

## South Centre International Symposium:

### Examining IP Enforcement from a Development Perspective

9 October 2007. Palais des Nations. Avenue de la Paix 8-14. Geneva. Switzerland

The South Centre-organized International Symposium provides developing country representatives a forum to discuss with North and South stakeholders the policy challenges that developing countries face on IP enforcement and how to integrate development concerns in the international IP enforcement discussions.

**Tuesday**  
9 October 2007

**OPENING REMARKS:** Dr. Xuan Li, Lead Economist & Acting Coordinator, South Centre provided background to the symposium and introduced the keynote speakers, H.E. Mr. Sun Zhenyu, Ambassador of the People's Republic of China to the WTO, and H.E. Dr. Makarim Wibisono, Ambassador of the Republic of Indonesia to the UN.



#### H.E. Mr. Sun Zhenyu (H.E Ambassador of the People's Republic of China):



His Excellency highlighted the need for striking a balance between the rights and obligations in TRIPS, while emphasizing that IP is becoming a decisive factor for competitiveness in a knowledge-based economy. In this regard, he stated, "We must stick to implementing the TRIPS Agreement as a whole." He also noted the "need to integrate IP into the long-term development strategies of developing countries."

#### H.E. Dr. Makarim Wibisono (H.E Ambassador of the Republic of Indonesia):

His Excellency stressed the steps taken by the Indonesian government in establishing a team for implementing TRIPS obligations on enforcement. He mentioned that execution of enforcement provisions is not the duty of the government only, but that private companies are roped in as well. He reviewed the challenges confronting developing countries, considering the scarcity of resources to creating an effective IP regime in the interests of the balance of rights and obligations.



## **SESSION I: Current Multilateral framework and Trends of IP Enforcement**

Chair: **Mr. Boumediene Mahi**, Permanent Mission of Algeria to the UN



### **Changing Structure of Global IP Enforcement System:**



We must identify what the *real* problems related to IPR-enforcement are. Identifying the problems will clarify the discourse that is presently based more on subjective arguments than strong arguments. It is also important to resist the pressure to enforcement only private IPRs and not the enforcement of the limitations and exceptions. Developing countries have no current obligations to adopt higher standards than those of TRIPS. -- Ms.

*Viviana M. Tellez, Programme Officer, South Centre*

### **IP Enforcement Flexibilities and Obligations in the TRIPS Agreement:**

TRIPS is the minimum level of protection, and is not about harmonization. WTO members have the freedom to determine the appropriate method of implementation within their own legal system and practice. In the TRIPS Agreement, the use of terms which imply flexibility, both within and without the enforcement section are abundant. Other important indicators for flexibility are the principle of proportionality, and taking into account of constitutional requirements and exceptional cases, etc. -- Mr. Roger Kampf, Counsellor, WTO



### **TRIPS-Plus IP Enforcement in Bilateral Free Trade Agreements:**

For enforcement and conflict settlement—major concerns for the US even before the agreements—the FTAs extend the treatment of these issues. In general, FTA provisions concerning enforcement have a structure similar to that of TRIPS, but in this respect the danger of the FTAs is that penalties that are optional in TRIPS are made mandatory. -- Mr. Pedro Roffe, Senior Fellow, ICTSD

*ICTSD*

### **TRIPS-Plus Enforcement in WTO Accession Protocols:**



When it comes to WTO Accession we face a situation where one country is going through an accession process with several member states and must undergo an extensive revision of its IP laws to satisfy those states. Countries undergoing accession have greatly reduced bargaining power, although negotiation is possible in practice. Developing country members of the WTO should actively participate in the Working Parties of acceding countries to ensure adherence to the general principles of balanced IP enforcement enshrined in the TRIPS agreement. -- Mr. Ermias Biadgleng, Programme Officer, South Centre

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## SESSION II: State IP Enforcement Policy and Practice, North and South

Chair: **Mr. Ali Asad**, Permanent Mission of Pakistan to the UN



### IP Enforcement in the US: Balancing the Rights of Parties and Competition



The standard in the US which other countries would do well not to repeat is that which views the IP right as a total immunity from antitrust scrutiny. There is no reason why unilateral refusals to license could not be subject to antitrust scrutiny. There is no necessary reason why the grant of a right should grant monopoly right over price.

-- *Prof. Joshua Sarnoff, American University, Washington DC*

### The Chinese Experience

It is necessary to learn from each other's strengths to enhance IP enforcement. For the relevant authorities in different developing countries, including legislature, administration and judicature, more study and research of other countries' legislation and practices are imperative at present as to create mutual understanding bases for further coordination to perfect their laws and enforcements in this area. Actually speaking, discussion, visit study and training, as well as symposium are some useful methods of this kind of coordination.



-- *Mr. Zhao Meisheng, Director of IP Enforcement, State IP Office, Beijing, China*

### Enforcement Measures: Impact on Developing Countries



Enforcement standards can be used and abused strategically to the detriment of developing countries. In FTAs, there is strong pressure for the right-holders to be supplanted; for example, the linkage requirements and the existence of infringements where in the most severe cases it is the *state* which requires a producer to desist without the right-holder taking any action. In the US and Europe it is the right-holder that must act to protect his patent right.

-- *Prof. Carlos Correa, University of Buenos Aires & Special Advisor to the South Centre*



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## **SESSION III: Learning from IP Enforcement Cases**

Chair: **Prof. Carlos Correa**, Univ. of Buenos Aires, Special Advisor to South Centre

### **E-Bay Case and its Effects on Injunctive Relief in the US**



The important thing to emphasize, therefore, is that even in the United States there is tremendous flexibility that is being recognized in regard to judicial discretion and how it is exercised, which has developed over time into a series of rules. Developing countries can choose different rules than the US *and* they can choose rules that might emphasize different considerations, such as cost to the public, other kinds of public interest, high prices, and various other kinds of issues that might be of greater interest in those countries than in the United States.

-- *Prof. Joshua Sarnoff, American University, Washington DC*

### **Who Should Bear Enforcement Cost?**

IP rights should not be seen as self-enforcing. Enforcement imposes a cost, and enforcement activities ought to be planned on a cost-benefit basis. A government should seek to balance the cost of enforcement plus the static loss of higher compliance with the dynamic gain of higher compliance. Remember – there is no such thing as a free lunch!



-- *Dr. Xuan Li, Lead Economist & Acting Coordinator, South Centre*

### **Commentary on US – China IP Enforcement Dispute**



The current WTO IP enforcement dispute brought by the US against China will likely have numerous important implications relevant to IP enforcement in developing countries. On the interpretation of the TRIPS Agreement, several provisions at issue have never been interpreted before in WTO jurisprudence – for instance, what is the meaning of the term “deterrent” in Articles 41.1 and 61; or the meaning of “commercial scale” in Article 61.1. It will also affect the

manner in which WTO adjudicating bodies deal with issues relating to public order and will likely impact the enforcement policies of Members with respect intellectual property, particularly developing country Members.

-- *Mr. Fernando Pierola, Counsel, Advisory Centre on WTO Law*

## **SESSION IV: Towards a Development Agenda on IP enforcement**

Chair: **Mr. Maximiliano Santa Cruz**, Permanent Mission of Chile to the UN



### **Proposals of the Friends of Development Related to IP Enforcement**

The WIPO Development Agenda is an ‘Anti-TRIPS-Plus’ initiative to a great



extent – a reaction to a TRIPS-Plus agenda pushed by developed countries in different fora. It involves soft- and hard-law issues, activities in the bilateral and regional context, and capacity-building. It attempts to achieve openness in the debate on IP, to make the debate on IP more democratic and informed, and to allow different perspectives to permeate the debate. We must export it to the TRIPS Council. We should all rally around the issue, be as informed as we can, and try to influence the process

in defense of the balance of the treaty.

-- *Mr. Guilherme de Aguilar Patriota, Permanent Mission of Brazil to the WTO and WIPO*

### **Enforcement: Ensuring Fair Procedures and the Protection of the Public Interest, Competition Law, and IP Enforcement**

IP is a certain freedom between illegal anticompetitive practices and full competition. A legal framework should ensure that all innovation activities should be protected while restraining anticompetitive practices. Developing countries must improve their domestic antitrust *and* IP legislation, utilizing the flexibilities of the TRIPS Agreement, and devote resources toward fostering a competition culture. Because competition law is very complex and difficult to implement, we need a step-by-step approach to achieve a balance between IP and competition law. We need as well international or regional cooperation to fill in the gaps posed by lack of capacity. -- *Mr. Chen Yusong, Permanent Mission of China to the WTO*



### **Making Technical Assistance Reflect a Development Agenda on IP Enforcement**

Technical assistance must be demand-driven and should promote a balanced and pro-competitive implementation of the TRIPS Agreement. In the area of enforcement we see there are many flexibilities built into the Agreement and only with proper application and use of these flexibilities can we ensure a balance between the public and private interest. Specifically, capacity needs to be built in the area of nullifying improperly granted IPRs. If the same patent is revoked in a developed country, it is not automatically revoked in the developing country, although it should be. In most developing countries there is not much examination capacity, and it must be built. -- *Ms. Sangeeta Shashikant, Third World Network*





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## *Closing Remarks by Dr. Xuan Li, Lead Economist and Programme Director, IAKP, South Centre:*

After thanking all those involved in making the IP Enforcement and Development Symposium a stimulating experience and resounding success, Dr. Xuan Li gave a short overview of the four sessions, and in light of the academic and practitioner perspectives professed throughout the day, gave a few tentative recommendations for developing countries regarding IP enforcement from a development perspective. These included:

- **Two legitimate balances should be maintained:** the first one is the balance between private IP rights on the one hand and public interest concerns on the other; the second one is the balance between the enforcement obligations on the one hand, and the limitations & exceptions expressly and implicitly provided for by the TRIPS Agreement on the other.
- **National, bilateral/regional, and multilateral positions:** *At the national level and bilateral/regional levels*, TRIPS-Plus enforcement standards (e.g. in regional and/or bilateral FTAs and EPAs) should be avoided. *At the multilateral level*, resist developed country pressure in the WTO TRIPS Council and other fora to establish soft-law norms – including best practices and declarations – that may require strengthening domestic enforcement of IPRs beyond TRIPS standards or lead to harmonization of enforcement standards.
- **Domestic legal and legislative measures:** Strengthen checks against abuse and misuse of IPRs and enforcement measures by right-holders; do not extend criminal penalties to patent infringement; be sure not to go beyond the boundary of the definitions of ‘counterfeiting’ and ‘piracy’ set forth in TRIPS Article 51, footnote 14; ensure that costs associated with enforcing IP as private right are undertaken by private parties; **above all**, remember that TRIPS *does not* imply harmonization as such and leaves substantial flexibility for domestic legal implementation that should be carefully developed with respect to a country’s specific jurisprudence, priorities and circumstances.

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