



Access to Climate Technologies: Constraints on Unilateral IP Actions by Developing Countries

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Approach

- Why unilateral options?: two motivations
- What kinds of unilateral actions? The TRIPS problem
- Existing jurisprudence on articles 7 and 8 – Canada Pharmaceuticals
- What lessons to be drawn from broader WTO Jurisprudence – “necessity”
- Limitations – Article 8.1 “ provided that such measures are consistent with the provisions of this agreement”
- Options going forward: Systemic Integration

Why Unilateral Options?

- To determine the necessary scope of action required at the international level to address intellectual property issues
- To determine how much freedom there is to act due to the failure of industrialized countries to meet their obligations under the UNFCCC
- Which technologies?
 - Mitigation
 - Adaptation

What Kind of Unilateral Actions?

- The IP problem
 - Access to goods
 - Ensuring the normal flow of goods by ensuring distribution at a price that makes it economical to adopt 'climate-friendly' technologies.
 - Access to knowledge/technology
 - Ensuring ability of domestic actors to produce, adapt, innovate on and around climate technologies. Issue is access to licensing at a reasonable price that make it economically sound to produce and disseminate climate technologies

What Kind of Unilateral Actions?

- Purchase, Imitate and adapt
 - Address failure to produce, distribute goods into the domestic market at a price necessary to meet the demand for climate technology
 - Domestic production – Direct copying or compulsory licensing supported by exceptions, or patent exclusions
 - Importation from other markets – lack of capacity in domestic market - parallel importing – limited by issues similar to Paragraph 6 Doha Declaration
 - TRIPS Areas implicated
 - Article 27.2 -
 - Article 30 – Exceptions
 - Article 31 - Compulsory licenses
 - Article 8.1 – Measures necessary to protect public health
 - Address failure to license or make available knowledge/technology into domestic market at price that will enable adoption of climate technologies.
 - Distribution of licensing, access to know-how and trade secrets
 - Compulsory licenses in the public interest
 - Competition law
 - Working requirements

Two key Considerations in Assessing Actions

- The Role of Emerging economies as intermediary distribution and sales points between large developed and the majority of developing countries
- The UNFCCC framework on CBDR and Historical responsibility
 - UNFCCC Article 4.1.c, Article 4.3, Article 4.5 and Article 4.7
 - Unilateral actions that are of use are aimed at ensuring the cost is not borne by consumers or actors in non-Annex 1 countries, or they are beside the point and likely to fail.

The TRIPS Problem?

- Article 27.1 and 27.2
- Article 30 – US Copyright; Canada Pharmaceuticals
- Article 31 – no jurisprudence – but significant discussion in the Doha Declaration on TRIPS and Public Health
 - Solution to Article 30 and 31 issues may be Articles 7 and 8 of TRIPS?

Lessons from the broader WTO Jurisprudence – “necessity”

- TRIPS Article 8.1
 - “Members may, in formulating or amending their laws and regulations, adopt measures **necessary** to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, ...”
- GATT Article XX
 - “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
 - (a) necessary to protect public morals;
 - (b) necessary to protect human, animal or plant life or health;
 - (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

TRIPS Article 8.1 – “provided that measures are consistent”

- How do we understand this? A limitation?
- What is the source? Look to the Uruguay Round
- How strong is the Canada Pharmaceuticals case reasoning? Is it possible to defend a measure purely on the basis of Article 8?
 - No

Conclusions on Unilateral Actions

- Unilateral IP Actions by developing countries are either unavailable due to TRIPS or the available avenues are too small to make a difference.
- We require multilateral action to address the IP and non-IP failures.

The Way Forward

- Unilateral Action at the Competition Law level
 - Aligning refusals to deal, competition law with the public interest goal of economy and sector wide transformations in energy production and consumption; and adaptation
 - Multilateral cooperation on this as required by TRIPS Article 40
- Multilateral platforms at the UNFCCC to provide
 - Commercial certainty for licensing into emerging economies – the proposed CTC&Ns may play a key role as a platform and for providing standard licensing such as the SMTA does at the ITPGRFA.
 - Segmented licensing markets for enabling emerging economy actors to export to developing countries. For compulsory licensing, possibly through a Paragraph 6 like process.
 - Multilateral funds that explicitly provide for support to pay for licenses to access IP where needed and proposed as part of a project or program to be funded.
- Systemic Integration of Legal analysis and interpretation at the Multilateral Level, especially the WTO
 - Avoidance of conflicts
 - Shared Objectives
 - Competencies