

# Access to Climate Technologies: Constraints on Unilateral IP Actions



## 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 exceptions, or patent exclusions
    - compulsory licensing supported by

## 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”





## 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 and sector wide transformations in energy production and consumption; and adaptation with the public interest goal of economy
  - 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 SMTA does at the ITPGRFA. providing standard licensing such as the
  - 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