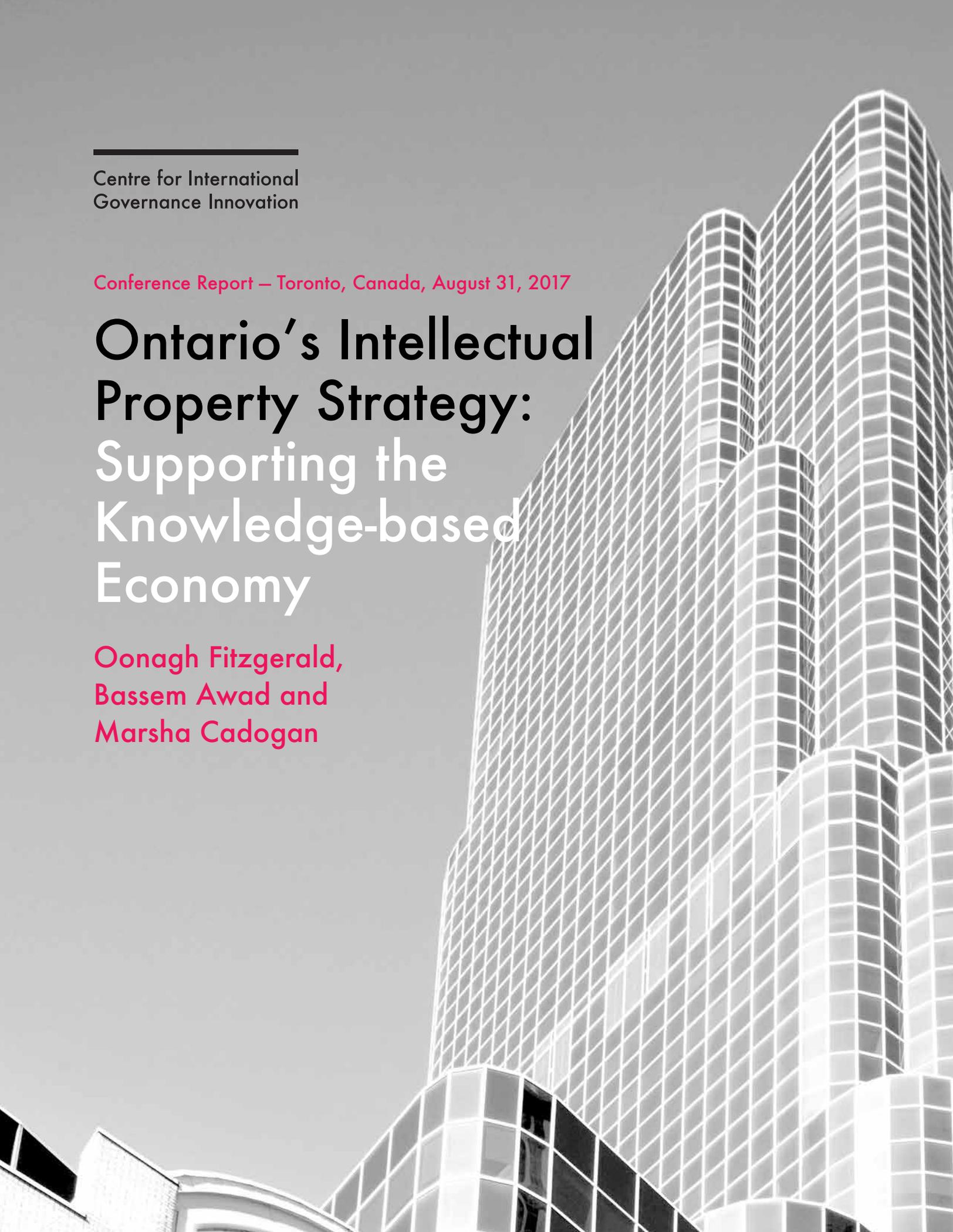

Centre for International
Governance Innovation

Conference Report – Toronto, Canada, August 31, 2017

Ontario's Intellectual Property Strategy: Supporting the Knowledge-based Economy

Oonagh Fitzgerald,
Bassem Awad and
Marsha Cadogan



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CIGI Masthead

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Table of Contents

vi	About CIGI
vi	À propos du CIGI
vi	About the International Law Research Program
vii	About the Authors
1	Executive Summary
1	Introduction
1	On Developing Ontario's IP Strategy
2	Debrief from MRIS/MEDG's Scale-Up Strategy IP Working Group
3	Changing the Game through Collaborative Mechanisms in Transformative Technologies
3	Further Work
4	Agenda

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law. The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world. The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, Indigenous law and constitutional law.

About the Authors

Oonagh Fitzgerald is director of CIGI's ILRP, where she oversees its international economic law, environmental law, intellectual property law and innovation, and new Indigenous law research agenda. She has extensive experience as a senior executive providing legal policy, advisory and litigation services and strategic leadership in international law, national security, public law, human rights and governance to several federal departments, including Justice Canada, National Defence and the Canadian Forces, and the Privy Council Office.

Oonagh has taught at the University of Ottawa, as well as Carleton University, l'Institut international du droit de l'homme in Strasbourg and the International Institute of Humanitarian Law in San Remo. She has a B.A. (honours) in fine arts from York University, an LL.B. from Osgoode Hall Law School and was called to the Bar of Ontario in 1983. She holds an LL.M. from the University of Ottawa, an S.J.D. (Doctor of Juridical Science) from the University of Toronto and an M.B.A. from Queen's University.

Bassem Awad is deputy director of international intellectual property (IP) law and innovation with CIGI's ILRP. In this role, Bassem provides strategic guidance and operations coordination and management of the thematic area.

Bassem, a specialist in IP law, has served as a judge at the Appeal Court in Egypt and adjunct professor at the Faculty of Law, Western University. He also works as a head tutor and professor at the master's level at the Academy of the World Intellectual Property Organization and as an instructor with the Institute for Training and Technical Co-operation at the World Trade Organization. He teaches advanced courses on IP rights at the Faculty of Law, Western University. He has also been working for several years as a consultant for the African Union and as a counselor at the Judicial Department of Abu Dhabi in the United Arab Emirates on IP topics.

Bassem holds Ph.D. and LL.M. degrees in IP from the University of Montpellier in France, and an LL.M. in international business law from l'Université Paris 1 Panthéon-Sorbonne. His research interests include copyright law, patent law, comparative IP and the management of IP rights.

Marsha Cadogan is a post-doctoral fellow with CIGI's ILRP. Her research at CIGI is focused on the interrelationship between geographical indications and trademark laws, as well as the global implications of geographical indications in preferential trade agreements.

Marsha's broader research interests are in IP rights and trade, and IP rights and development implications for emerging and developed economies. Marsha's research expertise is multi-jurisdictional and includes the IP jurisdictions of the European Union, the United States, Switzerland, Japan, Canada and the Caribbean.

Prior to becoming a post-doctoral fellow, Marsha contributed to CIGI's ILRP as a research assistant, co-planning workshops and writing her forthcoming paper on influencing the global state of play through geographical indications. Marsha has a bachelor of science, economics and management from the University of the West Indies (Jamaica), an LL.B. from King's College at the University of London (England) and an LL.M. and a Ph.D. in law from Osgoode Hall Law School at York University. She is a member of the board for Canada's International Law Association and is also a barrister and solicitor with the Law Society of Upper Canada.

Executive Summary

The fourth in a series of round tables organized by the International Law Research Program (ILRP) of the Centre for International Governance Innovation (CIGI), in collaboration with the Ontario Ministry of Research, Innovation and Science/Ministry of Economic Development and Growth (MRIS/MEDG), continued the dialogue on intellectual property (IP) and innovation. In attendance were policy makers, IP practitioners, IP experts, academics and representatives from trade and IP-intensive businesses gathered for constructive dialogue on specific issues. The round table addressed three specific IP topics: the development of Ontario's strategic framework for IP, potential IP-focused initiatives under the province's Scale-Up Strategy, and collaborative mechanisms in transformative technologies. The following report conveys the main points discussed.

The round table was conducted under the Chatham House Rule to encourage open discussion among stakeholders.¹

Introduction

This report is a summary of discussions held on August 31, 2017, at the round table organized by CIGI's ILRP and MRIS/MEDG. The IP round table was the fourth in a series that had previously addressed IP awareness and outreach, weak IP literacy among Canadian entrepreneurs, technology transfer at Canadian universities, sovereign patent funds and the absence of a national IP strategy. The latest round table sessions highlighted the development of Ontario's Scale-Up Strategy and the best framework for IP strategizing. Issues underlying the discussions included challenges for scale-ups (high-growth companies) and how best to generate domestic IP that is salient in both international and domestic markets. The main points discussed at the round table are summarized below.

¹ Under this protocol, those present, including media, "are free to use information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." For a full explanation of the Chatham House Rule, see www.chathamhouse.org/about-us/chathamhouse-rule.

On Developing Ontario's IP Strategy

MRIS presented its draft strategic framework for IP to the round table participants for discussion. Participants were asked to comment on the strategies identified by MRIS as relevant to the positioning of IP and innovation as integral to Ontario's knowledge-based economy. The strategic framework for IP focused in particular on the role of the province in the federal government's plan to modernize the IP system, with Ontario's place in federal IP modernization being identified as vital to the province's IP strategic framework.

Participants commented on measures identified as the province's Strategic Outcomes and Impacts in the province's strategies. On the point of creating social benefit through timely publication of publicly funded research, a participant commented that the stipulation was patent focused and should also encompass other IP forms. Another participant suggested that the province's interest in fostering good trade relations via trade agreements should be balanced with its ability to provide needed support to local entrepreneurs. In this context, a participant considered there might be an inherent tension between three of the MRIS Strategic Outcomes and Impacts (points 3 and 4, for developing and commercializing IP, and point 8, using international trade agreements to protect IP and data assets).² A suggestion was made to change the wording of point 8 to include the creation and generation of IP.

A participant suggested that in shaping MRIS's Strategic Outcomes and Impacts, the form and branding of the province's IP strategy would be important. The list of Strategic Outcomes and Impacts does not explain how the outcomes would be achieved and this needs to be addressed. A participant suggested that it is feasible to build patent pools in the short term, as other countries have done this successfully and relatively quickly. Questions were raised about the use of smart

² MRIS, Strategic Outcomes and Impacts: 3: Entrepreneurs have the IP knowledge and state-of-the-art support services to secure timely IP protection of their business ideas, while the provincial economy benefits from the retention of IP in Ontario; 4: Start-ups and scale-ups adopt robust IP strategies that protect their innovations, keep their IP in Ontario, enhance their valuation and enable their rapid growth into domestic and foreign markets; 8: International trade agreements protect IP and data assets generated by Ontario companies while enabling these companies to utilize their IP and data for increasing market share internationally.

regulation to achieve the ends of the IP strategy and whether IP vouchers could cover IP forms other than patents. An integrated approach to IP strategies was pointed out as more likely to facilitate the scale up of Canadian businesses. Other discussion points engaged in by participants concerned how to transact IP, IP mobility across sectors and jurisdictions, and IP licensing.

Debrief from MRIS/ MEDG's Scale-Up Strategy IP Working Group

The round table included a presentation by the external chair of the MRIS/MEDG working group on IP challenges faced by Ontario scale-ups and potential solutions that could be developed as part of Ontario's Scale-Up Strategy. The mandate of the working group was to identify a set of high-impact solutions that the government could consider to help scale-ups protect and leverage their IP for further growth.

Several observations and views were offered regarding key IP issues for scale-ups:

- IP literacy and access to efficient legal services pose a significant challenge.
- There is a knowledge and competency gap between scaling-up entrepreneurs and the lawyers they can afford to consult: they need lawyers with the understanding and skills to help them at this critical stage.
- Among entrepreneurs, it is a common perception that lawyers do not understand the entrepreneurs' language or choose not to speak their language. Based on resource constraints in funding legal assistance, the sense was that scale-ups were directed to "B team" lawyers, but not to the "A team."
- These companies may also not be well versed in what it takes to sustain an IP-based business in complex international markets.
- Embarking on defensive litigation is costly and complex.

- Patent trolls — organizations that acquire patents for licensing and litigation purposes — pose a challenge for many scale-ups, as the scale-ups lack the resources and sufficiently strong IP portfolios with which to defend themselves.

The working group chair discussed potential solutions to the challenges experienced by scale-up companies, including greater access to IP education and legal services. A high value is placed on legal service when it meets the needs of scale-ups on matters such as forum shopping and having the right information to tackle challenging situations. Other potential solutions that were discussed included patent pools, the use of sovereign patent funds, IP vouchers and forming an IP insurance regime. IP vouchers that can be tailored to the specific needs of the client were considered a good approach. The use of IP insurance was suggested as a way for companies to mitigate risks and gain access to defensive IP resources.

The working group debrief was followed by questions and feedback from round table participants. A participant asked whether there were discussions on prior art in the scale-up working group. It was clarified that the discussions focused on the most challenging issues facing scale-ups. Another point raised by the participants was how to create an IP culture in the province. It was suggested that IP outreach and awareness, and the integration of IP topics into all spheres of academia, would help build an IP culture and strengthen firm and economic growth in Ontario.

Changing the Game through Collaborative Mechanisms in Transformative Technologies

A facilitated discussion on collaborative mechanisms in transformative technologies was the focus of the final segment of the round table. Participants observed that in current circumstances the province and Canada are not winners in IP strategizing. Open innovation was suggested as one way of changing the game. A participant explained how open innovation involves the acquisition of IP and the strategic release of ideas to the public domain. The rationale behind these actions is that releasing the ideas to the public domain prevents others from patenting the ideas.

There are two perspectives on what is involved in open innovation. One perspective is firm-centric and builds on the sharing of IP rights as a way of facilitating knowledge production. The other perspective sees open innovation as system-wide collaboration, envisaging that IP favours incumbents over disruptors. Elon Musk's open artificial intelligence platform was suggested as an example that Ontario could emulate. The benefits of the model include cost savings, the creation of networks and increased collaboration across various spectra.

Participants then gave their perspectives on how open innovation should work in a domestic context. It was noted that collaborative mechanisms are central parts of an IP and innovation strategy. How an open data strategy should be structured was a concern. The concerns raised included how to structure data so that it is not lost and how data sovereignty can be ensured. The dialogue also led to questions about how much of so-called open collaboration is genuinely open or whether it is sometimes used as a vehicle for collusion (for example, a promise not to sue under any circumstances). One participant questioned whether credit is allocated appropriately for the work done in open collaborations. Relevant to advancing the open collaboration model was the need to differentiate between public relations initiatives and legitimate open innovation.

Rubrics and indicators of workable open innovation systems were identified as important guides. Montreal's neurological institute was highlighted as an example of open collaboration that Ontario could consider in shaping its framework.

Further Work

The round table ended with a reflection on the main ideas generated from all the sessions. Translating the ideas to policy was noted as a challenging task that involves significant cross-sector collaboration. The participants agreed to pursue resolution of the subjects discussed at the round table through ongoing engagement.

Agenda

August 31, 2017

8:30 a.m. – 12:00 noon

Ontario Investment and Trade Centre, 250 Yonge Street, 35th floor, Toronto

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|------------------|--------------------------------------------------------------------------------------|
| 8:30–9:00 a.m. | Coffee/networking |
| 9:00–9:15 a.m. | Opening remarks |
| 9:15–9:20 a.m. | Facilitator’s introductory remarks |
| 9:20–10:00 a.m. | Developing Ontario’s IP Strategy: Overview and Discussion |
| 10:00–10:50 a.m. | Policy Option Discussion #1: Scale-Up Strategy—IP Pillar |
| 10:50–11:00 a.m. | Break |
| 11:00–11:45 a.m. | Policy Option Discussion #2: Collaborative Mechanisms in Transformative Technologies |
| 11:45 a.m.–12:00 | Next steps and closing remarks |

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