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Second South Centre International Symposium

“Examining Intellectual Property Enforcement from a Development Perspective”

16 September 2008, Palais des Nations, Geneva, Switzerland

The Second South Centre Symposium was aimed at providing developing country representatives an international forum to discuss policy challenges they face on intellectual property (IP) enforcement and how to integrate development concerns into these discussions. It provided an opportunity to examine the trend towards increasing global IP enforcement, including IP forum shopping and capture, misunderstandings about IP enforcement, recent case law developments, abuse of IP enforcement procedures, and strategic considerations and recommendations.

Opening Statement: Dr. Yash Tandon, Executive Director, South Centre, Geneva.

- We live in a world of paradoxes: for 200 years, countries that are now industrialised had easy access to knowledge. These same countries are now placing barriers on the flow of knowledge! *The pirates of yesterday are pointing fingers at pirates of today.*
- The symposium should focus on IP issues within the broader context of interconnected issues: financial, food, and energy crises.



Symposium Chair: Dr. Xuan Li, Coordinator, Innovation and Access to Knowledge, South Centre, Geneva.

- Addressing TRIPS- Plus- Plus norms at various forums is a formidable challenge for developing countries. This symposium is being organized at a time when many related questions and issues are at the crossroads.

Keynote Address: Ambassador SUN Zhenyu, Permanent Representative of the People's Republic of China to the WTO, Geneva.

- After years of implementation of the TRIPS Agreement, continued complaints have been heard of from many developing countries.
- Which is the right place for discussion of IPRs? Many delegations believe that the IPR issues should be dealt by the WIPO. However, we are seeing IP issues at the WTO and other organisations, typically featuring “forum shopping”.
- There is a need for fair balance between enforcing IPRs and other public policy issues. The concept of enforcement should include not only protection of the IPR of the right-holders but also activities aimed at promoting social and economic welfare and providing balance of rights and obligations.



Panel I: Current IP Enforcement: A Curtain Raiser

Panel Chair: Mr. Ali Asad Gillani, First Secretary, Permanent Mission of Pakistan, Geneva.

After many years of TRIPS, we still have more questions than answers. Challenging and complex topics are a part of this symposium.



Current Challenges in International IP Enforcement Regime



- Economic trends, including the increasing value of IPRs in the global market, help explain the drive for greater IP enforcement by developed countries.
- It is not just “forum shopping” but “forum capture” - setting the agenda of different organisations to prioritise IP enforcement.
- Pressures for multilateral TRIPS plus IP enforcement regime: *A developed country agenda or a response to a global problem?*
- **Ms. Viviana Munoz Tellez**, Programme Officer, South Centre.

A Multistakeholder View of IP Enforcement



- There are three main stakeholder groups with clear roles and interests: *right holders, users and state authorities*. An emerging group, are the internet intermediaries.
- The importance, role and interest of stakeholder groups are likely to differ depending on the domestic environment and IP regime.
- This diversity demands sufficient domestic policy space to tailor the national IP enforcement system to the needs of relevant stakeholders.

- **Dr. Henning Große Ruse-Khan**, Max Planck Institute for Intellectual Property, Competition and Tax Law, Germany.

Forum Shopping in International IP Enforcement: Problems and Perspectives

- The G8, traditionally a political and economic group, now has WCO-SECURE and Anti-Counterfeiting Trade Agreement (ACTA) high on its agenda.
- Amongst the dangers of ACTA are the lack of transparency and democracy. The outcome may be manipulated by developed countries and latecomers cannot renegotiate the agreement.
- Forum shopping duplicates the work of specialised international agencies, puts additional burden on developing countries, and leads to conflict of jurisdiction in IPR norm setting.



- **Mr. Yusong Chen**, First Secretary, Permanent Mission of China to the WTO, Geneva.

Recent Negotiation on IP Enforcement at the Universal Postal Union

- There were procedural and substantive concerns regarding tabling of Resolution 40. The consequences of the potential adoption of Resolution 40 at the UPU congress could have been very negative.
- Developing countries need to be on constant vigil. Early warning strategies should be considered.



- There is a need for coordination among developing countries' capitals, where IP may be dealt with by different ministries. Positions adopted in one forum should match those in the other.
- **Mr. Johan van Wyk**, Counsellor, Permanent Mission of South Africa, Geneva.

Commentary: Mr. Cristiano Berbert, Second Secretary, Permanent Mission of Brazil to the UN, Geneva.

- Brazil has a strategic plan for IP enforcement to ensure that there are effective educational, economic and other measures in place.
- If obligations under TRIPS are followed, do we require more stringent standards?
- There must be a balance between IP protection and enforcement: the need for respecting the privacy and protecting consumer rights interest.



Panel II: Misunderstandings about IP Enforcement: Engaging Facts and Policy

Panel Chair: Mr. Johan van Wyk, Counsellor, Permanent Mission of South Africa, Geneva.

There are many misunderstandings about IP enforcement, the economics of IP and methods in quantifying counterfeiting and piracy, and of the counterfeit medicine problem.

General Misunderstandings about IP Enforcement

- Counterfeiting and piracy does not include patent infringement. A counterfeit medicine does not equate to an IP infringed medicine.
- Losses from counterfeit and piracy have been overstated and exaggerated since there are no robust methods of quantifying them.
- Right-holders should take primary responsibility of IP enforcement since IP rights are private rights. They should not blame governments of developing countries. Instead they should bear the costs of IP enforcement - TRIPS is clear on this point.
- **Dr. Xuan Li**, Programme Coordinator, IAKP, South Centre, Geneva.



Methodological Problems in Quantifying Counterfeits and Piracy



- Different types of IPRs-infringements have different welfare effects, which policymakers should take into account.
- Enforcement policies in developing countries are influenced by other public spending priorities, presence of foreign IPRs holders, and pressure from richer countries to step up enforcement.
- Weak IPRs enforcement in developing countries often reflects fundamental institutional deficiencies that cannot be simply addressed through international treaties and development aid.
- **Dr. Carsten Fink**, Visiting Senior Fellow, Group d'Economie Mondiale, Sciences Po, France.

Understanding Counterfeit Medicine and IP Enforcement

- The focus of combating counterfeit medical products is on the protection of public health and not on IPR or trade-related aspects of counterfeiting, if any.
- A definition of counterfeit medical product does not lend itself to legal action or litigation that results in hindering the availability of legitimate generic medicines.
- Patent disputes or violations are not to be confused with counterfeiting.
- Medical products, whether generic or branded, not authorized for marketing in a given country but authorized elsewhere, are not considered counterfeit but simply unauthorized.



- **Dr. Valerio Reggi**, Executive Secretary, IMPACT, WHO, Geneva.

Commentary: Dr. Mohamed Omar Gad, Permanent Mission of Egypt, Geneva.

- There are elements both internal and external to the "IP maximalist" agenda. While enforcement is a priority, is it about IP maximalist agenda or is it inclusive of other issues? There are other pressing priorities like transfer of technology.
- Epistemology of the problem: there is a lack of definition of counterfeit and enforcement. There are concerns on the WHO IMPACT working group, particularly its composition.



Panel III: Recent Cases and Developments in IP Enforcement: Is there more to the Problem?

This session presents various case studies to illustrate the concerns of developing countries on the TRIPS-plus IP enforcement.

Chair: Mr. Luis Vayas Valdivieso, Permanent Mission of Ecuador to the UN, Geneva.

Abuse of IP Enforcement Procedures: Lessons from the Monsanto Case



- The territoriality of patents does not provide protection against trade distortions.
- Broad border measures, including in case of suspected patent infringements, may create significant barriers to trade.
- As evident from the Monsanto case, it is very difficult for any custom authority to ascertain whether there is an IPR infringement. Do they have the technical expertise to ascertain whether or not IPRs related to genetic resources have been infringed? Doubtful - this is one reason why it is so dangerous to expand IPR protection and enforcement through border measures and customs authority.

- **Dr. Carlos Correa**, University of Buenos Aires, Argentina

US - China WTO Enforcement Dispute: Where from here?



- USA has always threatened to sue China for ineffective IPR protection through the WTO dispute settlement mechanism.
 - Has the TRIPS Agreement set standards/thresholds on what is commercial scale? US forced China to reduce the threshold at the domestic level, but it is still complaining. Where do you draw the line as to what is a violation under TRIPS enforcement provisions?
 - For 200 years the purpose of IP treaties was to provide minimum protection. The norm now has shifted to maximum protection. This new trend substitutes the principle of territoriality with that of harmonization.
- Loss of domestic policy latitude; being eroded by internationalization of IP law.

-Dr. Hong XUE, Hong Kong University, China

Unilateral IP Enforcement: The Case of the United States Special 301



- Developing countries have sought to de-legitimise the US 301 process, or remain silent, rather than participate. They should, maybe, reconsider their stand.
- History of participation in the 301 programme: Industry dominated. If countries do not participate and present counter representations, then the 301 process will deliver a straightforward industry perspective.
- 301 is a tool of unilateral enforcement being used to require TRIPS plus IP.

- Prof. Sean Flynn, Washington College of Law, American University, USA.

Commentary: Dr. Joost Pauwelyn, Professor of International Law, Graduate Institute of International Studies, Geneva.

- Could WTO be used to challenge over-enforcement of IPR in Monsanto case? For example, can Argentina challenge the EC rejection of imports through WTO?
- In the US vs. China Enforcement Case: "Willful piracy on a commercial scale" is not clearly defined. This can be a test case which will have large implications for domestic criminal law.
- Problem: Arbitrary decision making. On 301: If States seek redress through trade sanctions or threat of them, bypassing the WTO complaints mechanism, this would be the most likely ground on which US 301 policy could be challenged under article 23 of the WTO. E.g. EC customs case; US shrimp case.



Panel IV: Strategic consideration to Address the Challenges

Panel Chair: Mr. Sunjay Sudhir, Permanent Mission of India to the United Nations, Geneva.

The challenges are multiple and complex.



Dealing with Forum Shopping: Some Lessons from the Negotiation on SECURE at World Customs Organization



- Forum shopping is not a novelty in international politics: TRIPS itself is a result of forum shopping.
 - We have recently witnessed not only an expansion in the scope of IP norms but also an expansion of forums with a say on IP.
 - What is at stake at SECURE? Package of supposedly voluntary “soft law” instruments. However, the nature of soft law nature is relative.
 - Most SECURE standards are taken verbatim from ACTA, which is still under negotiation.
- While WCO is seen largely as a technical organisation, there is a blur between “technical” and “political”. Eg. WCO Model IPR Legislation (Introduction). TRIPS-plus provisions are justified as the “natural” application of the 1996 WIPO copyright Treaties to IP trade issues.
- Classic example of law through the back door: National customs regulation related to IP.
- **Mr. Henrique C. Moraes**, *Brazilian Mission to Brussels, Belgium.*

Alternative Innovation Models and the IP Enforcement Challenge: the Case of a Leading Chinese Seed Innovative Company



- The case of the development of hybrid rice in China as an alternative to the patent model. Our company has developed new varieties outside of a stringent IP framework.
- **Mr. WU, Yueshi**, *Board Chairman of Long Ping High-Tech Agriculture Co., LTD, Hunan, China.*

A “One Size Fits All” Approach to IP Enforcement: What Scenarios for the Future?

- Different scenarios can be envisaged. On IP enforcement, there are several attempts:



- i. To establish transnational schemes for litigation and disputes, derived e.g. from experience in international bankruptcies. Big industries increase the pressure. ACTA was put in place, but stays far below the universal reach of TRIPS; it eventually remains essentially an exclusive 'northern club'.
- ii. By big businesses to press for a simple, one-court solution, but such a unitary enforcement system is neither politically nor legally easy to develop. As agreements of this scale can only be achieved at political level, companies lobby hard, but their epochal

lobbying success in the mid 1990s cannot be repeated anymore.

- We need novel forms of knowledge governance, both at global and local levels, capable of accommodating the needs and aspirations not only of the powerful new entrants, but also of the majority of people on this planet who feel excluded. Every organisation capable of critical reflection should contribute to this effort, including IP institutions.

- **Dr. Konstantinos Karachalios**, *European Patent office, Germany.*

Towards a Development Approach on IP Enforcement: The WIPO Development Agenda and Beyond

- Enforcement of IPR is not and should not be the only priority of developing countries' governments. IPRs are private rights and, therefore, costs of enforcement activities should be borne by the beneficiaries.
- There is no significant evidence to bolster the argument to increase the standards beyond TRIPS. The European Parliament has rejected criminalisation of patent infringement, but insists on hoisting such measures on developing countries.
- Problem of counterfeiting medicines is not going to be solved by enforcement, but rather by regulation of production and distribution and better capacity of registering bodies in developing countries. It is not an IP issue.
- Statistician is someone who tortures data until it confesses: Developing countries need to conduct their own primary data research. Need to improve co-ordination among developing countries, WCO being a case in point.



- **Dr. Carlos Correa**, *University of Buenos Aires, Argentina.*

Commentary: Mr. Christoph Spennemann, *Legal expert (IP), UNCTAD, Geneva.*

- Antagonism on the IP enforcement debate should be replaced by co-operation. Co-operation on enforcement should enable developing countries to enforce their rights in developed countries' jurisdictions. At the moment, high legal costs are involved. This also concerns the case of traditional knowledge rights.
- Mitigate the impact of enforcement on developing countries' budgets: should be in civil rather than criminal courts.
- Enforcement is not a panacea. If the North wants to keep technological edge, much more is required than IP enforcement. Need more attention to cumulative forms of R&D and innovation, which do not correspond to the patent model.



Concluding Remarks: Dr. Xuan Li, Coordinator, Innovation and Access to Knowledge Programme (IAKP), South Centre, Geneva.

The key points emerging on conclusion of this Symposium are:

- IP enforcement and development are inter-twined. Any structural changes in functional composites of international IP enforcement standards can have profound implications on development of the South.
- The current views on IP enforcement that prevails in the Western media and academics circle are lopsided and are promoted by vested interests without recourse to public policy debates concerning them.
- Multi-stakeholder dialogue should be encouraged. Gone are the days when TRIPS standards were agreed without sufficient public policy debates. IP enforcement is an area of immense concern to holders, users, intermediaries, and the State. All stake holders must be actively involved in the discussions.
- Developed countries advocating application of higher standards through ACTA pose a grave threat to the developing countries. Developing countries need to have greater coordination and more effective cooperation to cope with this threat.
- The ongoing trend of forum shopping on IP enforcement should be arrested. There is a need for “single window” clearance on all IP enforcement standards that are to be part of the international “rule-based” economic systems.
- There is a need for evidence based understanding of the implications of IP enforcement on developing economies. More studies and technical assistance efforts are desirable in helping stakeholders in developing countries to grasp the nuances of such implications.
- There is a need for effective policy and logistical coordination among southern countries. Much has been done in the recent past. Our coordinated efforts at WIPO, WTO, WCO and UPU provide us with an illustration as to how effective coordination works!

To conclude: the upward tendencies in IP enforcement need a full stop. Developed countries need to understand that without considering the development dimensions, IP enforcement cannot produce effective socio-economic stability in the developing countries.

But if they turn a blind eye to these “development needs”, the South will come out resoundingly over such pressure tactics. As Mwalimu Julius K. Nyerere, the former president of the Republic of Tanzania and the Founder of South Centre, once said: *“The South should do what it can”*. IP enforcement is no exception. By fighting the cause for South together here, we can and will make a difference.

The South Face is a service provided by South Centre (An Inter-Governmental Organization and Think-Tank of South) to provide space to voices and opinions of the South on global issues.

This South FACE is produced by Mr. Yogesh Pai, Innovation and Access to Knowledge Programme, South Centre, Geneva.

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