

INTERNATIONAL IP RELATIONS TWENTY YEARS POST-TRIPS: DEVOLUTION AND ADAPTATION

PROF. FREDERICK M. ABBOTT

FLORIDA STATE UNIVERSITY COLLEGE OF LAW

INTERNATIONAL WORKSHOP ON THE IMPACT OF THE TRIPS AGREEMENT ON KEY
SECTORS AND ITS CONTINUING RELEVANCE IN THE CONTEXT OF REGIONAL AND
BILATERAL TRADING AGREEMENTS

26 OCTOBER – 27 OCTOBER 2015

CENTRE FOR WTO STUDIES/INDIAN INSTITUTE OF FOREIGN TRADE, NEW DELHI

THE RULE-BASED REGIME

- A rule-based multilateral system for IPRs in general has advantages
- Developing countries accepted the TRIPS Agreement largely to forestall a progression of unilateral trade actions
- No counterfactual to test, but international IP relations in the absence of the TRIPS Agreement may well have been more problematic

PATENTS ARE IMPERFECT INSTRUMENTS

- Given too much credit for scientific progress
- Private taxation scheme - rights without responsibilities (see Rethinking Patents in Kritika)
 - <http://ssrn.com/abstract=2662674>
- R&D requires investment, and most governments do not provide an alternative to private R&D investment

PROBLEMATIC TRENDS

- End of the Cold War and the strengthening of the emerging markets made mercantile gains in multilateral fora more difficult, arguing for second-best solutions; namely, agreements among more limited groups of countries which would be more accommodative
- NGOs perceived by mercantile interests as a threat to effectively carrying out “second-best” solutions
- Adopt approach to suppress information and limit parliamentary debate: the “fait accompli” agreement

IMPORTANCE OF POLITICAL PROCESS AND ASSERTION OF COUNTRY INTERESTS

- Formally and/or informally organized groups have defeated or caused the significant modification of mercantile business interest planners
- TPP negotiations reveal a growing willingness among trade negotiators representing less powerful high income countries, and developing or middle income countries, to resist the imposition of extraordinary restrictions that would adversely affect access to health product

TPP: OPEN QUESTIONS

- TPP is more notable for what is left out of Asia than what is added in; namely China, India and Indonesia
- Approval in the U.S. Congress is not a foregone conclusion
- Democratic opposition, anti-Obama Republicans and Pharma/Biologics

ISDS THREAT TO JUDICIAL AND LEGISLATIVE SOVEREIGNTY

- *Eli Lilly v. Canada* (NAFTA) represents extreme challenge to regulatory sovereignty, though unlikely to succeed
 - Calls for systemic response
- Tobacco ISDS a “wildcard”

IP AND THE ENVIRONMENT

- Can patents play a constructive role in aggregating private capital?
- Combination with public investment
- More competitive market
- See different views in Bulletin of the Atomic Scientist (Correa, Abbott and Abdel-Latif)

IP AND THE DIGITAL INDUSTRIES

- India as an emerging digital power
 - Youth, talent and modest barriers to entry
- Need to balance access to information and aspirations of young entrepreneurs
- Could it be time to revisit *sui generis* forms of IP protection?

EXPANDING THE ROLE OF COMPETITION LAW

- Competition law weakly regulated at multilateral level
- Developing/emerging market countries can lead in the development of progressive doctrines, e.g., excessive pricing
- We may see change in stakeholder perspective from USA and demand for multilateral negotiations

DEVOLUTION AND ADAPTATION

- The trend away from multilateral IP regulation has characteristics of late 19th, early 20th century - competing systems of influence
- That era ended badly, but "things are different" today
- There is no static endpoint of international IP relations. Science and technology change, IP addresses technological change, adaptation is inevitable
- We are managers and custodians of the public interest: We look to make the best decisions under conditions of uncertainty