

INTELLECTUAL PROPERTY, ANTITRUST, & ACCESS TO ESSENTIAL TECHNOLOGIES

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PREVIOUS PROJECT

How may developing countries attract cleantech transfer and build domestic cleantech innovation?

1. **Weakening or removing IPR on cleantech is not the optimal solution**
 - Tech Transfer, Domestic Innovation, Established/Negotiated Multilateral IP Regimes
2. Building up capacities for cleantech importation and domestic cleantech innovation
3. International community is to help via international aid and mutually beneficial cooperation

[Monograph. CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT AND CLEAN TECH – A PATHWAY FOR DEVELOPING COUNTRIES \(Edward Elgar Publishing, forthcoming\)](#), selected for Elgar Intellectual Property and Global Development series

- Thanks All for Your Input, Especially **Peter Yu, Abbe Brown, Francis Snyder, Stephen Minas**

THIS PROJECT:

Q1. **Should** countries leverage antitrust law to enhance access to essential technologies?

Q2. **How** may (developing) countries do so?

* You may access a current writing on the project [here](#).

WHAT IS ESSENTIAL TECHNOLOGY?

Technologies that are indispensable for the research community or the market to conduct further research or product development

Q1 – SHOULD?

No Multilateral Obligations. More Unilateral Discretion than IP Laws

Jurisdiction-specific objectives for antitrust law

- Market competition, economic efficiencies
- Consumer welfare, social welfare & public interests, healthy national economy development

Objectives	Jurisdictions (73)
Market competition	71
Economic efficiencies	69
Consumer welfare	47
Social welfare & public interests	27
Healthy and balanced development of the national economy	7

Q1 – SHOULD?

International instruments seem to support; e.g., re anticompetitive IPR practices

Multilateral

- TRIPS: Articles 7, 8, 31, 40, and 48
- Paris Convention: Article 5.A.(2)

Regional/bilateral FTAs

- UMCA - Yes
- RCEP - Yes
- CCTPP - Yes
- EU-China CAI – Silent, does not mention

AVAILABLE MECHANISMS IN ANTITRUST AND IP REGIMES

Abuse of a dominant position

- Refusal to license
 - Essential facilities doctrine
- Excessive or abusive pricing

Compulsory licensing

Denial of injunctive relief

Patent forfeiture

IP misuse doctrine

Exemptions and exceptions for patent protection

International or regional IPR exhaustion and parallel import

APPROACHES BY THE THREE

	U.S.	EU	China
Refusal to license	<p>Actionable under exceptional circumstances</p> <p>IP owner has no obligation to license.</p>	Similar to the U.S.	An IP owner has no obligation to license only when with valid justifications
Essential facilities doctrine	<p>Currently not favored</p> <p>Walked away from recognizing IP as an essential facility</p>	<p>Open to use</p> <p>IP may be an essential facility</p>	<p>Open to use</p> <p>IP may be an essential facility</p>
Excessive or abusive pricing	Not considered as abuse of a dominant position	<p>May be considered as abuse of a dominant position</p> <p>IP – a balanced approach in view of R&D investments</p>	<p>May be considered as abuse of a dominant position</p> <p>IP - yes</p>

Q2 – HOW?

A POSSIBLE APPROACH

1. Define “essential technologies”

- Essential social objective → essential technologies in a relevant market. – Abbe Brown
- Coverage of “technology” can be broad
- Shall involve experts in the relevant fields
- May reference processes used in determining standard essential patents. – Jorge Contreras

2. Learn from EU and China’s approaches on “abuse of a dominant position,” especially regarding the essential facilities doctrine

3. Remedies

- Government facilitates a voluntary license
- Government orders a mandatory license
- Deny requests for injunctive relief

GUIDELINES FOR ANTITRUST LAW DESIGN

1. Expansive Goals for the Antitrust Law

- Consumer welfare, social welfare and public interests, even healthy and wholesome national development
- In addition to the conventional goals of maintaining healthy market competition and efficiencies

2. Be explicit about antitrust law liability for

- Refusal to license without justifiable reasons, even for IP licensing
 - Acknowledge essential facilities doctrine, even for IP
- Unfairly high pricing

3. Denial of injunctive relief if the IP owner's conduct is deemed as anticompetitive

IMPLEMENTATION CONSIDERATIONS (1)

NECESSARY BALANCE

1. Potential overreaching of government power
 - Limit the regulation only to scenarios of extreme necessity, life-saving interventions. E.g., Covid-19, climate change
 - Do not let the unilateral regulations to destabilize the negotiated multilateral IP regime
2. Impact on foreign direct investment.
 - Foreign technology owners may thus limit exposure or exit the market
3. Unequal effect on foreign and domestic entities
 - In developing countries, most domestic entities are less likely to reach dominant market positions.
4. The danger of overusing the essential facilities doctrine on IP
 - Most IP-protected technologies have design-around and alternatives
 - Potential discouragements of investment in R&D and in finding alternatives.

IMPLEMENTATION CONSIDERATIONS (2)

INTERNAL OBSTACLES FOR DEVELOPING COUNTRIES

Lack of capacity and expertise

Lack of legislation

- Some exempt IPR-related conducts from competition regulations. E.g., Russia, Jamaica
- Some are vague. Lack of simple, clear and straightforward legislative and administrative procedures.

Absence of culture valuing competition

Lack of cooperation between competition authority and IPR authority

IMPLEMENTATION CONSIDERATIONS (2)

EXTERNAL OBSTACLES FOR DEVELOPING COUNTRIES

The Global South's application of domestic antitrust law to technology transfer often give rise to pressure from the Global North

Bilateral/TRIPS plus

- In cases, developing countries formally renounce their use of the TRIPS flexibilities as a conditional for obtaining further trade advantages
- TRIPS Art. 40.3-4 -- consultation cooperation on a case-by-case basis. Little evidence of effective use being made.

KEEP IN TOUCH!

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