

# Governance Processes in Negotiating Intellectual Property at the UN and WTO

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*Global intellectual property (IP) rules have a major effect on all development issues such as health, food, education and poverty. Governance principles are directly relevant to IP policymaking but there is disagreement on whether this is for good or ill. Examining the principles of participation, rule of law and effectiveness and efficiency, it is clear IP global negotiations do not meet the OECD's own good governance standards. All governments therefore have a duty to ensure that IP policies do not undermine or negate their commitment to development.*

## Introduction

Intellectual property (IP) is rarely seen as a key ingredient in discussions around sustainable development. When put alongside concerns such as health, education, food security, poverty and good governance, the relevance of IP seems to fade. Increasingly however, the global rules governing health, education and other development issues, are being influenced and shaped by IP treaties negotiated at the United Nations World Intellectual

Property Organisation (WIPO) and the World Trade Organisation (WTO).

The importance of global IP rules on development is recognised by a growing number of countries involved in WIPO and WTO negotiations. The UK Government's Department for International Development (DfID) established an independent Commission on Intellectual Property Rights (IPR Commission) in May 2001 to examine the overlap between IP and development. In the first lines of their report, the Commissioners state:

The Millennium Development Goals recognise the crucial importance of reducing poverty and hunger, improving health and education, and ensuring environmental sustainability.... It is our task to consider whether and how intellectual property rights (IPRs) could play a role in helping the world meet these targets – in particular by reducing poverty, helping to combat disease, improving the health of mothers and children, enhancing access to education and contributing to sustainable development.<sup>1</sup>

Very briefly, IPRs cover a range of legal rights awarded by a country to individuals or organisations involved in creative works. IPRs include patents, industrial designs, trademarks, geographical indications, trade secrets, copyrights and *sui generis* systems such as integrated computer circuits.<sup>2</sup> An IPR gives a creator the right to prevent others from unauthorised use of an invention or artistic work, for a limited period of time.

Within the global IP community there are two broad camps advocating opposing views on the impacts of IPRs on development. These views are summarised in the IPR Commission report as follows:

Some argue strongly that IPRs are necessary to stimulate economic growth which, in turn, contributes to poverty reduction. By stimulating invention and new technologies, they will increase agricultural or industrial production, promote domestic and foreign investment, facilitate technology transfer and improve the availability of medicines necessary to combat disease.... Others argue vehemently the opposite. IP rights do little to stimulate invention in developing countries,

because the necessary human and technical capacity may be absent. They are ineffective at stimulating research to benefit poor people because they will not be able to afford the products, even if developed. They limit the option of technological learning through imitation. They allow foreign firms to drive out domestic competition by obtaining patent protection and to service the market through imports, rather than domestic manufacture. Moreover, they increase the costs of essential medicines and agricultural inputs, affecting poor people and farmers particularly badly.<sup>3</sup>

Academics, governments, industrialists, lawyers and civil society groups are divided on this issue with no obvious consensus emerging. The only point of agreement is that IP does have an important impact on development.

## **Governance and IP**

Given the relevance of IP to development, governments in both developed and developing countries find themselves in the midst of multi-stakeholder processes when negotiating IP treaties. These negotiations require political compromises between the needs of different constituencies. IP was once a technical domain reserved for patent lawyers and professionals, but today it is a public debate that engages librarians, pop stars, farmers and company directors.

Political processes are complex, but there are rules and guidelines on how governments can ensure best practice. For the countries that make up the Organisation for Economic Cooperation and Development (OECD), these guidelines are often referred to as good governance. The specific role of government in this process is outlined by the World Bank as follows: “The World Bank has identified three distinct aspects of governance: (i) the form of political regime; (ii) the process by which authority is exercised in the management of a country’s economic and social resources for development; and (iii) the capacity of governments to design, formulate, and implement policies and discharge functions”.<sup>4</sup>

When governments meet at WIPO and the WTO they are discharging their function to *design, formulate, and implement policies* on IP. These policies are translated into the national

*management of a country's economic and social resources for development.*

The task of implementing the IP treaties to manage economic and social resources falls to civil servants and becomes part of national public sector management carried out by patent offices and other ministries. OECD/DAC good governance principles define public sector management as:

Art: 37. They [governments] play a key role in providing or assuring the environment for provision of basic services such as education, health, and infrastructure, that are fundamental to a society and its economy.

Art: 39. Experience suggests that public administration should:

- make a clear distinction between public and private resources and public and private property rights;
- have a predictable, coherent, consistent framework of law and government behaviour without arbitrariness;
- avoid regulations that result in sub-optimal resource allocation in markets and rent-seeking and may foster corruption; and
- be transparent.<sup>5</sup>

It is doubtful whether the Development Assistance Committee (DAC) of the OECD had IP in mind when defining these good governance principles for public sector management. However, IP has become a central tool for public servants in distinguishing public and private rights and regulating resource allocation in markets. This is increasingly the case when looking at basic services such as education and health.

OECD countries are very serious about the promotion of good governance principles as a necessary condition for development. What however, do good governance principles involve?

UN literature on this subject identifies nine characteristics of good governance<sup>6</sup> although the two UN agencies most directly concerned with IP (United Nations Conference on Trade and Development – UNCTAD and WIPO) do not have a working definition. The nine characteristics apply in different measure to

IP negotiations in WIPO and the WTO. For the purpose of this discussion, the focus is on three characteristics: participation; rule of law; effectiveness and efficiency.

The analysis below does not constitute a comprehensive or exhaustive study of this issue, but serves to highlight some of the more salient overlaps.

## Participation

*Participation – all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.*

Participation in global governance is covered under international human rights treaties. Article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights (ICCPR) refer to these as “participatory rights”.

In its resolution 2004/24, the Commission on Human Rights requested the High Commissioner, “in cooperation with the UNCTAD, the WTO and other relevant international financial and economic institutions, to study and clarify the fundamental principle of participation and its application at the global level”.<sup>7</sup> The report of the High Commissioner makes a number of observations regarding the participation of states at the global level that are relevant to WIPO and the WTO.

The first is that economic imbalances between members of global institutions can exacerbate political imbalances in decision-making. This can be seen in WTO formal consensus decision-making which necessitates a parallel process of informal consultation meetings of which the “green room” process is a well known example. These informal meetings are not recorded and are usually organised amongst a select number of the key players where deals are brokered providing the direction for the decision at the next formal meeting.<sup>8</sup> “Thus, while formal structures will include poorer countries in the tabling of negotiation proposals and at the end at the formal decision-making stage, those countries have nonetheless been practically excluded from the important intermediate stages of negotiations”.<sup>9</sup>

A further consequence of economic imbalances is how these translate into bargaining strength in negotiations. “In such cases, even where a country might have respected participatory rights at the national level in the development of trade policy, poorer countries might lack sufficient capacity to defend that policy in negotiations”.<sup>10</sup>

The High Commissioner also identifies the lack of capacity experienced by many poor countries as a problem for participatory rights: “[M]any poorer countries do not have sufficient representation in Geneva to participate effectively – either due to small numbers of staff or as a result of a lack of diplomatic representation in Geneva. Similarly, even where poorer countries can attend meetings, overburdened staff can lack the technical complexity necessary for effective representation and to undertake research on policy issues”.<sup>11</sup>

In addition to the human rights perspective, there is a growing body of literature focused directly on IP negotiations. In a recent paper Ahmed Abdel Latif identifies some problem areas faced by developing countries which adversely impact their ability to participate in negotiations.<sup>12</sup> The first is the proliferation of IP negotiations external to WIPO and the TRIPS Council.<sup>13</sup> Latif identifies nine UN and international organisations currently involved in IP related standard-setting.<sup>14</sup> He also highlights the role of regional organisations such as the Organisation Africaine de la Propriété Intellectuelle (OAPI) and the Andean Community. Lastly, he draws attention to the IP provisions that are key features of bilateral free trade and investment agreements concluded by the United States and EU with developing countries.

For developing countries it is increasingly difficult to follow all the IP related discussions under this continuous forum-shifting. “Although, forum-shifting is not entirely new, it has been mainly instigated successfully, by industrialised countries, which have dominated international IP standard-setting and has been, in general, to the detriment of developing countries”.<sup>15</sup> The second is that international IP standard-setting emerging from these diverse forums entails important legal differences that require a high degree of specialised legal interpretation. To start with, the WIPO and TRIPS norm-setting processes are different. The TRIPS Agreement established the minimum substantive standards of IP protection and debates in the TRIPS Council focus on modifying or interpreting these standards.

WIPO rule-making however, is focused on creating new norms in IP protection. This is particularly true for soft law

norms that do not require the same level of deliberation by members as a formal WIPO treaty. Soft law norms adopted by the WIPO General Assembly take many legal forms such as agreed statements, recommendations, resolutions, declarations etc. Latif points out that bilateral and regional free trade agreements can incorporate WIPO's soft law norms thereby creating legal ambiguity between treaty law and soft law norms. The bilateral agreements can also contain new IP protections that go beyond the minimum standards in TRIPS. These so called TRIPS plus standards create complex legal hierarchies among conflicting provisions. "The diversification of international IP standard-setting is a further challenge to the limited institutional capacity of developing countries to articulate coherent and well coordinated positions in ... IP rule-making".<sup>16</sup>

Third, many developing and some developed countries have fragmented and compartmentalised IP policy-making structures. Typically, delegates attending the TRIPS Council will be from the ministry of foreign trade whereas those attending WIPO will be from the ministry of foreign affairs. The ministry of environment covers the Convention on Biological Diversity (CBD) and the ministry of agriculture the UN Food and Agriculture Organisation (FAO). A national IP office dealing with the administration of patents, trademarks and copyright may not be in a position to address cross-cutting issues of public policy such as agriculture, health, environment and education.

This fragmentation is in part a result of the forum-shifting in IP, but also reflects the expansion of IP into many public-policy areas. The results however, as Latif observes, can be disastrous: "As a result of the lack of coordination at the national level, different government agencies and departments of developing countries pursue their agendas in an uncoordinated manner at the international level... Many developing countries have taken different positions with no other apparent justification than the lack of coordination between their respective delegations".<sup>17</sup>

The points raised above serve to illustrate that *participation* in IP policy-making is a serious problem for many developing countries.

## Rule of law

*Rule of Law – legal frameworks should be fair and enforced impartially, particularly the laws on human rights.*

It is difficult to take issue with such a statement and it would seem uncontroversial to apply this principle in IP. However, the enforcement of IPRs is a major issue for some countries in the TRIPS Council.

At the TRIPS Council meeting on the 14 – 15 June 2005, the European Communities (EC) submitted a communication on enforcement.<sup>18</sup> In the official minutes of the meeting, records show that the EC delegate makes a direct link between enforcement of IPRs and good governance: “He said that effective enforcement of IPRs was also essential to attract foreign investment, transfer of technology and know-how, as well as to protect local right holders in developing countries. It was also an indicator of *good governance*, international credibility, of respect of the *rule of law* and of bilateral and multilateral commitments”.<sup>19</sup>

If enforcement is so uncontroversial, the question that springs to mind is why some countries are not enforcing IP laws? Part of the answer, as Latif points out above, lies in the complex legal interpretations and hierarchies of laws covering IPRs. In addition, for many developing countries, IP legislation was either non-existent or fairly basic when the TRIPS Agreement was signed. Some therefore question whether they should prioritise the creation of legal frameworks to enforce IPRs, over more immediate development concerns.

Enforcement of IPRs through the TRIPS Agreement and WIPO treaties also brings into sharp focus the compatibility of IP laws with other forms of international law. In relation to governance, the most important of these is human rights law. A high-profile case involving IPRs and human rights has been over the issue of access to medicines.

The issue has focused on the price of essential medicines which became headline news when thirty-nine pharmaceutical companies sued the South African government. Their complaint was that a new law allowing the importation of cheaper drugs to address the HIV/AIDS crisis, would be contrary to the TRIPS Agreement. The South African government action was prompted when the price set by pharmaceutical companies for patented drugs became too high for the public health service budget. As Prof. Frederick Abbott explains:



Pharmaceutical patents by design and function increase the price of medicines to consumers. Patents enable pharmaceutical manufacturers to sustain prices higher than their marginal costs of production by discouraging the emergence of competitors. The United States and the OECD pharmaceutical industry have argued that price is only one factor in determining access to medicines in developing countries, and infrastructure and professional support must also be addressed. Yet this is hardly an argument against measures that would lower the price of patented pharmaceuticals.<sup>20</sup>

International human rights law also provides a legal basis upon which to develop legislative measures and administrative policies regulating access to medicines. The main instruments are “The Right to Health” in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and “The Right to Life” in article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>21</sup> WTO members who are bound by the TRIPS Agreement are also parties to either or both the ICESCR and ICCPR.

These human rights stress the need for all members of society to have access to essential medicines. The high costs of patented pharmaceuticals create a real barrier to the enjoyment of these human rights, especially when cheaper generic versions are available but prohibited by the TRIPS Agreement. Paul Hunt, Special Rapporteur on the Right to Health comments that “whether publicly or privately provided, the essential medicine must be affordable for all, not just the well off. Clearly, the affordability of essential medicines raises crucial issues, such as drug pricing, compulsory licensing, parallel importing and the reduction of import duties”.<sup>22</sup>

The dilemma for a government is how to interpret and prioritise its different international legal obligations. Is it more important to respect IPRs or fulfil human rights obligations to provide essential medicines?

This particular case links into the wider debates about the hierarchy of international laws. The WTO is the only inter-governmental organisation that has a dispute settlement mechanism whose rulings can be enforced using trade sanctions and other instruments. Some observers feel that this has led to an imbalance in the relationship between human rights and trade

law “because the WTO is capable of more concrete enforcement (including the risk of trade sanctions under the Dispute Settlement Mechanism, which all WTO members must accept as part of their ‘single undertaking’) than is the human rights regime, trade law has enjoyed a *de facto* primacy that cannot be defended under international law”.<sup>23</sup>

According to the International Federation of Human Rights (FIDH)<sup>24</sup> “the primacy of human rights under international law is outlined in the UN Charter (e.g. Art. 55 on ecosoc rights) and given definitive interpretation in the Universal Declaration on Human Rights (*viz.* Preamble and Arts. 21-28 on ecosoc rights). The Charter establishes that States’ obligations stemming from the Charter prevail over all others (Art. 103), an unequivocal statement of the *de jure* primacy of human rights in the international legal framework”.<sup>25</sup>

The OECD/DAC definition of the *rule of law* principle in good governance does not provide an answer to the question of primacy between national and international law and potential conflicts between international legal obligations. The importance of assessing how different legal obligations on states inter-link is however, recognised by the Director-General of the WTO. During the WTO Hong Kong Ministerial, Pascal Lamy is reported by FIDH to have said at a symposium hosted by the International Centre for Trade and Sustainable Development:

[T]he citizens of this planet basically know that trade and human rights, trade and social issues, trade and development, trade and the environment are things which are linked, not because they have long studies to tell them this, but because that is what they see every day. These things are linked. We can’t keep going this way. We see these things are linked, but the international organisation doesn’t recognise that they are linked so this leads to more and more discrepancy between what people see and what is said. This is a recipe for trouble.<sup>26</sup>

As IPRs are increasingly being enforced through international trade and legal instruments, the imperative to address the issue of whether they create obstacles to the fulfilment of other international treaty obligations is critical.

## Effectiveness and efficiency

*Effectiveness and efficiency – processes and institutions produce results that meet needs while making the best use of resources.*

The *raison d'être* of the IP system is that it provides an effective and efficient means of stimulating innovation, which drives the process of economic and social development. As such, the promotion of IP could be seen as a key public policy measure within good governance and development. In their book on the patent system in the USA, Adam Jaffe and Josh Lerner write:

Over the course of the 19<sup>th</sup> and 20<sup>th</sup> centuries, the United States evolved from a colonial backwater to become the pre-eminent economic and technological power of the world. The foundation of this evolution was the systematic exploitation and application of technology to economic problems. ... From the beginning of the republic, the patent system has played a key role in this evolution. It provided economic rewards as an incentive to invention, creating a somewhat protected economic environment in which innovators can nurture and develop their creations into commercially viable products.<sup>27</sup>

IP tries to balance the private rights of a creator alongside the public commons. The system grants the creator exclusive rights that result in a temporary monopoly in return for full disclosure of the invention. For many observers this system represents an effective and efficient use of resources for economic and social development.

However, since the 1980s the balance between private rights and public commons has been shifting towards the rights-holders. This shift is partially explained by changes in the nature of research and innovation. The shift has also been prompted by commercial and business practices that are actually separate from the creative process. In the USA context, Jaffe and Lerner point to legislative changes in 1982 as the defining moment of this shift in balance. The creation by Congress of the Court of Appeals for the Federal Circuit (CAFC) was designed to minimise uncertainty in patent litigation by consolidating all legal rulings under one court.

Shortly after the CAFC's creation in 1982, firms came to understand that patentees' likelihood of success in court was improving. Partly as a result, a number of firms began to assert their cases for royalties on patents that they had held for some time but had not previously actively enforced.<sup>28</sup> In other words, the 1980s saw a proliferation of patents on technologies that already existed. The logic of granting a patent to stimulate innovation is not present in this scenario. So why should companies be interested in claiming patents on technologies that they have invented, commercialised and on which they have already recouped their research costs?

The answer is that a patent creates a monopoly and that licensing use of your invention to others generates revenues. "Texas Instruments had virtually no licensing revenues when it decided to assert a number of the patents in its portfolio against its competitors in the mid 1980s. This strategy was so successful that by 1999, the firm was estimated to be earning about \$800 million from patent licensing revenues, which represented more than 55% of TI's total net income".<sup>29</sup>

The lesson for company directors and shareholders alike was that enforcing your monopoly and extracting license revenue was as profitable as inventing and marketing new products. Rent-seeking was and still is a profitable business. In terms of business management practices, there is nothing inherently wrong with this development. However, for developing country governments, granting these types of monopolies and licensing powers to foreign companies through the recognition of private IPRs was not obvious.

This changed during the Uruguay Round of multilateral trade negotiations (1986-94) which concluded in the creation of the WTO and signing of the TRIPS Agreement. In their book on IP, economists Carsten Fink and Keith Maskus look at the driving forces behind the TRIPS Agreement

The process of economic globalisation has enabled intellectual property to cross international boundaries more easily. Indeed, for many rich countries, IPR-intensive goods and services constitute a rising share of the income they derive from their presence in foreign markets. It is therefore not surprising to see political economy forces at work in these countries, leading governments to raise IPR protection as a key negotiating issue in international trade agreements.<sup>30</sup>

We see here that the primary motivation for the inclusion of IPRs in international trade agreements is economic and that it largely favours industrialised countries. The question then arises, will the enforcement of international IPRs through the TRIPS Agreement and WIPO treaties provide an *effective and efficient* means of stimulating innovation and development in the developing world?

Many of the governments that pushed for the inclusion of TRIPS also argued that by enforcing an international minimum standard of IP protection, developing countries would be in an equal position to exploit their inventions. This would in turn generate innovation and economic development. The difficulty for many developing country governments is in assessing the validity of these claims. As Fink and Maskus observe:

In particular, economists have tried to assess the effects of stronger standards of protection on various measures of economic and social performance – ranging from innovation, competition, and market structure to trade, investment, and licensing decisions. Such analysis can be useful to policy-makers, both in deciding what kinds of IPR standards are in a country's best interests and in designing complementary policy reforms that help minimise the costs and maximise the benefits of new IPR regulations.<sup>31</sup>

What is significant in the findings of Fink and Maskus is that “most positive and normative effects of IPR reforms are theoretically ambiguous and dependent on circumstances”. To prove the theory that IP can stimulate innovation and development in developing countries, it is therefore necessary to conduct empirical research. However, Fink and Maskus note: “One shortcoming of existing research is that it has focused on the richer middle-income countries. It would be useful to have more case study evidence on least developed countries and lower-middle income countries, which typically have a less developed legal and institutional infrastructure and in which very few firms, if any, conduct R&D”.<sup>32</sup> They conclude:

The economic research presented in this book suggests that there is an important development dimension to the protection of IPRs. At the same time, in view of the various tradeoffs associated with alternative IPR standards, a “one size fits all” approach is unlikely to work.... Future trade

negotiations may well place pressure on developing countries to sign up for stronger standards of protection. Developing countries should carefully assess whether the economic benefits of such rules outweigh their costs.<sup>33</sup>

Bearing these points in mind, it would seem logical that countries engage in empirical research to assess the impact of IPRs in developing countries and whether these represent *effective and efficient* use of economic resources. However, what we see in bilateral free trade agreements and at WIPO is a constant drive by the USA and EU towards ever higher standards of IPR protection.

The debates around whether IPRs constitute an *effective and efficient* use of economic and social resources will continue in the years to come. The driving force behind increased IP protection appears to be largely related to commercial interest rather than as a stimulant for innovation. That the theory of pro-development IPRs is inconclusive and that little empirical research has been conducted, should be a cause for concern. This characteristic of good governance, as defined by the OECD/DAC, has been notably absent from the current IP negotiating package.

## **What next for IP and good governance?**

At the beginning of this article, the question raised was whether the principles of good governance for development have any relevance for international negotiations on IP at WIPO and the WTO. Through an examination of three good governance characteristics (participation, rule of law, effectiveness and efficiency) we have seen that these principles are not only applicable, but already the subject of widespread debate in the IP community.

As the main proponents of good governance, OECD countries should take a lead in analysing the implications of these principles for IP negotiations. At this time however, the main actors in looking at the linkages are the developing countries themselves. The Friends of Development are behind recent attempts in WIPO to establish a development agenda for the UN agency.<sup>34</sup> In their submission<sup>35</sup> to the first Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO held in Geneva on 11–13 April 2005, the Friends of Development directly address governance issues.

For example, the Rule of Law characteristic is explored in section III.1(e) entitled Compatibility with, and Support of the Objectives and Provisions of other International Instruments.

51. In order to fully incorporate the development dimension, norm-setting in WIPO should ... ensure that these processes and outcomes are fully compatible and actively support other international instruments that reflect and advance those development objectives. ... As a result, for instance, under no circumstances can human rights – which are inalienable and universal – be subordinated to intellectual property protection.<sup>36</sup>

In relation to effectiveness and efficiency, section III.1(b) entitled Comprehensive Assessment and Justification in Terms of Sustainable Development has this to say: “44. Intellectual property protection is not an end in itself, but rather a means to support public policy objectives such as economic, social, and cultural well-being.... All norm-setting activities in WIPO should be based on available empirical evidence and on a cost-benefit analysis”.<sup>37</sup>

To address these issues, the Friends of Development have urged members of WIPO to establish an independent WIPO Evaluation and Research Office (WERO).

29. Such an Office would provide a transparent, independent and objective mechanism, *vis-à-vis* the General Assembly, the WIPO Secretariat and all interested stakeholders, through which WIPO’s programmes and activities would be evaluated with respect to their development impact in general, and their impact on innovation, creativity and access to, and dissemination of knowledge and technology. Its creation would ... be in line with established international practice. The World Bank Group, the International Monetary Fund (IMF), the European Investment Bank, the United Nations Development Programme (UNDP), among other international institutions, already have similar mechanisms.<sup>38</sup>

The OECD countries have officially affirmed their support for pursuing a development agenda in WIPO. The USA however, disagrees with many of the premises upon which proposals such as WERO are based. It is concerned that the proposals made by the Friends of Development revolve around a flawed premise that

weakening intellectual property rights would assist development. The USA has made a number of its own proposals – and supported those of other developing countries – that are based on a positive view of the relationship of intellectual property and development.

To try to understand why the USA thinks the development agenda and its wide-spread support amongst the majority of developing countries in WIPO is based on a false premise, it might be instructive to look more closely at mandates. Typically, the delegates who attend WTO and WIPO meetings are civil servants from the ministries of trade and industry, justice and patent offices. They are not trained in development issues and have for the most part, limited experience of work in developing countries.

For example, the Irish Patents Office / Oifig na bPaitinní is part of the Department of Enterprise, Trade and Employment and has a mission statement that outlines its role as being:

To provide an efficient and effective system of industrial property protection that will encourage technological progress and promote enterprise through the implementation by the Office of the relevant legislation. This is to be achieved through the protection of industrial property rights in the fields of patents, trade marks and designs, and the dissemination of relevant information in conjunction with each of these activities.<sup>39</sup>

It is easy to see how the Irish Patents Office might assume that it has no mandate to engage in good governance and development issues. After all, it is not the job of a patent office to question whether IP laws constitute an effective and efficient use of economic and social resources or whether they are compatible with human rights obligations. It is certainly not their job to solve problems developing countries might have participating in negotiations. However, the public declarations of the OECD might beg to differ. In the same DAC paper quoted above, the OECD recommends under the sub-heading Coherence and Coordination:

Art: 84. They [aid ministries/agencies] have a crucial role to play in making sure that adequate assessments of the “LDC dimension” of various policy options are taken into account and that development co-operation becomes a more central policy concern in coming years.



Art: 85. Coherence is essential for the effectiveness and credibility of a donor country's stance in good governance and participatory development.<sup>40</sup>

In other words, the Irish Government is under an obligation to ensure that its IP policies do not undermine its public commitments to development. This issue is also raised by the Friends of Development.

52. Likewise, intellectual property must adequately support basic rights and public policy objectives enshrined by the international community, including the Millennium Development Goals (MDGs), the Plan of Implementation of the World Summit on Sustainable Development, and the Convention on Biological Diversity. In this regard, a critical criterion in the analysis of the costs and benefits of norm-setting initiatives should be ensuring that the proposed rules or standards are supportive of these other international instruments and do not run counter to their objectives.<sup>41</sup>

## Conclusion

This article makes the proposition that OECD/DAC good governance principles are of direct relevance to many aspects of IP policymaking. Through examining three principles related to participation, rule of law and effectiveness and efficiency, we have seen that IP negotiations at WIPO and the WTO are failing to live up to the self-imposed OECD/DAC good governance standards.

For the Irish Government in 2006, these issues are likely to intensify rather than subside. For a snapshot of just some of the IP negotiations coming up in 2006 that the Irish Government will be involved in, we can include:

- Negotiations in the TRIPS Council on paragraph 19 of the Doha Ministerial Declaration that was reaffirmed in paragraph 44 of the Hong Kong Ministerial Declaration, instruct Members to examine, *inter alia* the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD).
- The CBD is negotiating an international (legally binding) regime on access and benefit-sharing with implications for the patent system.

- WIPO Members will be participating in the Provisional Committee on a Development Agenda (PCDA), the Inter-Governmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore (IGC IPGRTKF) and a Substantive Patent Law Treaty (SPLT) in the Standing Committee on Patents (SCP).
- The World Health Organisation (WHO) is looking at a resolution on international trade and health and its Commission on IPRs, Innovation and Public Health is in the final process of delivering its recommendations. Both go to the World Health Assembly in May this year.
- European Partnership Agreements (EPAs) between the EU and African, Caribbean and Pacific (ACP) states include IP chapters.
- The Commission on Human Rights (if it meets this year) should look at issues related to IP and the right to health.

International IP negotiations this year will entail public policy implications for education, research, genetic resources, health, the food system and human rights. The Irish Government can decide to approach these negotiations from the perspective of IP enforcement which is consistent with the mandate of the Irish Patents Office. Alternatively the government could decide to look at the broader context of the management of economic and social resources for pro-poor development.

### Footnotes

<sup>1</sup> Commission on Intellectual Property Rights (2002), *Integrating Intellectual Property Rights and Development Policy*

<sup>2</sup> See <http://www.wipo.int/about-ip/en/> for an introduction to IPRs.

<sup>3</sup> Commission on Intellectual Property Rights (2002), *op.cit.*

<sup>4</sup> World Bank (1989), *Governance and Development*, Washington DC: World Bank

<sup>5</sup> Organisation for Economic Cooperation and Development (1993), *DAC Orientations on Participatory Development and Good Governance*

<sup>6</sup> United Nations Development Programme (1996), *Good Governance – and Sustainable Human Development*, UNDP policy document available at <http://magnet.undp.org/policy/chapter1.htm>

The nine characteristics are: participation, rule of law, transparency, responsiveness, consensus orientated, equity, effectiveness and efficiency, accountability, strategic vision.

<sup>7</sup> Commission on Human Rights (2004), *Analytical study of the High*

*Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization*, E/CN.4/2005/41, Economic, Social and Cultural Rights

- <sup>8</sup> Varma, Sabrina (2002), *Improving Global Economic Governance*, Occasional Paper 8, South Centre
- <sup>9</sup> Commission on Human Rights (2004), op.cit.
- <sup>10</sup> Ibid.
- <sup>11</sup> Ibid.
- <sup>12</sup> Latif, Ahmed Abdel (2005), *Developing Country Coordination in International Intellectual Property Standard-Setting*, Working Paper 24, South Centre. Ahmed Abdel Latif is a former Egyptian delegate to the WTO TRIPS Council and WIPO.
- <sup>13</sup> The Council for Trade Related Aspects of Intellectual Property Rights (TRIPS) in the WTO
- <sup>14</sup> Convention on Biological Diversity (CBD), Committee on Economic, Social and Cultural Rights (CESCR), Commission on Human Rights (CHR), United Nations Food and Agriculture Organisation (FAO), International Telecommunications Union (ITU), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organisation (UNESCO), World Customs Organisation (CSO), World Health Organisation (WHO).
- <sup>15</sup> Latif (2005), op.cit.
- <sup>16</sup> Ibid.
- <sup>17</sup> Ibid.
- <sup>18</sup> Communication from the European Communities IP/C/W/488 (2005), *Enforcement of Intellectual Property Rights*, TRIPS Council
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- <sup>32</sup> Ibid.
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