

Keynote Address by

Dr Rob Davies

Minister of Trade and Industry of South Africa

World Intellectual Property Organization

International Conference on Intellectual Property and Development

Geneva, 7 April 2016

Mr Francis Gurry, Director General of the World Intellectual Property Organisation

Excellencies

Distinguished Delegates

Ladies and Gentlemen

Good Morning

It is an honour to address the WIPO International Conference on Intellectual Property and Development. This gathering takes place during a period when many developing countries are formulating or reviewing their intellectual property (IP) policies, and therefore offers a timely and important opportunity to reflect on how the IP system can best assist developing countries including least developed countries achieve their wider development objectives.

We applaud WIPO for taking this step in its continued efforts to implement the 45 recommendations of the WIPO Development Agenda.

Africa's Industrial Development Imperatives

I want to start by situating my remarks on IP protection in a wider historical view that all countries that have succeeded in breaking out of poverty and underdevelopment – beginning with Venice in the middle ages, through Britain in the 18th and 19th century, to the Asian newly industrializing economies, and to China and India today – all of them without exception have done so by nurturing a cluster of industrial activities characterized by increased, rather than diminishing, returns.

Nurturing has involved the identification and targeting of appropriate value adding activities, the deployment of public and private resources to support innovation, entrepreneurship and infrastructure development as well as the judicious use of tariffs and other forms of protection.

This understanding has informed South Africa and indeed Africa's recognition that its sustainable development will, in great measure, be dependent on pursuing structural transformation of its economies through industrialisation.

Let's step back for a moment: Over the last decade or so, Sub-Saharan African countries have shown impressive economic growth, outpacing advanced economies. That growth rate has also been above the average for all emerging and developing economies and while only Asia has recorded higher growth rates, the differential has been narrowing.

Seven of the top ten fastest growing economies in the global economy are African and Africa now offers the highest return on investment of any region in the world economy. Africa's abundant natural resources, the growing consumer power of Africa's emerging middle class and favourable demographics offer enormous potential for sustainable economic growth and development across the continent.

While all this has been positive, and suggests prospects for future growth and development are much improved, Africa's growth path has been based primarily on commodity exports, particularly to Asian countries, as well as by strong consumption based on the rise of middle class consumers. There is a now widening consensus among African government and business leaders that growth on this path will not be

sustainable in the longer term and that, to place the continent on a firmer footing towards sustainable development, Africa will need to pursue structural transformation of its economic base and build a more diversified productive capacity through industrialisation. The recent dramatic decline in a range of commodity prices, many of which are the mainstay of African production for export, should only redouble our efforts at industrialisation and economic diversification.

South Africa's Industrial Policy Action Plan

In South Africa, the Government has chosen a growth and development path that prioritises industrial upgrading in more labour intensive sectors to generate sustainable and decent employment. Upgrading South Africa's industrial base in this way and encouraging the production and export of more sophisticated value added products, require purposeful intervention in the industrial economy aimed at achieving dynamic, competitive advantages.

Our National Industrial Policy Framework (NIPF) and Trade Policy and Strategic Framework (TPSF) depart from the view that deliberate policy interventions are needed to address impediments to economic diversification, and specific measures are considered on a sector-by-sector basis, and these are dictated by the needs and objectives of sectoral strategies.

Two dimensions of this process may be instructive for the remarks I will make later more directly on IPR and economic development. First, our sectoral work is grounded in a 'self-discovery' process of engagement between government, business and labour, through which we

collectively identify the specific measures and programmes needed to advance industrial development.

Second, our approach to tariff policy is one in which we make no *a priori* presumption of the benefits or costs of maintaining either low or high tariffs. Instead, tariff setting is assessed on the evidence obtained at firm and sector levels through detailed investigations that consider the impact of proposed tariffs on, amongst other things, economic output and employment across the value chain.

In short, tariff setting is evidence-based and the product of intensive consultations between affected stakeholders. Of course, the upper limits for tariffs are set by the binding obligations South Africa has undertaken in the WTO and in bilateral trade agreements.

IPR and Economic Development

If the proposition that industrial development and structural transformation are necessary for sustainable development in many developing countries is correct, the question of whether and how IP protection can support these objectives becomes relevant.

Considerable work has been undertaken in the relationship between IPR and economic development, including excellent work under the aegis of WIPO. In our reading of this literature, it seems clear that the international community is far from reaching convergence on the question. Indeed, this field of work remains a site of contestation.

While few policymakers, commentators or academics deny the importance of IP protection and enforcement, the questions revolve

around nature of the standards that should be implemented and enforced, and whether this changes over time as countries industrialize and develop.

Strengthening and extending IPR regimes and enforcement are strongly advanced by countries at the cutting edge of innovation globally. One can understand that, for those countries, it is of strategic value to use IP protection as a mechanism to preserve the rent-generating and other advantages that arise from the technological capabilities built up by their firms. In this sense, such an approach could well be understood as a *de facto* industrial policy and there is an argument to be made that this may need to be balanced by appropriate diffusion policies in catching-up countries.

In any case, in the history of development and ‘catching up’, successful strategies always appear to have involved ‘emulation’ that requires measures that are targeted at acquiring knowledge in increasing returns activities. Furthermore, all successful catching-up episodes occurred under condition of weak IPR regimes that permitted easier knowledge acquisition and imitation. During the 19th Century, today’s advanced economies used the IP system and the flexibility it accorded in a judicious manner as they pursued their industrialization. This allowed those countries to strengthen their IP regimes at their own pace, and in support of overall progress in their economic development.

We may recall that Switzerland did not institute a national patent law until 1888. When the law was introduced, it was very narrow in scope and did not provide protection to chemical inventions. It is argued that this allowed domestic chemical industries to develop imitative capacity.

Today, Switzerland boasts some of the most innovative and accomplished chemical and pharmaceutical industries in the world. Similarly, countries such as Germany, Switzerland, France and Japan only introduced pharmaceutical product patent protection in the 1960s.

Only a handful of countries have made the transition from “developing” to “developed”. If one looks at the performance of the “Asian Tigers”, it is clear that they relied on a heterodox of policy measures to achieve industrialisation. For example, Korea’ relied less on FDI and initially acquired most of its technology through trade, reverse engineering and technology licensing. When it became competitive, its own companies began to invest heavily in R&D to develop their own innovative technology.

Singapore followed a different model. Singapore has always had an open trade regime and depended very much on FDI for its technology. While generally working with market principles, the government was heavily involved in attracting the kind of foreign investment that it believed would bring cutting edge technology that could underpin wider economic development. The development story of Singapore may be characterised as one of moving quickly from cheap unskilled labour to a knowledge-based economy. The government continued to invest heavily in education, skills and, in time, research and development. It has now become an important regional hub for knowledge-based services.

More recently, we can see that India pursued a somewhat different path in so far as it has taken advantage of the transitional provisions in TRIPS to develop a globally competitive pharmaceutical industry. By so doing, India has been able to increase global output and competition, thereby

enhancing economic welfare. In the process, the industry in that country has become increasingly innovative and has sought to make greater use of the patent system.

The essential point of drawing on these examples is simply to reiterate that countries have taken different paths in pursuing economic development and they have used IP protection in different ways and at different times to support their development effort.

Some Theoretical and Empirical Questions

Opponents of strong IPR typically raise concerns that stronger IPR raises the costs of protected goods and reduces the accessibility of innovations. They often argue that a stronger IPR regime is costly including with respect to the fact that stronger patents confer a greater degree of monopoly power on the patent holder that are often foreign-based multinationals.

Opponents also contend that stronger IPR regimes can retard industrial development, as weak IPR can function as a kind of infant industry policy, allowing indigenous firms to learn from, absorb and experiment with foreign technology at low cost. In other words, establishing a strong IPR regime prematurely limits the diffusion of innovative technology more widely and by imposing high prices for patent-protected goods thereby lowering consumer welfare.

The role of patent protection in promoting innovation has also been controversial. There are arguments that patents are unlikely to foster innovation in developing countries at early stages of industrialization. The evidence on the extent to which patent protection, which is of

particular relevance in the context of industrial policies, contributes to encouraging innovation is, at best, inconclusive. Some studies contend that other factors, notably ‘first mover’ advantages, are more decisive in promoting innovation.

Proponents of stronger IPR regimes, by contrast, suggest that IPR protection fosters innovation in reforming countries. They also argue that stronger IPR facilitates transfers of technology to reforming countries, increases foreign direct investment (FDI), and spurs industrial development. They point to the growing literature that shows a correlation between IPR reform and industrial development and argue that the concerns that a shift to stronger IPR would undermine industrial development are overstated.

As the policy debate unfolds, there nevertheless seems to be a wide acceptance that research on the topic must be extended and deepened if we are to have a better grasp of the complex relationship between IPR reform and FDI flows, technology transfer and industrialization. While generalized conclusions can offer insightful guidance, it may not be applicable at all times to all countries. If that is the case, it is vital that research is undertaken in a manner that context specific, taking into account the level of development of the country under consideration, with a clear focus on its industrial profile and capabilities.

In countries at an early stage of industrialization where technologically mature technologies may be embedded in equipment, strong IPR regimes may be unnecessary. As the manufacturing production of a country becomes more diversified and higher value added is sought (e.g. fine chemicals, electronic equipment and consumer goods) IPRs

may growingly narrow down the freedom to operate in the absence of a license authorizing the use of the protected technologies and designs. Where countries begin to develop their own innovation through greater investment in R&D, the demand for stronger IPR protection is likely to grow in tandem.

What are we to make about these complex, varied, and sometimes divergent accounts of the historical, theoretical and empirical dimensions of the question of IPR and industrialization?

I would summarize the answer as follows: First, historically, different paths have been taken to economic development and the IPR protection provided. Second, IP protection has been strengthened and evolved in different countries over time. Third, there is no unambiguous evidence that stronger IPRs foster industrial development and countries may require different approaches and policies dependent on their level of industrial development.

The range of unanswered questions suggests the need for a cautious approach to reform of IPR. It also suggests the need to strengthen capacity to assess the costs and benefits of IPR reform in the specific contexts where the reform is being considered or undertaken. In other words, it should be evidence-based and tested in extensive consultations with affected sectors, industries and firms. In short, there are no simple answers.

At this stage I think it is appropriate to recall paragraph 7 of the African Group's proposal for the establishment of a Development Agenda for WIPO in which it stated:

“IP is just one mechanism among many for bringing about development. It should be used to support and enhance the legitimate economic aspirations of all developing countries including LDCs, especially in the development of their productive forces, comprising of both human and natural resources. IP should therefore, be complementary and not detrimental to individual national efforts at development, by becoming a veritable tool for economic growth”.

TRIPS and Flexibilities

Having made all these points, it is also clear that as many developing countries pursue industrialization, they do so in the context of an international IP regime that is more constrained than it was in the 19th century. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) establishes extensive standards of IP protection that are almost without exception legally binding on all WTO Members.

While developing countries are committed to implementing and enforcing these standards, it is also clear that the TRIPS Agreement contains flexibilities that can be exploited to craft a greater developmental role for IP protection in respect to industrialisation.

Patents are likely to impact technologically dynamic sectors where domestic value added is higher as compared to sectors where more mature technologies predominate. Therefore, as countries pursue industrialization, we need to explore how best patent regimes can be designed to expand the opportunities for access and diffusion of technology.

As noted, whether or not IPRs in fact generate net benefits or costs to any particular country will depend on its productive profile, its R&D infrastructure, and the extent to which policy space is preserved to adapt the IPRs regime to local conditions and needs. In that context, governments retain an important role in ensuring that patentability standards such as the requisite level of inventiveness are appropriate and rigorous in order to avoid the introduction of patents that unnecessarily stifle local innovation and production.

Compulsory licenses are another avenue of policy flexibility permitted under the TRIPS Agreement that may be used as an instrument to promote domestic production where voluntary licenses are not available on reasonable commercial terms. There are several examples around the world where compulsory licenses were issued and employed successfully to ease access to affordable medicines.

Developments in South Africa

In South Africa, our National Development Plan (NDP) calls for greater emphasis on innovation, improved productivity and more intensive pursuit of a knowledge economy. We regard the IP system as an important policy instrument in promoting innovation, technology transfer, research and development, industrial development and more broadly - economic growth.

South Africa has had a long history of IPR protection and, as signatories of the WTO, we have adopted and implemented all our obligations under the TRIPs Agreement. As we review our IP policy, we are seeking to ensure that appropriate balances are struck in providing protection for innovation and ensuring that benefits are shared in society. In particular,

we are interested in ensuring that the IPR regime in South Africa supports our wider development objectives and underpins our efforts at industrial development objectives.

In doing this, we aim to harness the capabilities across the government and draw in expertise across society through a strengthened national consultative process. We have taken this approach in two recent initiatives.

First, following many delays, we have recently ratified the WTO Paragraph 6 mechanism that allows the issuance of compulsory licenses for export of medicines to countries that lack pharmaceutical manufacturing capacity. As part of the future work to give greater effect to this effort, we will engage with our regional partners to make effective use of the regional waiver contained in the Paragraph 6 mechanism to augment what are relatively small markets by harnessing economies of scale.

Second, we are now engaged in a process to strengthen the capacity of the Companies and Intellectual Property Commission (CIPC) so that it is able in due course to undertake substantive examination of patent applications. For reasons of allocation of scarce resources, South Africa has traditionally used the “depository” system in terms of which patent applications are examined to determine whether they meet the patentability criteria only if the patents are challenged in litigation. The work being done to capacitate our registry to conduct substantive examination is crucial if the patent system is to truly fulfil its intended purpose of effectively promoting innovation.

Towards an African Agenda for Intellectual Property Protection

As I move to make my concluding remarks, it is appropriate that we reference the work we are doing with our partners on the African continent. South Africa has been active at AU in working toward the establishment of a Pan African Intellectual Property Organization (PAIPO). Key objectives of PAIPO include:

- Encouraging a harmonization of IP systems;
- Establishing platforms for policy discussions on how IP systems can serve as a tool for economic, cultural, social and technological development of the continent.

In a region exclusively comprised of developing countries and least developed countries, PAIPO aims to pursue a pro-development and balanced approach to IPR protection.

Sub regional configurations on the African continent have done significant work on integrating IP into their developmental policy mix. The Common Market of East and Southern Africa (COMESA) has a comprehensive IP policy while the East African Community (EAC) and Economic Community of West African States (ECOWAS) have policies on IP and TRIPS flexibilities.

As for IP institutions, the African Regional Intellectual Property Organization (ARIPO) and *Organisation Africaine de la Propriété Intellectuelle* (OAPI) serve as registration offices for much of the continent and together with international partners, provide policy support. The key challenge for the African continent is to improve coordination of the different initiatives to promote efficient use of resources and ensure alignment in approaches to IP pursued by ARIPO

and OAPI and sub-regional policies, informed by the African continent's development objectives. Such collaboration will give rise to convergence of standards.

ARIPO and OAPI have recognised the need to align their approaches and have begun working toward integrating their functions into the broader AU vision on IP. South Africa will work with regional partners to facilitate increased coordination.

African countries have consistently strived for the promotion of IP regimes which are balanced and supportive of their public policy objectives. In recent years, there has been much debate over the extent to which the WIPO Development Agenda (DA) recommendations have been effectively implemented as well as reservations over the extent to which the development dimension has been mainstreamed in WIPO's work. The implementation of some of these recommendations remains at best a work in progress, particularly when it comes to the delivery of technical assistance to poorer countries and the promotion of innovation and access to knowledge. Recommendation 1 of the WIPO DA underlines that "WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States." Africa has also been a strong advocate for the conclusion of legally binding global norms for the protection of genetic resources, traditional knowledge and traditional cultural expressions against misappropriation particularly in the context of WIPO's main body dealing with these issues, the IGC.

In all these efforts, we would want to be in a position to continue to call on WIPO, through the Committee on Development and Intellectual Property (CDIP) and pursuant to its development agenda, to support us to craft IP policies that support our objectives for African industrialisation. We look forward to continued dialogue and to hearing the advice and learning from experts at this conference over the next two days.

I wish us all a successful Conference and thank you for your attention.