

# IP, TRADE AND DEVELOPMENT

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# ROLE OF INTELLECTUAL PROPERTY

- Intellectual Property (IP) is an instrument of industrial policy
- Addresses intangible characteristics of knowledge and information
- Takes different forms to accommodate different subject matter and objectives
  - Patent, trademark, copyright, design right, geographical indication, trade secret, data protection

# CHARACTERISTICS

- Precise characteristics of IP defined by governments
- Scope, duration and effect of each form capable of calibration to achieve intended objectives
  - Correlation between variables and outcomes not always well-understood (e.g., defining criteria of patentability)
- Alternative industrial policy instruments may be used to accomplish similar objectives
  - Research and development (R&D) subsidies as alternative to patents (see, e.g., Nordhaus)

# CONTROLS

- IP has social welfare effects – positive, neutral and negative -- generally arising from exclusionary nature
- Impact must be calibrated through limitations on scope of IP rights – balancing
- Competition law provides basis for continuous monitoring of behaviors and effects
  - Measures to redress imbalances

# IP, TRADE AND DEVELOPMENT

- IP primarily an instrument of domestic policy calibrated to address local/national interests: economic and social development
- National IP policies and rules may have significant trade and investment effects
- Complex and dependent on characteristics of “hosts” and foreign nations
  - IP “effects” between China and USA may be quite different than effects between Ecuador and Peru, or China and India

# CAPITAL EXPORTERS AND IMPORTERS

- Capital exporting countries tend to favor stronger IP protection in importing countries to protect value of investments in R&D and royalty earnings
  - Foreign indigenous growth may be encouraged by weaker IP (e.g., through technology appropriation), but generally assumed not to offset capital/royalty losses
- Capital importing countries tend to favor weaker IP protection to lower costs of acquiring newer goods, services and technologies – domestic investment in R&D may be limited

# INTERNATIONAL RULES

- GATT Uruguay Round (1986-93) included strong push by capital exporters (USA, Europe, Japan) to globalize strong IP protection standards
- Substantially accomplished through WTO TRIPS Agreement (1995)
  - “Single undertaking” approach of WTO key element of outcome (see Abbott, “Protecting First World Assets in the Third World”, 1989)
- Wisdom of single undertaking today under challenge - at center of proposals (e.g., EU) to reform WTO

# SHIFT IN GEOGRAPHIC FOCUS

- Capital exporters dissatisfied by “gaps” in TRIPS, as well as accounting for “evolution” of technology demand new rules to protect IP assets
- Multilateral forum inadequate because of wide disparity in country characteristics and interests, plus “consensus” rule
- Proliferation of bilateral, regional and plurilateral agreements
- “Investment” protection assumes role equivalent to “trade” (i.e., exports and imports)



# EVOLUTION

- National IP interests change over time (see, e.g., Maskus)
- Capital importer may evolve into capital exporter
- Increased domestic R&D investment leading to demands for stronger internal and external protection
- China appears to have exceeded “cross-over” threshold and adopted stronger IP policy and rules
  - Trade-offs between benefits of weaker protection (e.g., reduced acquisition costs) and stronger protection (e.g., increased investment in R&D)

# TRANSITION

- Transitions typically gradual
- China “evolution” is not unusual (e.g., USA/Britain, Japan-Korea-Taiwan/USA)
- China today more likely risks IP “over-protection” than under-protection
- Transfer of technology disputes complex but represent contest between traditional capital exporters and capital importer in transition
  - Investment rules more relevant than trade

# SPECIAL AND DIFFERENTIAL TREATMENT

- Concept of providing IP flexibility for low- and middle-income countries (LMICs) is currently under threat from strong mercantile perspective
- Strong IP in smaller economy unlikely to influence level of R&D investment and requires implicit or explicit royalties
- LMICs lack bargaining power to determine terms of trade
- Public health and other socially sensitive areas may suffer