

The Full Paper

- ◎ “Over 5 Billion *Not Served*: The TRIPS Compulsory Licensing Export Restriction”
 - Available at www.ssrn.com under author name “Cameron Hutchison”
- ◎ I welcome your comments now or later:
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Breakthrough Technologies

- ◎ Patent holders choose whether to sell technology and at what cost

- ◎ Three outcomes
 1. Refusal to sell / license (ozone regime)

 2. Indiscriminate monopoly pricing (pre-TRIPS *Essential Medicines* amendment)

 3. Differential pricing in all markets based on ability to pay (optimal)

What if Option 1 or 2 Happens?

- ◎ “Nothing!” Compulsory licensing, i.e. forced sale of patent to home country competitor, to supply export market is prohibited
 - This problem led to Article 31 *bis* for *Essential Medicines*
- ◎ But it is in virtually no one’s interest to have this prohibition

A Win – Win Proposal

- ◎ Creates wealth in *developed* countries by opening up markets
- ◎ Maximizes technology transfer into *developing* countries consistent with a market based approach

The Proposal

- ◎ Get rid of Art 31 compulsory licensing restrictions: non-exclusivity, time limits, and export markets
- ◎ Why?
 - TRIPS is suppose to encourage innovation (monopoly incentive) *and* technology transfer through trade and investment
 - Technology transfer can be maximized without harm to the patent incentive

Preserve Incentive / Max. Transfer

- ⊙ Concept of patent abuse (e.g. Art 8 TRIPS)
- ⊙ “If the demand for the patent article...is not met to an adequate extent and on reasonable terms”
- ⊙ Make no mistake – these thresholds will be set high by national courts

Preserve Incentive / Max. Transfer

- ⦿ Legitimate business reasons requiring a high level of unmet demand
 - Competitive advantage in entered markets
 - Transitional (to adjust production)
 - Transaction costs (give negotiations a chance)
 - Profit maximization
- ⦿ Illegitimate business reasons where lower level of unmet demand is justified
 - Defensive patenting
 - Undermining competition in markets not entered

For This to Work and to Happen

- ◎ Effective Segregation of Markets
 - *All countries must prevent trade diversion (e.g. customs, serial numbers, distinguishing packaging and guises)*
- ◎ Developed countries need to understand that it is in *their* economic (as well as environmental) interests
- ◎ Effect: *Essential Medicines* experience suggests that threat of compulsory licensing forces patentees to lower prices in developing country markets