



***Can Government Intervention Sustain  
Economic Incentive, Technological Innovation, and Capital Flows?***

**Geneva Side-bar Panel Event**

**Convened During the Fifteenth Session of  
The WIPO Standing Committee on the Law of Patents**

**October 12, 2010**

**Moderator**

**Lawrence A. Kogan, Esq.  
Institute for Trade, Standards and Sustainable Development**

**Location**

**World Intellectual Property Organization  
34, chemin des Colombettes  
CH-1211 Geneva 20, Switzerland  
Room B**

**Time**

**1:00-2:45pm CET**

**Program**

1:00 – 1:15	Welcome
1:15 – 1:25	Panel Convenes/Introductions
1:25 – 2:25	Panelist Discussion
2:25 – 2:45	Q & A
2:45	Panel Adjourns

*Attendance and participation at this side-bar event is free and will be accompanied by a light buffet*

## ***Can Government Intervention Sustain Economic Incentive, Technological Innovation, and Capital Flows?***

The pathways that lead to the success of cutting-edge technologies are often fraught with risk, difficulty and uncertainty, and more so under a regime of lengthy time horizons for competent research and development, and commercialization which may require regulatory approvals.

These challenges are known to be endemic to capital-intensive technology development particularly highly regulated industries such as life sciences (e.g., pharmaceuticals/biotechnology and electronic medical devices) and clean and renewable energy technologies; these conditions also loom large with respect to the development and introduction of new paradigm-setting information and communication technologies.

Innovators, investors and commercialization partners must overcome challenges posed by those entities charged with regulatory authority at the national or regional level wherein greater innovation may be seen as capable of significantly disrupting the marketplace *status quo ante*.

One of the most formidable obstacles faced by inventors and commercial innovators, especially where long gestation periods are involved, is the securing of adequate financing over time to permit market entry. It is precisely in this instance that law and policy proposals, enactments or implementations impact the course of innovation and market presence and increase the uncertainties affecting the measurement of value. To the extent that intrusive government policy creates legal and economic uncertainties it may be expected that actual and intended capital availability may be put at risk and/or withdrawn prematurely as measured by the recipient's economic model.

Certain of the WIPO secretariat reports discussed within the Standing Committee on the Law of Patents (SCP) during the Thirteenth and Fourteenth sessions contain sections that allege that patents and standards themselves are in apparent irreconcilable conflict, and that patent holders are unreasonable monopolists that exploit the period of temporary exclusivity associated with a patent grant at the expense of the civil society and the public interest. These allegations are customarily unsupported by evidence and imply that standards setting organizations/ standards development organizations (SSOs/SDOs) are incapable of self-regulation or managing their own external affairs in the complex and unsettled environment in which they must operate. To the extent that emerging policy may intrude upon the discretion of such standards bodies by mandating certain patent disclosure, royalty and interoperability policies, and further to be impacted by the putative rules under which government procurement would proceed, the quotient of uncertainty increases exponentially.

In addition, such government initiatives are believed to seek to establish that the purpose of a technology patent grant *ab initio* is primarily to serve the public interest (in terms of knowledge dissemination, technology transfer and affordable technology-based products) rather than the private interests of inventors, innovation and commercialization partners and investors which are the source of public good, but at private expense; further, there are notions that patent holders are failing to recognize the "imposed need" to offer their technologies gratuitously and are derelict morally in not doing so, as dictated by overarching government policies – compulsory licensing is one element of this phenomenon.

It is the position of the ITSSD that legislative proposals and enactments such as these create significant economic and legal uncertainties that have already and will likely continue to adversely impact technology investment and research and development decisions by hi-technology companies and their advisers that otherwise might have satisfied public policy aims now deemed proposed for mandates by governmental bodies and civil society groups.

While it is generally agreed that government patent policy, by itself, is an incomplete measurement of a country's market and investment-friendliness it is reflective as well as indicative of a country's law enabling environment. Indeed, ITSSD research has revealed and the WIPO Secretariat's *Report on the International Patent System* has corroborated that it is well recognized that patents serve multiple functions within society that can result in public as well as private benefits: 1) Patent protection provides inventors with the necessary incentive to generate intellectual creations for economic and social gain (i.e., the incentive function); 2) Patent protection facilitates collaborative research endeavors that enable the conversion of inventions into marketable products; 3) Patents also facilitate the orderly division of profits among contributors to a given stream of research which, in turn, affects the extent of incentives available to successive inventors (i.e., the transactional function); 4) It is generally agreed that a properly prepared patent application can and must publicly disclose all of the technical information concerning the invention described in a clear enough manner to enable a skilled person to reproduce the invention (i.e., the disclosure function); 5) Rights of patent ownership indicate to prospective investors a firm's proper regard for its intellectual property security, its innovative capabilities, and its market potentials, and thereby increases that firm's ability to secure requisite financing, including from angel investors, venture capitalists, secondary markets or others (i.e., the signaling function).

Consequently, and self-evident, is the requirement that countries which seek to attract private invention, innovation and related knowledge-based investment should possess or seriously consider establishing strong private property rights regimes that: 1) adequately recognize and respect patents and the inventions that practice/implement/incorporate them and associated trade secrets and proprietary know-how; 2) recognize and respect freedom of contract as between private individuals and/or organizations; and 3) avoid dictating *a priori* standardized solutions to technical and/or legal challenges or problems unless market abuses eventuate, and/or genuine public emergencies or threats to the public welfare arise, and are declared and are indisputably shown to be unquestionably imminent. It is both economically and legally logical and an inescapable market reality that a country's capacity or lack of capacity to provide such a law enabling environment will in the end either promote or hinder such country's ability to attract the type of hi-technology-based businesses and investments which contribute to national intellectual capital, local knowledge diffusion, stimulus toward innovation, technology transfer, market availabilities, and public welfare enhancement. However, a discussion concerning trade/investment capacity building is better suited to another venue within the WIPO such as the Committee for Development and Intellectual Property (CDIP), and is not intended be taken up for consideration by and within the Standing Committee for the Law of Patents (SCP).

## The ITSSD Panel

The ITSSD panelists have been asked to be prepared to respond to the following three questions pertaining to the above:

1. Given your professional standing and related experience, to what extent, if any, do you believe that proposed governmental intervention in SSO/SDO policymaking especially as concerns ‘essential’ patent identification and disclosure, royalty pricing and related issues of licensing would likely increase legal and economic uncertainty, such that unanticipated and/or unfavorable innovative and market consequences would be triggered, and how would you advise governments to avoid risking such consequences?
2. In your estimation, how indispensable is market stimulus provided by patent and trade secrets and the legal protections afforded them, and the freedom of contract, to secure and retain needed investments funds, and how would you advise governments to proceed in order not to jeopardize the domestic or foreign direct capital flows necessary to bring high technologies to market for the public benefit?
3. Bringing forward your experience, what public and private market consequences (relating to invention, innovation, investment, manufacturing, licensing, distribution, etc.) do you foresee as the result of government procurement rules involving development of a national or regional technology standard that directly or indirectly expresses a preference for an ‘open standards’ business model dependent upon low or no royalty-based technologies or nonproprietary technologies?

### Suggested (Extensive) Reading List

#### **A. Establishing the Appropriate Rule-of-Law-Based Enabling Environment is Critical to Fostering Innovation, Investment and Increased Knowledge (“the 3 ‘I’s”)**

- See (SCP/12/3 Rev.2 – *Annex II Comments on the Report on the International Patent System Received from Members and Observers of the SCP* (Feb. 3, 2009), selected Institute for Trade, Standards and Sustainable Development Comments at pp. 18-26, at:  
[http://www.wipo.int/edocs/mdocs/scp/en/scp\\_12/scp\\_12\\_3\\_rev\\_2-annex3.pdf](http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3_rev_2-annex3.pdf) ;  
[http://www.wipo.int/edocs/mdocs/scp/en/scp\\_12/scp\\_12\\_3\\_rev\\_2-annex3.pdf](http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3_rev_2-annex3.pdf) ;
- See Lawrence A. Kogan, *Promoting International Development, not Welfare Dependence: Benefiting From Intellectual Property*, presentation at the Harvard Kennedy School of Government’s 15th Annual Harvard International Development Conference IMPACT Turning Global Challenges into Opportunities (April 4, 2009) at:  
<http://www.itssd.org/Intellectual%20Property%20Promotes%20International%20Development%20-%20Kogan%20-%204-4-09.ppt> ;
- See Lawrence A. Kogan, *Harnessing Korea Biotech For the Markets: The Importance of IP Protection and Technology Transfer*, presentation at the BIO Korea 2008 Osong Conference and Exhibition, Osong-Bio Technopolis, Chungbuk, South Korea (Oct. 9, 2008), at:

<http://www.itssd.org/Harnessing%20Korean%20Biotech%20for%20the%20Markets%20-%20LKogan%20presentation%20-%20Track%208%20-%20Oct%209,%202008.ppt> ;

- See Yelena M. Bakulina and Lawrence A. Kogan, *How Market-Based Policies Could Spur Biotechnology Growth in Russia*, Washington Legal Foundation Backgrounder (March 2008), at: <http://www.itssd.org/Publications/03-21-08balukina.pdf> ;
- See Lawrence A. Kogan, *Basic Directions of Modern Biotechnology: Biotechnology – A Scientific Practical Priority of the Kirov Region Development*, presentation at the International Conference of the Government of the Kirov Region, Vyatka State University, Yu. A. Ovchinnikov Russian Society of Biotechnologists (June 28, 2007), at: <http://www.itssd.org/Programs/BasicDirectionsofModernBiotechnology-KOGANPresentationKirovConferenceJune26-28,2007.ppt> ;
- See Lawrence A. Kogan, *Rediscovering the Value of Intellectual Property Rights/IP in the 21<sup>st</sup> Century*, presentation at the XXth Annual Forum da Liberdade, Convened by the Instituto de Estudos Empresariais (IEE) in Porto Alegre, Brasil (April 17, 2007) at: <http://www.itssd.org/ppt/IPinthe21stCentury.ppt> .

**B. Legal Certainty via Recognition and Protection of Exclusive Private Property Rights, Namely, Freedom of Contract and Exclusive IP Development and Licensing Rights, Rather Than the Legal & Economic Uncertainty Created by Mandatory Compulsory Licensing, Will Result in Greater R&D-based Investment (FDI), Knowledge Dissemination and Technology Transfer**

- See Lawrence A. Kogan, *Climate Change: Technology Transfer or Compulsory License*, presentation at the American National Standards Institute (ANSI) Monthly Caucus Luncheon, National Press Club Washington, DC (Jan. 15, 2010), at: <http://www.itssd.org/LKogan%20-%20Climate%20Change%20-20Technology%20Transfer%20or%20Compulsory%20License%20-%20ANSI%20Luncheon%201-15-10.doc>
- See *ITSSD Comments Concerning Document (SCP/13/3) Patent Exclusions, Exceptions & Limitations*, Institute for Trade, Standards and Sustainable Development (March 27, 2009), at: [http://www.wipo.int/export/sites/www/scp/en/meetings/session\\_14/studies/itssd\\_2.pdf](http://www.wipo.int/export/sites/www/scp/en/meetings/session_14/studies/itssd_2.pdf) .
- See *ITSSD Comments on Annex III*, Institute for Trade, Standards and Sustainable Development (Feb. 24, 2009), at: [http://www.wipo.int/export/sites/www/scp/en/meetings/session\\_13/pdf/itssd\\_annex3.pdf](http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/itssd_annex3.pdf)
- See Lawrence A. Kogan, *Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth*, Executive Summary reproduced in *Ideas, Innovation and Patents*, ICFAI Law Books Division, ICFAI University Press, Andhra Pradesh, India Edited by C. Sri Krishna (©2007-2008), at:

<http://www.itssd.org/Ideas.%20Innovations%20and%20Patents%20-%20ICFAI%20Law%20Books%20India%20-%20Rediscovering%20the%20Value%20of%20Intellectual%20Property%20Rights.zip> ;

- See Lawrence A. Kogan, *Forced Licensing of Drug Patents Reflects ‘IP Counterfeiting’ Efforts on World Stage*, Washington Legal Foundation Backgrounder Vol. 22 No. 22 (June 22, 2007) at: <http://www.itssd.org/Publications/ForcedLicensingofDrugPatentsReflectsIPCounterfeitingEffortsonWorldStage-WLF06-22-07kogan.pdf> ;
- See Pat Choate, *Brazil’s ‘Open and Universal Access’ Agenda Undermines Its Own Technological Future*, International Journal on Economic Development, Vol. 8, Nos. 1-2 (2006), at: <http://www.spaef.com/file.php?id=967> ;
- See O. Lee Reed, *Exclusive Private Property Is Indispensable to Brazil’s Economic Development*, International Journal on Economic Development, Vol. 8, Nos. 1-2 (2006), at: <http://www.spaef.com/file.php?id=968> ;
- See John Kilama, *Brazil’s Incentive-less Innovation Is Not a Viable Economic Development Model for LDCs*, International Journal on Economic Development, Vol.8, Nos.1-2 (2006), at: <http://www.spaef.com/file.php?id=969>  
<http://www.spaef.com/ijed.php>  
<http://www.spaef.com/articleArchives.php?journal=IJED> .

**C. Government Procurement-Related ‘Open Standards’ Interoperability Frameworks Mandating or Expressing a Preference for Business Models Premised on Low or ‘Royalty-Free’ Patent-based or Nonproprietary Technologies to be Incorporated Within National and/or Regional Standards are Unfair, Unnecessary and May Potentially Engender Trade Disputes - The ‘Open’ in Open Standards and Open Source Software (“the double ‘O’s”) Does NOT Necessarily Mean ‘Royalty-Free’**

- See Lawrence A. Kogan, *How SMART are Standards that Sacrifice Intellectual Property Rights?*, presented at the American National Standards Institute (ANSI) Intellectual Property Rights Policy Committee (IPRPC) (April 15, 2010), at: <http://itssd.org/How%20SMART%20are%20Standards%20that%20Sacrifice%20Intellectual%20Property%20Rights%20-%20Full%20Outline.doc> ;
- See *Supplement to ITSSD Comments Concerning the WIPO Report on Standards and Patents (SCP/13/2) Paragraph 44* Institute for Trade, Standards and Sustainable Development (Jan. 25, 2010), at: [http://www.wipo.int/export/sites/www/scp/en/meetings/session\\_14/studies/itssd\\_supplement.pdf](http://www.wipo.int/export/sites/www/scp/en/meetings/session_14/studies/itssd_supplement.pdf) ;
- See *ITSSD Comments Concerning SCP/13/2 – Standards and Patents*, Institute for Trade, Standards and Sustainable Development (March 23, 2009), at: [http://www.wipo.int/scp/en/meetings/session\\_14/studies/itssd\\_1.pdf](http://www.wipo.int/scp/en/meetings/session_14/studies/itssd_1.pdf) .