



STRIKING A BALANCE: MYANMAR AND THE ISSUE OF INTELLECTUAL PROPERTY RIGHTS

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Strengthening the protection of intellectual property rights in Myanmar has the potential to act as a catalyst for economic growth, spurring foreign direct investment and in the long run helping the country reap rewards in terms of greater domestic innovation and increased technology diffusion. While Myanmar would do well in this regard to ensure the implementation of the WTO TRIPS Agreement, this should not come at the expense of developing its own innovative capacity. In drafting new legislation, the country's policymakers must be careful to strike a balance between the interests of technology-intensive multinational companies, who wish to break into what has been dubbed the last frontier market of Asia, and striving to develop a viable and innovative technological base of its own.

Decades of political and economic isolation have left Myanmar with intellectual property rights (IPR) legislation that is at best outdated and indeed, in some cases, non-existent. Lacking a patent or industrial design law as well as a transparent and official trademark registration system, its laws in this area are cobbled together from a few vague statutes and regulations, many of which date back to the colonial era. For multinational companies, any lack of legal certainty, including the inability to safeguard intellectual property—the mainstay asset of modern technology-intensive enterprises—serves as a deterrent to investment in the country, excepting those firms hoping to reap quick profits in capital-intensive and labor-light extractive industries, such as mining. And yet, attracting foreign investment with the potential to transfer technology to domestic firms is a key factor in Myanmar's economic development. Thus, the future pace of investment will depend to a large extent on how quickly the Myanmar government takes steps to upgrade its IPR legislation.

Myanmar's political leadership has acknowledged the cooling effect that the lack of proper IPR legislation is having on the willingness to invest in the country, and the implementation of a strengthened IPR regime has been na-

med as a top priority by government officials. Indeed, during a discussion on a proposed industrial design rights bill, held in Naypyidaw in late May 2013, Aung Zaw Min, Deputy Minister of Science and Technology, recognized the importance of such as a driving force behind the country's economic development. As a member of the WTO and thus a signatory to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, Myanmar has agreed to conform to the provisions of the agreement by 2021 at the latest; this includes awarding de minimis protection for trademarks, patents, copyright, and industrial designs. To fulfill these obligations, Myanmar will have to completely revamp its current IPR system, including the drafting of a new patent law.

Striking a Balance

Notwithstanding Myanmar's urgent need for a proper IPR framework, it is of critical importance for the country's lawmakers to carefully balance the interests of both potential foreign investors and its own development—interests that are both shared and conflicting to some degree. While big name investors with billions of dollars invested in IP would



like to see a very strict patent law enacted that affords maximum protection for their IP assets—thus barring imitation—Myanmar, belonging to the LDC group of nations, has a considerable incentive to implement a less protective IP system, as this would create better conditions for domestic firms to absorb and benefit from the technology that foreign companies bring to the country.

Research suggests that the problem with too stringent an IPR regime in developing countries is that any positive effects in terms of economic growth, technology diffusion, and spillovers are highly dependent on the country already possessing an innovative capacity of its own. Lacking such, Myanmar is not even listed in the World Intellectual Property Organization (WIPO) and INSEAD's Global Innovation Index for 2012. By comparison, neighboring Lao PDR, with just over a tenth of Myanmar's population, received an equal share of FDI in 2012 and is ranked 138th out of 141 countries surveyed; Thailand is ranked 57th. Given its lack of capacity, it is obvious that the implementation of too stringent IP laws would not be the optimal course of action for Myanmar.

It is clear therefore that while Myanmar must change its current IPR system, and its long-term aspiration must be to fully comply with the TRIPS Agreement, this must be a process—taking too large steps too fast could easily backfire, and only serve to impede Myanmar's ability to develop its own innovative capacity. Indeed, the WTO recognizes the need for developing and least-developed nations to enjoy some leniency in the application of the TRIPS Agreement, which is why some of its provisions explicitly state that such countries must be given the chance to develop innovative capacities of their own. Myanmar must accordingly make use of these flexibilities in order to give their own firms the chance to first pass through what has been dubbed the “imitative phase,” a precursor to gaining innovative capability in relatively high-tech industries.

Inventive Steps

It follows that the policy implications should be guided along the lines of a country's level of development and its level of imitative or innovative capacity. Hence, Myanmar's policy priority should be to improve the investment environment, with liberal trade policies to encourage imports of technology embodied in goods. It should be careful not to apply and enforce too stringent IPR legislation, particularly where this

would increase the cost of importing IPR protected goods.

In more specific terms, well-tailored policies related to patent fees, novelty requirements, and the scope of patentability can all serve the development of a domestic innovative sector and facilitate technology spillover to domestic firms, prompting for example the development of innovative capacity in Myanmar's petrochemical and agricultural sectors. A policy of setting high standards for the novelty requirements of patents can prevent routine discoveries from being patented; this can be combined with a system of “utility models” (also known as petty patents), with less stringent patentability requirements, in order to create opportunities for domestic innovators to build on the technology brought in by foreign companies and sow the seeds of a viable domestic innovative capacity.

In tandem with these policies, it is also advisable for Myanmar to enact policies consistent with the TRIPS Agreement to offset the market power for foreign patent holders. This can be achieved, for example, by making use of compulsory licensing for vitally important technologies and by allowing parallel imports to prevent patent holders from exploiting their monopoly further by engaging in market segmentation.

Myanmar should also draw on the expertise of the international community in receiving technical assistance in the drafting of its new IPR legislation. For example, WIPO has an important role to play in giving better focused, quantifiable, and realistic development aid in the building and modernization of IPR systems. The U.S. Patent and Trademark Office and the Japan Patent Office are already providing technical assistance to Myanmar, and as a member of ASEAN, Myanmar is also engaged in the ASEAN Working Group on Intellectual Property Cooperation.

In sum, as long as Myanmar's IPR legislation remains unchanged, it will continue to constitute a severe disincentive to foreign direct investment in the country. The main obstacles to any successful reform in this area are the political will to make changes and the legal expertise to actually implement them. Whereas the Myanmar government has recognized the importance of revamping its legislation, in itself a move in the right direction, practical steps will necessitate striking the right balance between stringency and flexibility in its implementation of the TRIPS Agreement. This is likely to pose a significant challenge for the country, but failure to do so will prove costly in the long run, stifling chances for the country's economic development.



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