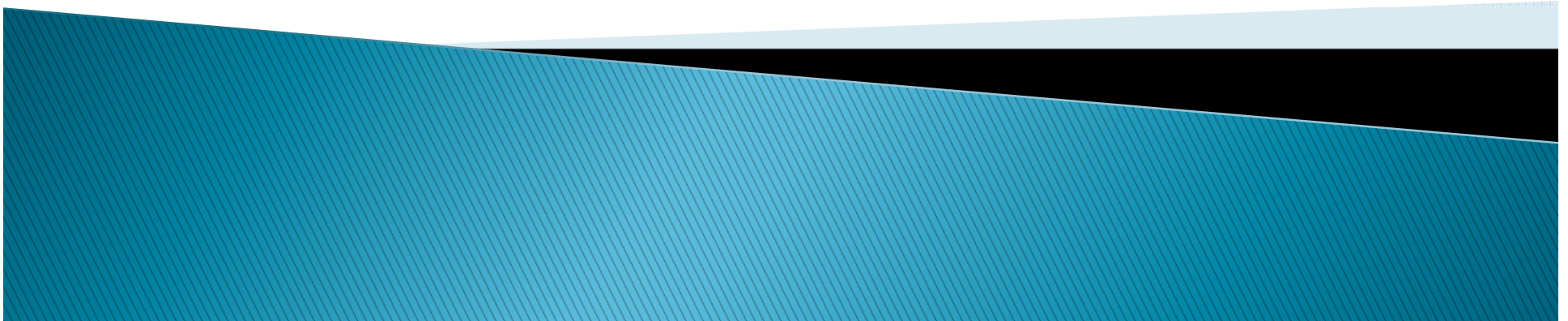


IP and Innovation Policy: Paradigms for Development

RETHINKING INTELLECTUAL PROPERTY AND
DEVELOPMENT AFTER 15 YEARS OF THE WTO TRIPS
AGREEMENT

New Delhi, April 28–29 April 2011

Frederick M Abbott
Professor of Law
and Legal Consultant



Developmental Critiques of TRIPS Agreement Well-Known

- ▶ Preferred strength of IP protections vary depending upon national market characteristics
 - Level of technological development
 - Size of market and income characteristics
 - Social welfare requirements
 - Government policies
- ▶ Preferred IP policies may vary among industrial sectors
 - Public health, agriculture, computer software and energy/climate change requirements may demand different solutions
- ▶ To the extent TRIPS Agreement flexibilities not understood to allow alternate solutions, may hamper development



Emerging market policy changes

- ▶ As local entrepreneurs generate innovation and marketing strategies, interests in IP protection change
 - Local brands compete with each other and with foreign market participants
 - Investments in development of new products require protection against uncompensated appropriation
 - Expansion to export markets requires IP strategy
- ▶ Samsung, LG Electronics, Tata, Wipro, Baidu, Lenovo, et al., are sources of domestic economic growth and general welfare
- ▶ Domestic industrial policy interests in innovation and IP protection gradually shift
 - See, e.g., changes in Chinese approach
- ▶ Not inconceivable that ACTA/border measures approach will be used as market barrier by developing countries



Pre-Condition: Establish capable domestic agencies to protect competitive markets

- ▶ European Commission Competition Directorate and US Federal Trade Commission provide potential models
 - Financial resources must be allocated. Pursuing successful competition actions resource intensive.
- ▶ Pre-Chicago school approaches may be better suited to emerging market economy
 - i.e. more detailed rules
- ▶ Training of judges in application of competition law
- ▶ Legislate against abusive use of IP



Maintain flexible policy to protect public

- ▶ Use of TRIPS flexibilities, including transitional, implementation, exceptions and enforcement critical to maintaining protection of broad public
- ▶ TRIPS permits differentiation for legitimate reasons, e.g., Section 3(d) of Patents Act
- ▶ Pursue “cabining” of public health as *sui generis* subject matter
- ▶ Government use and compulsory licensing (including for dependent inventions)
- ▶ Public and private vigilance to maintain public domain space



Development of national innovation program

- ▶ Promotion of innovation requires more than IP policy
- ▶ Models available in Brazil, Singapore, Taiwan, Israel and elsewhere
 - Subsidized industrial parks
 - Seed financing for startup entrepreneurs
 - Financing for facilities and consolidation activities to achieve economies of scale
 - Promotion of translation activities moving technical development from laboratory to commercial market
 - See, e.g., new US NIH Center for Translational Research
- ▶ Monitor foreign acquisitions to assess potential restraints on successful local development, potential for controls



Local preferences and subsidies

- ▶ Establishing preferences for local enterprises, particularly SMEs, to sell to government sector may be important for providing local capital base
 - Some caution needed to prevent inefficiencies (e.g., Brazilian experiment with computer sector)
- ▶ OECD economies rely heavily on subsidization of innovation, including in military and civilian aircraft, health and pharmaceutical technology development, energy
 - Developing country resource constraints requires careful identification of target sectors



Promote subject matter interests of local industries

- ▶ India's AYUSH program promoting development of traditional medicines (TM) and complementary and alternative medicine (CAM)
- ▶ Database of prior art in traditional medicines prevents unjustified patenting of key local knowledge
- ▶ Value-added traditional products may require branding and technology protection for potential penetration of export markets
 - Bulk commodity traditional medicinal products represent low value portion of industrial chain, comparable to cocoa beans exported for European chocolate refining
 - Maintain bulk availability for local consumption



Potential elements of development-friendly IP policy

- ▶ Education and training for local entrepreneurs in developing IP strategies and securing appropriate protections
- ▶ Policies that promote participation of small and medium-sized enterprises (SMEs) in competitive environment
 - Utility model provides a mechanism for introducing variable standards
 - US Patent Act option of filing provisional application without claims to establish priority date, and sliding fee scale

▶ Clarify copyright fair use for education



Potential elements of development-friendly IP policy

- ▶ Absence of access to efficient registration systems disadvantages less financially able participants
 - Facilitate access to trademark registrations, including through participation in Madrid System (which may require follow-on foreign legal assistance)
 - Trademark registration important to web-based businesses
 - If Party, provide support for participation in PCT system, including legal support
 - Requires maintaining national capacity to assess PCT applications as screen



Facilitate access to civil courts

- ▶ Local industry associations and others should support SMEs in pursuing legal actions as appropriate, both from financial and training standpoint
- ▶ Assistance in defense as well as offense
- ▶ IP clinics in national law schools potential approach
- ▶ Training of judges critical



Innovation and industrial development are not “level playing fields”

- ▶ Governments continuously endeavor to tilt innovation playing field to domestic advantage
- ▶ 2008 financial crisis led to massive increases in innovation subsidies
 - Look for potential collaborations, e.g., with NIH
- ▶ IP policy is a significant component of industrial development policy, but only in combination with other policies
 - Protection of public interest/public domain
 - Maintenance of competitive markets
 - Fair access to judicial assistance
 - Rule of law



TRIPS baseline provides foundation and flexibilities

- ▶ Intellectual property is not going away. Trends in global markets suggest greater reliance on IPRs as competitive instruments
- ▶ Emerging market economies have potential to create innovative paradigms for IP policy, consistent with TRIPS Agreement
- ▶ Developing countries with less financial and technical capacity remain vulnerable, and support remains a necessity.

