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**South Centre's Fifth South Innovation Perspectives Series Seminar:
The Implementation Game: Developing Countries, the TRIPS
Agreement, and the Global Politics of Intellectual Property
Innovation and Access to Knowledge Programme, South Centre
5 December 2007, Palais des Nations, Geneva**

The TRIPS Agreement has triggered an intense debate on the relationship between intellectual property (IP) regulation and development. A closer analysis shows TRIPS implementation process to be a competitive game played out between governments, industries, NGOs and international organizations—each working to advance their views and interests. An in-depth analysis of TRIPS implementation is key to understanding the impact of new IP rules on developing countries, particularly as TRIPS was conceived as a framework agreement to be implemented through measures at the national level.

Lead Presenter: Dr. Carolyn Deere, Director, Global Trade Governance Programme, Oxford University



The TRIPS Agreement was primarily an initiative of the developed countries; developing countries accepted it only after a long period of resistance in the Uruguay Round. However, when it came to implementation, there has been an apparent contradiction between what developing countries said about TRIPS and the types of policies they have implemented. While many developing countries have enacted only the minimum required legislation (or indeed have delayed implementation of TRIPS) and have made use

of its flexibilities, a surprisingly large number of developing – and even least-developed – countries have gone well beyond their TRIPS requirements, enacting 'TRIPS-Plus' legislation and forgoing the use of flexibilities.

Neither domestic economic factors nor international power pressures fully explain the variations in TRIPS implementation across developing countries. Some of the world's poorest nations are among those that have gone beyond their TRIPS obligations despite little or no power pressure. Surprisingly, developing countries with higher GDP per capita and who have experienced constant power pressures are among those with 'TRIPS-Minimum' legislation and that have broadly utilized TRIPS flexibilities.

Taking a political science approach, Dr. Deere explained the 'implementation game' that involves two distinctive groups: the first group led by developed countries and multinational corporations that favor compliance with TRIPS and further strengthening of IP protection, and the second group that calls for developing countries to tailor implementation of TRIPS to their needs and use 'flexibilities' extensively.

Dr Deere concluded that the variation in TRIPS implementation among developing countries can be explained in terms of (i) the interplay of the global politics of implementation, in which WIPO and others play an important role in sponsoring pro-IP legislation via capacity-

building projects in countries, with specific factors relating to the national political economies of developing countries; and (ii) the interaction between international power pressures and the politics within developing countries of responding to these pressures. In many cases, the increased delegation to regional decision-making groups or to autonomous IP Offices led to TRIPS-Plus standards. Lack of national expertise and capacity regarding IP meant that pro-IP expert advice from WIPO, USAID, and the EC, inter alia, was translated almost directly into regional or national legislation without any consideration of public policy needs and lacking key TRIPS flexibilities. Sometimes 'coercive' measures were really quite innocent, and not about some grand strategy: it was just as if some transaction was made to fill a regulatory vacuum.

The full results of Dr. Deere's research will be published as a book in 2008.

Commentators:

Mr. Boumediene Mahi, Permanent Mission of Algeria to the UN and Coordinator of the African Group at WIPO:



Ignorance of the flexibilities and the way to use them has prevented countries from benefiting from them. Sometimes, sub-regional offices such as the African Intellectual Property Organization made a decision that was later applied to individual countries without them having the possibility to discuss the decision at the national level.

Technical assistance to use flexibilities is essential. It is only over the last two years that WIPO has started to deliver technical assistance that refers to the flexibilities. However a number of least developed countries still do not know how to use them. The new WIPO Development Agenda promotes the idea of balanced protection: it encourages innovation while protecting public interests. This is an encouraging first step toward more fairness.

Christoph Spennemann, Legal Expert, IP Team, Policy Implementation Section, UNCTAD:



The more advanced developing countries, especially Brazil, Argentina, India, are the countries that participated actively in the TRIPS negotiations and have been most active in implementing its flexibilities. On the other hand, the poorer developing countries and the LDCs were less active in the Uruguay Round TRIPS negotiations and less aware of the consequences of TRIPS. I see a correlation between the degree of developing countries' involvement in the Uruguay Round negotiations on the one hand and the implementation of TRIPS flexibilities on the other hand. For

that reason, I am not so sure if there is really a big discourse gap between what countries said in the Uruguay Round and did afterwards – I believe there is actually some coherence.

When talking of the 'implementation game', in my view, the countries that do not have much IP capacity, also do not actively participate in this competitive game between the two groups. They are passive, without the capacity to assess what their standpoint should be. Thus they are willing to accept anything that technical capacity providers tell them, be it from the 'protection' group or the 'flexibilities' group. With these countries you find yourself in a race among technical assistance providers to 'win the game': who gets there and imposes their position first?

Domestic technical capacity to understand the implications of intellectual property is the key consideration here. The lack of IP capacity has important implications for domestic implementation. We must take into account the development objectives and TRIPS flexibilities in domestic capacity-building.

Mr. Ahmed Abdel Latif, Programme Manager, Intellectual Property, International Centre for Trade and Sustainable Development:



The ultimate goal of capacity building should be to foster national expertise in developing countries on IP issues. This means these countries should have the ability to do their own synthesis of international developments, international rules, and their domestic needs. This is the critical thing.

Even after ten years of TRIPS implementation, despite all the capacity building that has been done – but because it has not been tuned towards or sensitive to national needs – this capacity to have a national expertise and a viewpoint on all the complex issues and how to fine-tune them with the national needs, is still lacking. The ability or inability to process international rules with national needs explains the implementation trends discussed earlier in the session.

Session Chair: Dr. Xuan Li, Coordinator, Innovation and Access to Knowledge Programme, South Centre:



There is considerable variation in developing countries approaches to TRIPS implementation. The factors contributing to this observed variation are multi-dimensional, as reflected in Dr. Deere's presentation and the three commentators' observations. As developed countries exhibit significant variations in how they apply IPRs at present, and to an even greater extent in the past, developing countries should likewise be free to proceed according to their own national priorities. It is highlighted here that the interests of developing countries would be best served by tailoring their intellectual property regimes to local economic and social circumstances. The "TRIPS flexibilities" should be implemented on equal terms with the other explicit provisions in the TRIPS Agreement.

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