



# The Future of IPR Issues in the Multilateral Trading System



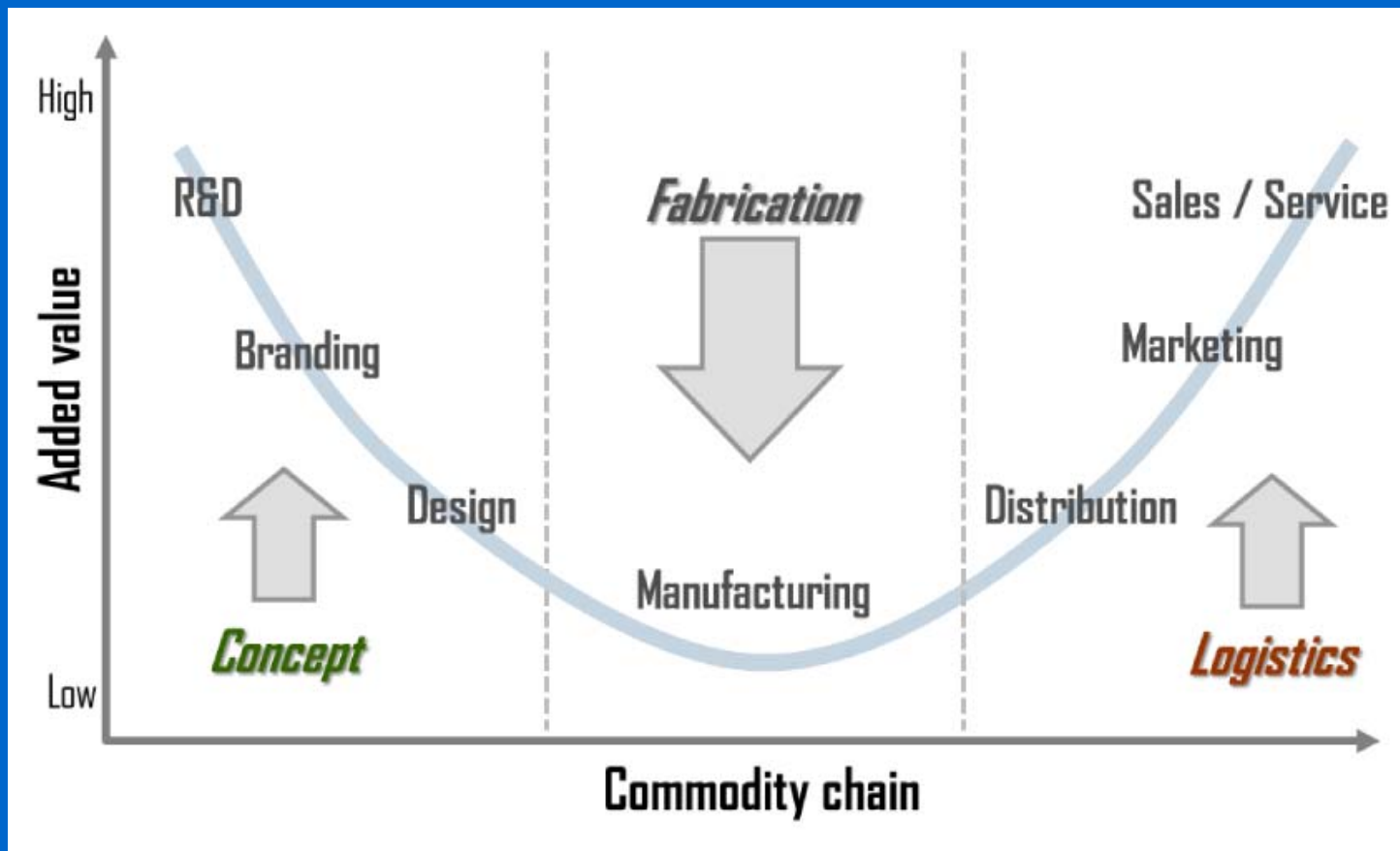
Prof Thomas Cottier

Symposium on the TRIPs Agreement for  
TRIPs Council Members and Observers

WTO, Geneva, 26<sup>th</sup> February 2015



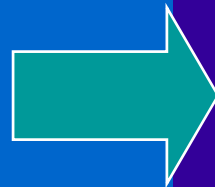
# Global Value Chains



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# Case Law Relating to TRIPS

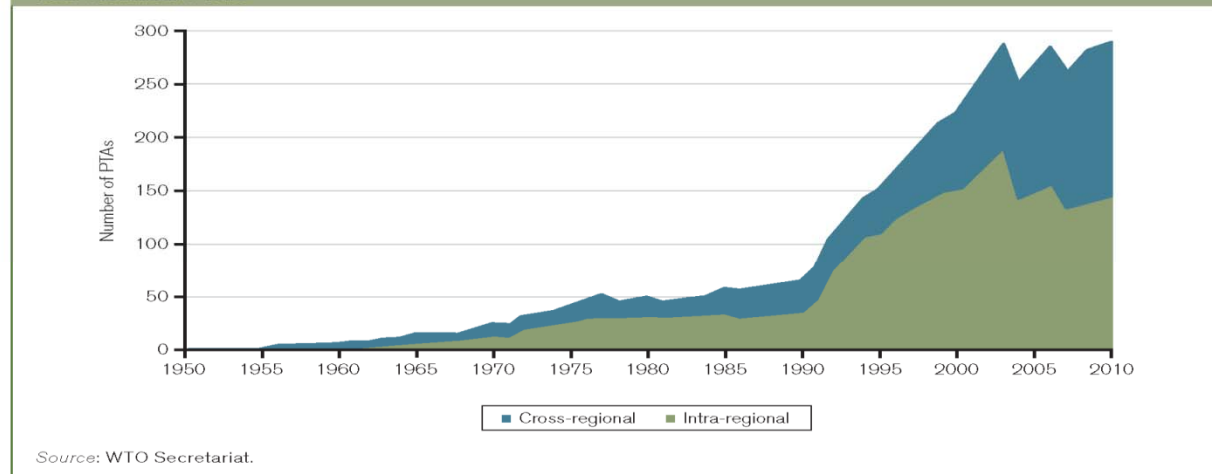
- Complainants:
  - US 18
  - EC 7
  - Brazil: 1
  - Canada: 1
  - Australia 1
- Defendant:
  - US: 4
  - EC: 9
  - LDCs: 7
  - Canada: 2
  - Japan 2
  - China 2
- Cases settled:



- Panels and Appellate Body\*:
- 11 major cases decided (7 upon complaint EC)
  - India Patent: US/EC (2)\*
  - Indonesia Automobiles\* (US/EC/Japan)
  - Canada Patent (EC)\*
  - US Copyright (EC)
  - Canada Patent Term (US/EC)\*
  - US Section 211 Omnibus Act (EC)\*
  - US - Copyright (EC) (Arbitration)
  - EC Trade Marks GI (US/Aus)
  - China IPR Enforcement

# The Shift of Forum to PTAs

Figure B.2: Cumulative number of intra- and cross-regional PTAs in force, 1950-2010, notified and non-notified PTAs



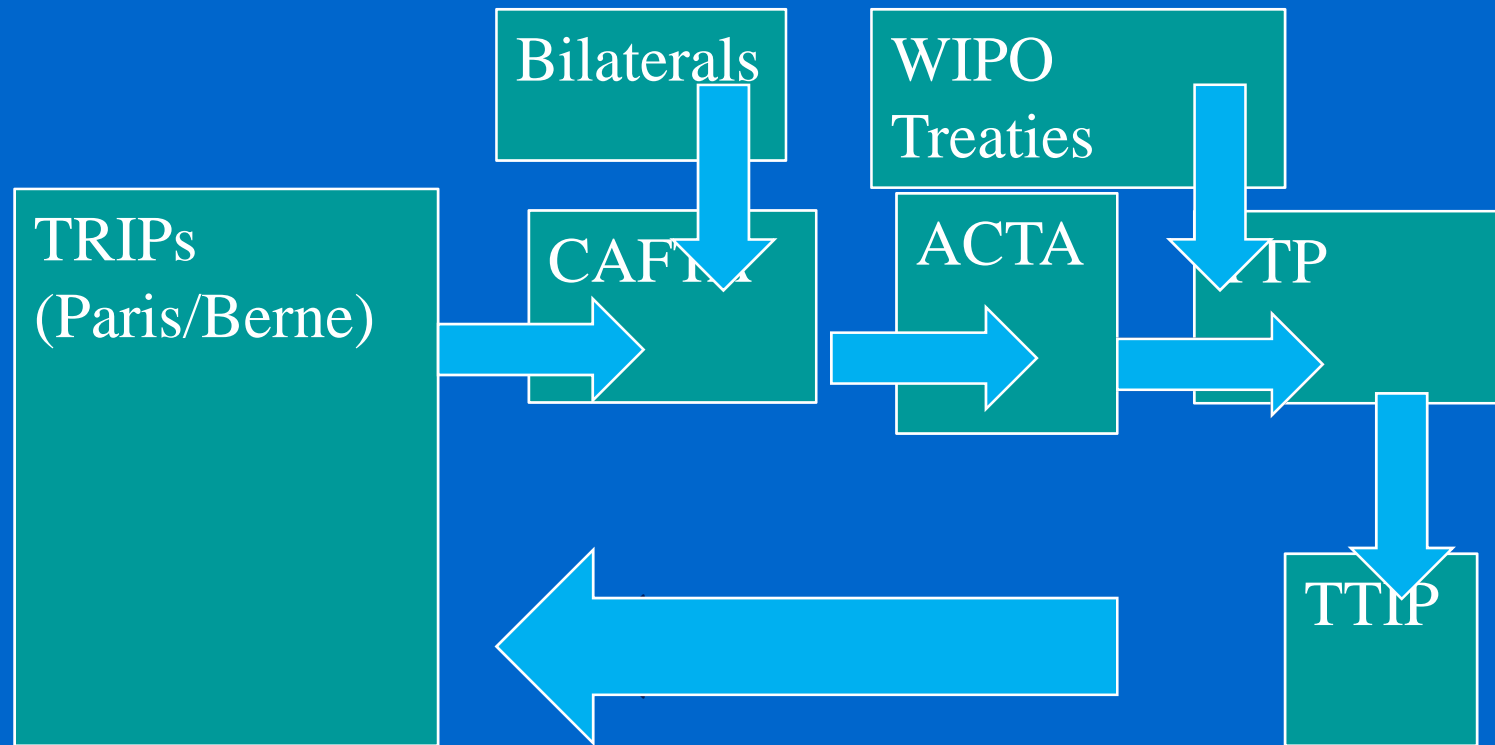
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## The Common Law of IPRs

- WTO TRIPs plus Paris and Berne provide the foundations for TRIPs plus obligations in Preferential Trade and Investment Agreements
- Trips plus standards are subject to MFN Art. 4 TRIPs: globally increasing levels of protection
- We see the emergence of an international common law

# Post TRIPs Process



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## Likely Developments

- In diplomacy likely to see further increases of MFN based levels of protection
- Increased levels essentially driven by producer interests
- Uniform standards but benign neglect in enforcement and dispute settlement for developing countries and LLCs
- Risk of excessive protection and clogging of the system, reducing innovation and welfare?



# Sectorial IP negotiations

- Doha Declaration on Public Health
  - Waiver
  - Amendment Article 31 TRIPs (CL)
- Climate change mitigation and adaption
  - Need for new rules on technology transfer to producer countries (renewable energy)
- Sectorial negotiations (Health, energy, internet) developing specific IPR rules

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# Why Nations Succeed

- Daron Acemoglu & James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, London 2012
- Welfare and prosperity essentially induced by:
  - Inclusive v. extractive institutions
  - Creative destruction (Schumpeter)
  - Rule of Law
  - Protection of property and legal security

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## The contribution of IPRs

- The IPR system contributed to the Rule of Law
- The IPR system contributed to the protection of property
- Is the international IPR system sufficiently inclusive, or is it extractive, i.e. exploiting? What effects do have ever increasing levels of protection of IPRs?
- What role for imitation?
- How to take into account different levels of economic development?

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## The Future: Towards Coherence

- Past and present combine fragmentation and integration short of taking into account all pertinent elements in shaping IPRs in law-making and interpretation
- Need to develop an intellectual framework in academic research informing future developments
- Need to bring about inclusive processes

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## Relevant Context

- International trade regulation, in particular combatting economic protectionism and rent-seeking
- Anti-trust rules, unfair competition (TK and CSR)
- Investment protection
- Human rights and sustainable development
- General principles of law, constitutional law
- Linkage to real property protection

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# International Trade Regulation

- Equal conditions of competition and market access:
- IPRs prerequisite of fair trade
  - Encouraging and rewarding of innovation
  - Exclusion of dangerous products (e.g. counterfeit pharmaceuticals)
- Excessive protection amounts to non-tariff barrier
  - Produces market segmentation and extractive pricing
  - Impedes learning by imitation
- Need to factor in trade needs in IPRs

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# Competition Law

- Unfair competition rules (Art. 10bis Paris Convention) provide basis for new forms of protection:
  - Traditional Knowledge and TIP rights
  - Enforcing Corporate Social Responsibility
- Antitrust rules provide ex-post control of operation of exclusive rights
  - Lack of international disciplines
- Need for ex-ante ceilings in IPRs

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# Investment Protection

- Much of IPR protection essentially amounts to investment protection without being defined as such:
  - Gen patents, patents of chemicals as such
  - Trademarks (Investment in advertising)
  - Data collections
- Right to use? (e.g. plain packaging)
- Impact of regulatory taking in IPRs?
- Need to factor in investment protection in IPRs doctrine



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# Human Rights

- IPRs except for moral rights in copyright are based upon utilitarianism
- Human Rights impact on the scope and use of IPRs
  - Access to essential drugs
  - Access to education
  - Food security
- Relevance of procedural human rights: due process of law, transparency
- Need to take Human Rights concerns into account in shaping IPRs

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# Principles of Sustainability

- Balancing economic, social and environmental concerns
- New generation of international principles informing IPR policies, with a particular focus on poverty alleviation and inclusiveness
- <https://sustainabledevelopment.un.org/owg.html>
- Need to take sustainable development into account in shaping rights and obligations, in particular on transfer of technology to LDCs.

# General Principles and Constitutional Law

- Principle of equity
- Protection of legitimate expectations (good faith)
- Necessity and proportionality
- Principle of non-retroactivity
- *Ne bis in idem*
- Principle of legality
- Domestic constitutional principles: Interstate commerce, free movement of goods, regulatory principles

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# Graduation

- Considering all the context, the IPR system will show:
  - Common principles and rules for law
  - Special rules applying to advanced economies only
  - Granting of policy space to developing countries in need of using imitation potential
- Comprehensive rules based upon graduation and kick-in criteria (e.g. GDP, HDI)

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## Conclusion

- The transition from fragmentation to coherence needs to consider all pertinent fields of law and economics
- Inclusive political processes representing all stake holders and interests in shaping future IPRs, informed by research results
- The quest for an appropriate balance never ends, fuelled by new technologies

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Thank you for your attention!