through which amendments of the European Patent Convention (EPC) can be introduced, the gradual transfer of legislative powers to the Administrative Council, as well as the dominance of technocratic governance and the limited access of public interests to the work of the Council (cf. Art. 30 EPC). In this light, the broad possibilities for participation in the EPO quasi-judicial process (in particular in the form of third-party interventions, Art. 115 EPC), are seen as a somewhat questionable way of compensating for the closeness and opacity of the political process through openness of the judicial process. Also other problems in the institutional design of the EPO Boards of Appeal (i.e. the quasi-judicial body hearing appeals from the divisions) are underlined. For instance, while the EPC stipulates that the Boards of Appeal and the Enlarged Board of Appeal shall be impartial and independent, the latter form institutionally part of the Office (a General directorate) and are appointed by the Administrative Council upon a proposal by the President (Art. 11(3) EPC). This arrangement
is not unproblematic when viewed against the requirements for an independent and impartial tribunal set out in Article 6 ECHR.

These limitations in the institutional architecture of the EPO are all the more glaring when compared with the more sophisticated governance design of the EU, with notable guarantees for access, accountability and balanced representation in decision-making processes at all levels. The possible negative effects of institutional design on substantive outcomes are illustrated by developments in the sphere of patenting of biotechnology (e.g. patenting of embryonic stem cells), where the EPO has proven not to be sufficiently apt to accommodate the growing public interest in the ethical implications of patent policy. Certainly, criticism at the institutional set up of the EPO and the lacking autonomy of its appellate bodies has been voiced in earlier debates on the subject. However, proposals for reform have been slow to materialize.

Following this critical analysis, the search light is directed to the Unitary Patent Package and the Agreement on a Unified Patent Court, focusing on some governance modalities of the new system. The objective of the UPP and the UPC can at least partly be viewed in terms of improved participation. By lowering the costs of patenting and increasing the accessibility of patent litigation, the ambition has certainly been to improve the possibilities for participation, especially of SME, in the granting and adjudicative process. However, while the efforts to link the EPO and the EU patenting systems are commendable, a number of crucial issues of institutional design and of participation in decision-making processes appear not to have received sufficient attention.

In terms of participation of States, obviously the system builds on the instrument of enhanced cooperation, which means that it has developed without the participation of important players in the EU political process, namely Spain and Italy. More generally, the new unified judicial system is based on an international agreement outside the constitutional framework of the European Union and of the well-established and sophisticated “Community governance method” (Scott and Trubek, 2002). This brings forth a number of uncertainties as to the legitimacy and the institutional balance of the system. There is a risk that the incomplete participation on the part of states may negatively affect the attractiveness of the system to, and the expected participation of, private actors.

Furthermore, there are signs of persisting and even enhanced dominance of technocratic governance, keeping the system impermeable for actors from outside the patent profession. Thus, concerns have been raised as to the lack of transparency and public insight in the drafting of the rules of procedure for the Unified Patent Court. Observers have also noted the marked attempt to reduce the role of the EU Court of Justice in patent adjudication and in exercising supervision over the Unified Patent Court. An additional issue that is critically examined is the composition of some of the new institutional bodies, such as the Select Committee at the EPO and the Advisory Committee for the Unified Patent Court (Art. 14 Agreement on the Unified Patent Court), the latter to comprise mainly patent judges and practitioners.
Importantly, the new system builds in the granting phase exclusively on the existing structures of the EPO. The EPO decisions of granting, and in particular of refusing to grant, unitary patent, effectively escape the supervision of the EU Court of Justice. At the same time, no efforts have been made to introduce reforms in the governance of the EPO and the Boards of Appeal.

For the future, two possible scenarios are envisioned. Following an optimistic route, the EU constitutional model of multi-level governance may through the Unified Patent Package and the Unified Patent Court have positive spill-over effects on the EPO, including increased influence of the ECHR and the Union Charter of Fundamental Rights as a blueprint. On a more pessimistic track, the intergovernmental model of governance may increasingly ‘infect’ the newly built patenting regime of the EU. International agreements are difficult to change and adapt to dynamic developments and generally tend to remain ”underconstitutionalised”. In any event, ensuring all-sided participation in the governance structures of the new patenting regime in Europe is singled out as a priority issue in the ongoing institution-building process.
A. THE COMPLEXITY OF THE EUROPEAN PATENT FRAMEWORK

The multi-level patent system:

The European patent system is a special form of multi-level governance system including various actors, namely the member states of the Organisation, the EPO, the EU, but also WIPO and even WTO.

Three possible routes to file a patent:

At present there are three different routes to file a patent application. It can be the national route, via national offices whereby the resulting patent is valid in one country only, the European route (EPC), via EPO or National Offices (for priority the document) which is valid in up to 38 countries, and the International route (PCT), via International Bureau, EPO or National Offices, which could lead to patents valid in up to 147 countries.

User feedback on the European Patent System (received by EPO)

In general, the EPO remains a reference for its overall quality and the EPO’s highly skilled and specialised patent examiners are much appreciated. However, there are concerns about keeping the deadlines, patentability of computer implemented inventions (CII) and the level of training of European patent attorneys in the new contracting states.

The users’ needs: a main driver for the co-operation activities

Each year there are around 300,000 “same” applications filed in two or more IP5 Offices (US, Japan, China, Korea and Europe). Understandably, the industry has demanded easier processing of cross-filings.

B. HOW DOES THE EPO ADDRESS THIS COMPLEXITY?

By striving for high quality services:

The aim of the EPO is to deliver state-of-the-art examination (EPOQUE search tool) and patent information services (Espacenet, Patent Translate). This is achieved by highly skilled examiners, thorough procedures and review processes and quality controls. Furthermore, the EPO Quality Policy is towards ISO 9001 compliance.

By working together with other IP offices (see item C)
C. CO-OPERATION AS A NECESSITY:

Cooperation with Member States (38 member states + 2 extension states):

The formal basis of co-operation with member states are Bilateral Co-operation Plans (BCP’s). The cooperation focuses on three main areas, namely training for staff of NPOs and other institutions, patent-related IT services and tools, and patent information awareness and tools.

Examples of on-going co-operation projects are the European language technology services (patent specific machine translation), EQE Candidate Support Project (training patent attorneys in new member states), Federated European Patent Register (one-stop-shop access to the various patent registers in Europe), EPOQUE-NET (making the EPO search tool available to examiners in national patent offices), Discussion Platform for Exchange on Patent Procedures (between EPO examiners and examiners of national offices), CPC (new standard for classifying patent documents).

Cooperation with international Organisations

- WIPO – fully electronic exchange of PCT documents
- EU – Brussels Bureau, Unitary Patent
- OHIM – IP training, IP promotion, IT systems, etc.
- OECD – common studies
- ISO – public availability of telecommunication standards

Non-Member States

For non-MS the focus is on the IP5 offices, due to their outstanding importance in terms of filing figures and expertise.

CONCLUSION

Due to the complexity of the system and the inter-dependency of the actors, the issue is not: Harmonization, Centralization **OR** Networking? but

Harmonization, Centralization **AND** Networking!
The European Patent With Unitary Effect and the Problem of Legal Uncertainty With Regard to the Patenting of Biotechnological Inventions

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According to the European Union “patent package”, a European patent with unitary effect is created which provides uniform patent protection within the participating Union Member States. Also, Union law provides substantive rules for the requirements for patentability of biotechnological subject-matter by means of Directive 98/44 (Biotech Directive). The combination of these two elements, namely the uniformity of the protection provided by the European patent with unitary effect, and the regulation of patenting of biotechnological inventions by rules of Union law, begs the question whether indeed under all circumstances a European patent with unitary effect guarantees uniform protection of biotechnological inventions.

The actual examination and grant of a European patent, or a newly envisioned European patent with unitary effect, and possible post-grant opposition procedure, is governed by the European Patent Convention (EPC), which has no connection with Union law. For harmonization purposes, provisions of the Biotech Directive were taken over in literal wording into the EPC. This taking over of rules from the Biotech Directive into the EPC does not mean that Union law was implemented in the EPC. The judiciaries of the European Patent Office (EPO) ultimately deciding on patentability, the Boards of Appeal, apply EPC law only, and Boards of Appeal cannot refer questions on the interpretation of Union law, such as the Biotech Directive, to the Court of Justice of the EU (CJEU).

It appears that the present system ruling the patenting of biotechnological inventions in the Union is a hybrid system. There are two separated judicial systems that ultimately decide on the criteria for patentability of biotechnological subject-matter, namely national courts of Union Member States applying Union law in collaboration with the CJEU, and Boards of Appeal of the EPO applying EPC law. This hybrid situation results in legal uncertainty, since there is no guarantee that decisions made by the two separate judicial systems about the patentability of the same subject-matter are similar. The field of patenting of human embryonic stem cells provides some striking examples of this uncertainty.

A major question is whether the newly envisioned system creating a European patent with unitary effect also is a hybrid system with concomitant legal uncertainty as regards the patenting of biotechnological subject-matter. The court deciding on the validity of European patents with unitary effect, the envisioned Unified Patent Court (UPC), shall apply Union law and shall cooperate with the CJEU and refer questions on the interpretation of Union law to the CJEU. Thus, also the new system appears to be a hybrid system: when the UPC examines the validity of a granted European patent with unitary effect and the Biotech Directive is involved, this court can or must refer questions to the CJEU, but in contrast when the EPO investigates a granted European patent with unitary effect during opposition procedures, it cannot refer questions to the CJEU. There is no guarantee that with respect to the patenting of biotechnological inventions the two judicial systems will come to similar conclusions.
A European patent with unitary effect should provide uniform protection, and the fate of such a patent in the field of biotechnology should be independent of testing its validity during a procedure before the envisioned UPC or during an opposition procedure before the EPO. It would seem uncertain whether this uniformity and consistency can be guaranteed. The division of powers between the UPC and EPO judiciaries implies legal uncertainty. Different and non-uniform criteria may be applied with respect to the requirements for patentability of biotechnological products and processes, and claimed subject-matter in a European patent with unitary effect may be affected in a different manner during an opposition procedure than during a procedure before the UPC after appropriate referral of a question to the CJEU. Thus it may be questioned whether uniform protection of patent rights, as required by the Treaty provision on which the creation of the European patent with unitary effect is based, can be fully achieved.
Integration by Courts: The Role of the CJEU in the European Patent System: 
Reconciling the Single Market with Human Rights Concerns?

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The Unified Patent Court (UPC) constitutes an important step in the construction of a European system in the field of intellectual property (IP). Nevertheless, being a hybrid of EU and international law, the question arises on the role of the Court of Justice of the European Union (CJEU) in the emerging European patent order. Throughout the years, the CJEU through its case law has been active in contributing to elaborate the contours of the European IP legal framework. However, in the new judicial system, the role of the Court of Justice has been limited, at least on paper. As the aim behind the UPC was the creation of a specialized jurisdiction to deal with the particularities of patent law and to insure legal certainty, concerns were expressed by some potential users of the system that the inclusion of substantive law provisions into the Draft Regulation 1257/2012 would imply too much control by the CJEU as a non-specialized court. As a result, it was decided to remove these provisions from the Draft Regulation and to include similar clauses into the UPC Agreement, limiting the involvement of the CJEU. Moreover, in the new regime, the Court has not been awarded an appellate function and will thus only be able to be active when it is asked through preliminary rulings.

However, having in mind the “conquering spirit” of its past jurisprudence, it is not sure that the CJEU will accept to stay in the limited function assigned by the UPC Agreement. Notably, as stated in the Preamble of the latter, the Unified Patent Court will have to “respect and apply Union law” and to cooperate with the CJEU “by relying on the latter’s case law and by requesting preliminary rulings”. In this respect, the role of the CJEU could become crucial in the future by, first, securing the coherency of the system. In fact, perhaps paradoxically, some of the deficiencies of the system could be “fixed” by the harmonizing effect of case law on certain issues, as European patent law (non-EU law) will have several interferences with the EU legal framework. Second, the CJEU can help to secure the acceptability of the system by safeguarding the proper balance of rights in accordance with the general principles of EU law on free movement of goods and services, free competition and human and fundamental rights law, thereby reconciling economic rationales with ethical principles. Finally, in the long run, the case law of the CJEU might inspire a future revision of the system and the creation of a true EU Patent system.
Institutionalism versus Intergovernmentalism:
The example of the “Unitary Patent Package”

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A review of the last almost seventy years of the process of European construction reveals the extent to which the whole exercise seems to be a carousel, where times of euphoria, of leadership by the institutions (“institutionalism”), give way to periods where the Member States take the power again (“intergovernmentalism”), and vice versa. The example of patent governance in Europe over the last two decades is paradigmatic.

As early as 1962, both the European Commission and the then six Member States acknowledged that for an actual common market to be achieved, a condition not contained in the Treaties had to be accomplished: the Member States of the European Communities should have a Community Patent System, that is to say, a system where a) a single patent office b) applying a single patent granting process c) would grant a unitary patent (the Community Patent) with common effects, d) subject to a uniform Community law, and e) where all issues dealing with both revocation and infringement would be solved by a common judiciary.

After some well known failures (1962, 1975, 1989), the Commission proposed in 2000 a Regulation according to which the European Patent Office was given exclusive competence for a) receiving Community patent applications, b) studying them through the patent granting process established by the European Patent Convention, and c) granting Community patents d) subject to Community uniform law. Also, the Commission proposed in 2003 a Decision creating a Community Patent Court within the framework of the Court of Justice of the European Communities, with exclusive competence for both revocation and infringements actions regarding Community patents. In other words, the institutions clearly led the process towards an actual Community Patent System.

However, the rebellion of some – relevant – Member States has radically reversed the situation. First, late in 2012 twenty five Member States of the EU (all, but Spain and Italy; Croatia joined the EU in July 2013, and did not join the enhanced cooperations yet) agreed within the framework of two “extraordinary” enhanced cooperation procedures a) to attribute competence to the European Patent Office b) in order to create a special register where a classic European patent, granted with the same set of claims in respect of all the participating Member States, can obtain a “unitary character” if the patent holder so desire, that is to say, uniform protection and equal effect in all the participating Member States. The so-called “European patents with unitary effect” may only be limited, transferred or revoked, or lapse, in respect of all of them, but c) the scope of the right conferred is not governed by EU Law but by the national law of one of the said states. Second, early in 2013, twenty five Member States of the EU (all but Spain, Poland and Croatia) signed a classic international convention creating a Unified Patent Court with exclusive competence for both revocation and infringement actions where European patents validated in one or several of the Contracting States and / or European patents with unitary effect were involved. In order to allow this
Court, which where necessary has to apply EU Law, the possibility of referring preliminary questions to the European Court of Justice, it has a two-headed nature, being not only an international court but also a court belonging to the judicial powers of all the contracting Member States. In other words, the Member States are clearly leading the process towards a “European patent with a unitary effect” and a Unified Patent Court outside the framework of the European Union where the institutions of the Union are virtually absent.

This example shows to what extent the political will of some Member States has prevailed over the governance of the institutions, marking a dangerous tendency to move from a delegation/supervision scheme to a simple replacement of the EU institutions by the Member States themselves. It is my conviction that this process should never have been evolved in this direction and that the vision should move back to the European Union. The risk of generalisation of these practices is too high, and too much is at stake for the future of Europe.
Patent Integration at European Level

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I. The Commission's general approach to IP policy – the inventor's trail

Knowledge is the currency of the future and innovation is one of the key reliable drivers for growth in Europe. A recent study carried out by OHIM and the EPO provides compelling evidence on the economic importance of intellectual property rights in Europe: 40% of total economic activity in the EU and 35% of all employment is generated by IPR-intensive industries. Patent intensive industries in Europe contribute to 10% of EU direct employment (22 million) and 14% of EU GDP (EUR 1.7 trillion).

The Commission's objective is to make sure that inventors and creators are successful on the "inventor trail". This requires good laws, efficient registration procedures, the capacity to leverage capital for developing an idea, a framework for branding, a clear and predictable legal environment for distributing and licensing innovations to consumers and customers, efficient jurisdictions for ensuring respect for rights and investments, trade agreements with third countries that offer a stable and predictable environment for exporting innovations. Intellectual property is not a purpose in itself. It is a tool to stimulate innovation and dissemination of knowledge. There is clear evidence that a well calibrated intellectual property system creates qualified jobs and growth in Europe.

II. Unitary Patent Package: State of play and outlook

Today the patent system in Europe is complex, fragmented and costly. And this is also true for litigation. While big companies might be able to afford the price to validate and defend their patent across multiple jurisdictions, small innovative companies cannot. The Commission made the unitary patent package a top priority for the single market. The landmark political agreement in 2012 provides for an important step forward which will bring substantial benefits to European innovators. It establishes a one-stop shop procedure for unitary title, centralised litigation and offers substantial reduction in costs and administrative burden. The Commission is now working together with the Member States and the European Patent Office to ensure that the system becomes an attractive option for innovative companies. Key features in the implementation process include: Timely ratification and entry into force, an attractive cost structure, legal certainty and trust in the new judges, a good balance of patent holder and user interests, and full compatibility with Union Law.

III. Patent integration at the international scale

There is a need to further explore some basic common features for efficient patent systems globally. Today's challenges such as climate change and food security are global. We need innovation to address these challenges on a global scale. Supply chains for delivering

* The views expressed are purely personal and do not represent the official view of the European Commission
innovation are increasingly global. There are a number of differences in approach in different jurisdictions. That is true, for example, for the grace period concept, the notion of protected subject matter and the publication of patent applications. Patent quality is a key issue for Europe. WIPO and trade discussions can be instrumental to progress in these areas.
Cooperation or Conflict

European politics of intellectual property rights and the relation between Commission, Council and European Parliament

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In the late 1980s, shortly after the then twelve member states of the European Union had signed the Single European Act (SEA), which has set the legal foundation for the single European market, the European Commission has started to expand its competences into the field of intellectual property politics. Since then, the Commission’s legal activities in this field have focused mostly on Copyrights, but in three instances it has also tried to shape patent rights – with very mixed outcomes. The three directives have addressed biopatents, software patents and the enforcement of intellectual property rights. Of these, the directive on the “patentability of computer-implemented inventions” failed completely, the directive on the “legal protection of biotechnological inventions” initially failed and was only successful in the second attempt. Only the directive on the “enforcement of intellectual property rights” passed the legislative process without larger conflicts.

A comparison of the four cases strongly confirms the agenda-setting and policy-shaping role of the Commission and thus highlights the importance of the drafting phase. But the Commission was only able to successfully shape IP politics by seeking compromises between the European institutions and thus has to account not only for the IP community and select industry actors but also for other actor groups with stakes in the field of patent politics.

The European Parliament tried to assert itself an indirect agenda-setting capacity by revising in two cases the Commission’s proposals in a way that they no longer reflected the original intentions of the Commission. But it did not succeed, because the Commission was able to rely on the Council’s veto power to reject the Parliament’s amendments. Thus the parliament was in the end only able to use its own veto power to reject a proposal, but not to shape the policy field with its own ideas.

The Council emerges as the most passive of the three institutions. While there was usually disagreement among the member states, the Council was never the main arena in which the conflict was staged.

In a broader perspective this means that the involvement of the European institution in IP politics has sustainably politicized a field that was formerly characterized by de-politicized technocratic governance mechanisms.
EU and WIPO: What Comes After the Development Agenda?

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The WIPO DA: Its emergence and significance

The Development Agenda (DA) proposal was launched in 2004 by a group of twelve developing countries led by Brazil and Argentina. It emerged in a context of mounting criticism by many developing countries and civil society groups towards the World Intellectual Property Organization (WIPO) ‘one size fits all’ approach to intellectual property (IP) protection. The DA proposal argued the need for WIPO to pursue a more balanced approach which recognised both the benefits and costs of IP protection, took into account differences in levels of development and ensured that IP effectively promoted innovation. It also argued that WIPO, by virtue of becoming a UN agency in 1974, should be fully guided by the UN principles and objectives such as the Millennium Development Goals (MDGs).

The WIPO DA 45 recommendations

After three years of deliberations, in 2007, the WIPO General Assembly (GA) adopted 45 DA recommendations divided in 6 clusters: technical assistance; norm-setting; technology transfer and access to knowledge; assessment and evaluation; institutional matters such as mandate and governance and enforcement. The DA seeks ultimately to ensure that development considerations form an integral part of WIPO’s work.

The Committee on Development and IP (CDIP) was established to oversee and monitor the implementation of the 45 recommendations and, in 2009, a project-approach was pursued to carry forward such implementation for many of them. By 2013, 27 projects were approved covering 31 DA recommendations. In 2010, a Coordination and Monitoring Mechanism was established by the WIPO GA which instructed “(…) relevant WIPO bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective DA recommendations.”

The WIPO DA implementation: a work in progress

A comprehensive assessment of the WIPO DA implementation remains challenging. In 2010, the WIPO GA requested the CDIP “to undertake an independent review of the implementation of the DA Recommendations (…)”. However, WIPO member states have been so far unable to reach agreement on the terms of reference for such review. There has also been no agreement to have some WIPO bodies – such as the Programme and Budget Committee (PBC) – report on their implementation of the WIPO DA recommendations.

No doubt the WIPO DA has incited WIPO to pay greater attention to the diversity of views among its stakeholders. At the level of norm setting, the Marrakech Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (2013) was adopted. However, tensions remain vivid between two competing visions of the IP/development interface encapsulated in the DA recommendations: ‘IP for development’ i.e. the use of the IP system as an engine of growth vis-à-vis ‘development-oriented IP’ i.e. the need to ensure that such system is balanced, takes into account different levels of development and is supportive of public policy objectives.
Ultimately, the implementation of the WIPO DA remains a work in progress. Thus, it might be still premature to talk about ‘what comes after the WIPO DA’. The question that is increasingly raised is whether WIPO’s governance is fit for mainstreaming the WIPO DA and changing WIPO’s institutional culture, which remains an ongoing challenge.

**EU and the WIPO DA**

The European Union (EU) is well-placed to potentially bridge the gap in developed and developing country positions in a manner that advances in a constructive manner the WIPO DA implementation process. Some EU countries played an important role in reaching agreement on the 2007 recommendations. The EU can also contribute to building trust with developing countries on a range of matters which have proven divisive so far, including patent related ones. More broadly, the EU could also help advance a balanced and inclusive norm-setting agenda for WIPO, which comprises addressing in an effective manner issues relating disclosures of the origin genetic resources in patent applications and the protection of traditional knowledge.
The World Intellectual Property Organization (WIPO), as a specialized agency of the United Nations, offers a multilateral forum to develop an international IP system that encourages innovation and creativity worldwide and facilitates participation by all Member States in the benefits of technological and cultural advances. While this high level common goal is embraced by its Member States, there are criticisms that multilateral cooperation, particularly in relation to the development of international IP norms, has been lagging far behind today’s reality.

One of the contentious issues in recent international debates is the harmonization of patent laws. According to the definition of “harmonization” by Boodman (1991), harmonization of patent laws is not the unification of laws, and it inherently embraces flexibility and diversity of laws. The development of international norms is thus a history of efforts to establish and re-establish a harmony in a specific set of circumstances at points in time.

WIPO’s activities are aligned to its nine strategic goals, which are underpinned by the WIPO Development Agenda recommendations adopted in 2007. These activities have political, legal or practical dimensions, which vary from the operation and development of international filing/registration systems, norm setting and capacity building, to technical infrastructure, such as the automation of patent offices and digitization of patent information. Since they are pursued simultaneously, the efficiency and effectiveness of cooperation depends on the coordinated actions of stakeholders involved with shared common goals.

The coordination of activities will become even more vital, as cooperation activities take place in the complex web of national, bilateral, plurilateral, regional and multilateral frameworks, either within IP or beyond. To provide an environment conducive to multilateral cooperation, the important role of neutral facilitators who supply empirical information to support informed decision making in the process cannot be underestimated.

Statistics suggest that the “production” of science and technology has become more internationalized, and the international mobility of inventors leads to cross-pollination of technological development. To meet the increasing demands for patent protection, both at the national and international levels, not only the further development of the PCT, but also international cooperation regarding non-PCT foreign filings could be intensified, particularly in the area of patent search and examination. In that regard, the development of ICT would offer a better possibility to share and process information internationally, and could revolutionize, at the operational level, the way patent offices cooperate. Further, earlier international discussions tended to focus on use of patent rights – post-grant issues – and their

† The statements and views expressed during the presentation are solely those of the presenter and do not represent any official position of WIPO.
impact on public health, competition or access to knowledge. However, more recently, there has been a wider recognition of the intertwined nature of pre- and post-grant issues at the international level, e.g., scrutinizing the conditions of patentability from the perspective of innovation promotion and dissemination of technological knowledge. The future patent governance in Europe would probably have an impact on such a wide range of future international patent cooperation agenda.
The recent dynamic progress (for better or worse) in the development of European Patent Law, in particular the creation of a unitary patent title and a common court to litigate patent infringement in Europe raises, inter alia, questions on the interface with international (IP) law. From the three core issues I addressed in my presentation in September in Hamburg – the role for TRIPS in interpreting the UPC Agreement (UPCA); the impact of increasingly detailed IP enforcement rules in the EU’s free trade agreements (FTAs); and the potential for Investor-State Dispute Settlement (ISDS) over decisions handed down by the UPC – I will focus on the third aspect in this brief summary.

International investment law – although a distinct body of rules than IP treaties – is becoming increasingly relevant for the protection of IP rights, including patents, abroad. In a nutshell, these rules, usually embedded in bilateral investment treaties (BITs) or Investment Chapters in FTAs, protect assets, including IP rights, of foreign investors against state interference. BITs or FTAs often allow foreign investors to challenge host state measures directly in international dispute settlement in front of an arbitration tribunal (ISDS). Increasingly, the measures challenged involve IP rights: Philip Morris currently challenges plain tobacco packaging rules in Australia and Uruguay; while the US pharmaceutical company Ely Lilly is suing Canada under NAFTA’s investment protection rules for the revocation of two crucial patents by Canadian courts.

In light of the arguments made in the Lilly vs Canada case,‡ there are several scenarios for ISDS challenges of UPC decisions: Decisions revoking a patent under Art.32:1 d), 65 UPCA for example could be challenged as a form of indirect expropriation or breach of the fair and equitable treatment (FET) standard that is often held to protect legitimate expectations of the patent holder. Here, an important question concerns whether a foreign patent holder can claim any legitimate expectations based on the grant of a patent.§ Declaratory judgements of non-infringement based on Art.32:1 b) UPCA could be viewed as in breach of the duty to provide ‘full protection and security’ – if this standard is understood as encompassing a duty to protect patents against third party infringements.

‡ At the centre of the dispute is a ‘promise doctrine’ whereby Canadian courts take for granted what the patent application has described as useful effect of the invention and hold the applicant responsible for fulfilling this ‘promise’ of utility: If the patented invention later is found not to meet a promise the court has constructed from the patent application, the patent can be revoked. Lilly complains that the strict patentability requirements resulting from this doctrine, as applied by the Canadian Courts since 2005, are violating Canada’s international IP obligations under NAFTA, TRIPS and the Patent Cooperation Treaty (PCT). This in turn, Lilly argues, breaches the fair and equitable treatment (FET) and expropriation standard under NAFTA’s investment chapter since it interferes with reasonable investment-backed expectations. For a full discussion of Eli Lilly vs. Canada and other IP-related investment disputes, see H Grosse Ruse-Khan, Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation (2014) http://ssrn.com/abstract=2463711.

§ Ibid, at III. 1).
The nature of UPC decisions makes such challenges all the more likely: As “court common to the Contracting Member States” and “part of their judicial system”, the UPC is – by virtue of the UPCA preamble – a “national court” of all the Contracting Member States. As a national court, its decisions could be challenged by investors who enjoy protection under any of the BITs or FTAs agreed by participating EU Member States, as well as new EU investment agreements. Essentially, patent holders may ‘treaty shop’ for the most favourable international investment agreement available: It may well be quite a number of such treaties that are binding upon UPCA Contracting Member States and that offer ISDS.

This highlights the potential for international investment law and in particular the ISDS system to interfere with national court decisions and other state measures affecting patents and other IP rights. It remains to be seen whether IP holders as foreign investors attempt to use this as a forum where they get another option for challenging otherwise final decisions of national courts. If one of the underlying reasons for creating the UPC and the substantive patent law in the UPCA is to keep the Court of Justice of the EU out of substantive patent law, then there is even more reason to worry: It certainly can be doubted that ISDS tribunals have similar (let alone more) expertise and experience in ruling on patent law matters. States are beginning to respond to this problem: The EU and Canada have introduced language in their FTA aiming to prevent a re-interpretation of IP law via ISDS tribunals. Whether this is sufficient to prevent future ISDS challenges however remains to be seen – as it will not affect the huge amount of existing BITs of EU Members currently in force.

** Since the Lisbon Treaty, the EU has the exclusive competence for Foreign Direct Investment (FDI); and has recently concluded with Canada the first FTA with investment protection rules binding the EU.

†† See the CETA Investment Chapter provision on expropriation and the additional Declaration on IP and ISDS.
Intellectual Property, Plurality, Culture, National Interest, and International Harmonization

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Theses:
- National interest and culture drive both developed and developing countries
- Substantive patent harmonization still not in best interest of many developing countries
- Plurilateral engagement may be best option for developed and developing countries on some issues (e.g., disclosure of origin)

National Interest Examples:
United States: Pushing WTO TRIPS, USITC complaining about China (IP infringements cost U.S. 24 million in 2009, 2.1 million jobs could have been created), yet only country that has not complied with two WTO TRIPS DSB decisions.
Namibia: Should do own search and examination; to ensure only properly vetted patents are issued considering importance of patents to reasonable prices and fact that foreign ownership of patents (vast majority of Namibian patents are foreign owned) is unconnected with tech transfer and local production.

International Harmonization Issue Examples:
EU Nagoya Protocol (NP) Implementation Regulation: Specifies genetic resource/tk user compliance obligations. Temporal scope issue: Only applies to Genetic Resources/Traditional Knowledge (GR/TK) accessed after the NP enters into force (October 12, 2014). However, some provider countries define access as including new utilizations of GR/TK. Thus the Regulation will not cover a significant amount of GR/TK actually used in the EU, undermining the spirit of the NP and creating legal uncertainty (regarding liability in other countries) for EU GR/TK users.
EPO Patent Validation Program (proposed): encouraging non-EPO countries to allow international applicants to validate the effects of their European patent applications and patents in their national territory as national rights. System touted to “reduce national office examination workload by up to 90% and allow the offices to focus on developing their examination capacity for national filings.” Elements of UK re-validation system (colonialism déjà vu?). Apparently would make it easier for foreigners to obtain patents, and potentially more difficult for domestic applicants (if that is where national office efforts would be focused). Also, laws of developing countries may be different to EPC (e.g., TRIPS flexibilities) and the fact that another country/region has similar patent law does not mean its patent office is properly applying the law to claims it receives. Moreover, significant percentages of patents are invalidated after challenge in many large patent granting countries including Germany, Japan, and the United States. Instead, developing country patent office
should use other office examination results as floor, not ceiling, to enhance independent search and exam, not replace it.

**Plurality and Culture:**
WIPO IGC text based negotiations on legally binding instrument(s) for genetic resources, traditional knowledge, and traditional cultural expressions: progress stymied by objections from certain Group B members; developing country demandeurs may need/choose to work plurilaterally to achieve agreement amongst themselves, good timing with Nagoya Protocol in effect and countries having to create legislation to implement, patent office is logical checkpoint and disclosure of origin requirement logical tool. When enough countries adopt such legislation, may create sufficient momentum to return to IGC for broad, multilateral effort.
Good Patent Governance: Norms, Criteria and Procedures

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The paper explores the different conceptions of “governance” by lawyers and political scientists with regard to patent governance. As a preliminary overview, it identifies 9 governance norms by which political scientists aspire to better judge the legitimacy of modern governance arrangements. The paper takes up the challenge and explores the challenges of the notions of good government to the legal paradigm of separation of power. It reiterates briefly the well researched shortcomings of the principle in modern societies as a base for legitimacy judgement. While governance norms can easily be channeled as normative guidelines into law making processes and processes of administrative organisation, the quest to integrate the norms into judicial reasoning are much more demanding. It sets out to test the integration of the political science’ legitimacy norms by a re-argumentation of two well known patent cases. It focusses on the norm complex “regulation” which encompasses the norms of territorial sovereignty and pro-active dealing with complexity. It picks out two complementary examples of public and private self-regulation each, combined with a constellation pre-grant and post grant. The pre-grant example is the examination of the patent exemption of human embryonic stem cells, and departs from the EBA-EPO (WARF) decision and the German Brüstle case as decided by the European Court of Justice. The post-grant example is the restriction of patent injunction to a duty to license (conceptually reducing the property rule into a liability rule) for standard essential patents.

The exercise reveals that (additional) yard-sticks of good governance norms will not necessarily violate limits set by the separation of power principle. Instead, a discussion of governance norms enable a normative reflection of social practices and conflicting constitutional positions involved. The judicial reasoning becomes enriched by a more complex reflection on the line of a set of legitimacy norms beyond a narrow text application often misunderstood as the proper judicial task. Legal principles applied (anyway) become more transparent, the legal decision appears more convincing. However, as the exercise also reveals, the legal reasoning requires an exercise of “interdisciplinary translation”.

Good Patent Governance: Best Practices in Europe and the US

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Background
“Good governance” is becoming a key theme in legal research. In some legal fields, such as company law, environmental law and EU institutional law, principles of good governance have already been widely acknowledged and confirmed in legislation, policies, soft-law documents and corporate strategies. Patent law largely is an uncultivated area in terms of good governance. However, analyzing patent systems from a good governance perspective is helpful, in particular in comparing different jurisdictions, as these jurisdictions differ significantly in terms of their institutional, administrative and regulatory framework. For instance, despite attempts at the EU level to establish administrative law principles and model rules, Europe lacks a uniform administrative law framework, which could contribute to the realization of a balanced, consistent patent governance system. On the other hand, most countries do have an extensive body of administrative law and doctrine, but differ considerably in content. Moreover, patent systems around the world are subject to important reforms, such as the Unitary Patent Package in Europe, the US America Invents Act and the different reform cycles in Japan aimed at turning it into an “IP based nation”.

Working with general principles that underpin good governance seems to be apt in such a comparative, dynamic context. Examples of such principles are: transparency, public participation/inclusion (input legitimacy), effectiveness/expertise (output legitimacy), accountability, coherence/consistency, subsidiarity/proportionality and access to justice.

Objective
The objective of this paper is to initiate a discussion regarding the compliance of the European and US patent systems with good governance principles and to derive best practices from this analysis.

Provisional Results
In the paper important components of the European and US patent system and their respective patent reform processes are analyzed through the lens of the different good governance principles. With respect to Europe, particular attention is paid to the decision-making process on the Unitary Patent Package (transparency), the use of the enhanced cooperation procedure in the decision-making process on the Unitary Patent Package (input legitimacy & coherence), the opposition procedure at the European Patent Office (EPO) and the EPO’s Scenario’s for the Future project (input legitimacy) and the limited competence of the Court of Justice of the EU in patent matters (access to justice). Regarding the US, the paper focuses on USPTO Notice-and-comment rulemaking (transparency & input legitimacy), the newly created review procedures (input legitimacy), the relationship between the US Patent and Trademark Office (USPTO) and the specialized IP court (Federal Circuit) (output legitimacy), and the role of the US Supreme Court in patent law (access to justice). For all these components, an analysis is made of the pros and cons and the opportunities for improvement (partially) based on a comparison with the other patent system and its best practices.
A good patent governance is not an easy concept to define – whether as a normative goal to achieve in the substance of the norms or as an procedural tool to measure a policy implementation. Despite its indeterminacy, it is highly welcoming to see research projects on patent governance as it suggests that the patent law research as a discipline of social science finally has matured, as the discussion no longer occupies a quiet corner of epistemic society of technological experts and technocrats, focusing on finer points of doctrines, which can be an internal monologue.

A patent governance approach as a method seem to also include at least three elements: it is based on a fundamentally instrumentalist view of the patent system (that the current arrangement is contingent and that the rights may be recalibrated to fulfill its goal): it is process oriented, emphasizing that the “patent system” has to be governed through democratic process; and the legitimacy (of the process and substance) is highlighted. To this, I add a perspective on information and institutional design. As governance requires information and no single institution or network has information omniscience. (Drahos). Expertise, and inclusion of the process highlights that a good patent governance need to consider information and institutional capacity to collect information necessary for decision making. A good patent governance need to include an institutional design that takes informational capacity of multiple institutions into consideration; particularly addressing the issues of decentralized decision making and agenda setting and the need to coordinate overlapping institutional competences.

Based on this understanding of a good patent governance, two national practice examples from Japan and Korea are examined. The three tables in the slides show a generic model of patent decision making with four institutions (legislative, administrative, judiciary and market) with two specific countru examples. When one look at the Japanese example, various Cabinet ministries are entrusted with mixed tasks of policy setting and the function as an agenda setter of the legislative processes that are relevant to IP laws. Due to multitude of agencies, there is a question of overlap as well as conflict. IP governance in Japan went through a series of structural reform in 2002-3 to centrally coordinate the IP policy making from the IP Headquarters as well as centralized jurisdiction at the appellate court level (IP High Court) in 2005. Korea went through a similar reform in 2011 creating a “Presidential Council on IP” to activate “Creative Economy 2014.” At this point the practice is hard to evaluate.

These examples highlighted coordination. If a good patent governance requires an inclusive process coordination among the actors as well as institutions may be come necessary. Some decision making channels that coordination simply to market and make market takes the coordinator’s role. Market may govern the uses of resources but it is too opaque and amorphous to set policies. We have seen now above practice examples where executive took
the role and set the agenda. One caveat. National patent governance with stronger roles from the administration has a tendency become a means of governmentality as success of the initiative often have to be measurable and they made be used to measure performances of the particular agencies. Sometimes competition among the actors within the institution is unavoidable and even good as long as it is done through transparent, democratic process.

To conclude, is there any lesson for Europe here at all? Maybe it is not to possible to demand the task of long term policy setting with holistic vision from the individual DGs. A higher administrative agency makes need to take the task to really govern the institutions of patent. For example, EU’s 2011 IP Strategy paper alone may not be fully implemented, without the necessary institutional arrangement to oversee the implementation. Because as seen in the above, an implementation of such level of policy program calls for a stronger executive power with mandates. Maybe the role should be entrusted elsewhere.