

Commission on Intellectual Property Rights

CONFERENCE

***“HOW INTELLECTUAL PROPERTY RIGHTS COULD
WORK BETTER FOR DEVELOPING COUNTRIES AND
POOR PEOPLE”***

**TRANSCRIPT
Closing Address by Supachai
Panitchpakdi**

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**THE ROYAL SOCIETY
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Closing Address by Supachai Panitchpakdi

John Barton: Chair of the IPR Commission

I would like to introduce Dr Supachai to present our final keynote address. We are very honoured to have you here and delighted that you are taking over the WTO.

Supachai Panitchpakdi: DG Designate WTO

I intended to come here to listen mainly because I have been told many times by well-wishing friends around the world that as an incoming Director General I should not be too provocative in provoking controversies and adding to the existing ones. I should be trying to listen to what countries tell me to do and try to see to it that I am instrumental in seeing the new Doha Development Round to completion within the mandated period of time. I would like to state that, of course, I will have submit myself to the directives coming from the member countries. The WTO is, after all, a member driven organisation. It wasn't my intention to come to the WTO just to listen, I thought I would have to take up some challenge and the challenge is to change some of the things that probably we have not fully realised in the past that there has been some symmetric consequences of the things that we have agreed upon. I am not advised to talk about redressing the imbalances, sometimes it has been said that there have been no imbalance anyway. I will try to address some of the challenging and controversial issues and try to confront them and look ahead, particularly at how we can bring this important institution, the WTO, into serving all members alike. We are supposed to be doing that, but if we do not give all members equal chances to participate in the WTO affairs, in the work of the commissions and councils and also in the ongoing negotiations, in the new negotiations, in being part of all the greenroom processes or whatever colour rooms we might have in the future, then we might not have an organisation that will be able to serve our member countries alike and this is my real intention. If I have to bring up and propose some forward-looking changes, then I hope that I will have your support and I would not actually be deterred from doing that. Of course, I won't have the executive authority to take action but I will try to do my best to give legitimate and sincere advice to the member countries, which they may be able to act on. The work that Professor Barton has been doing with the Commission on IPRs which has been set up by the Department for International Development, a UK Government Department, is something to which I would like to give my support and blessing and would like to say that this is the reason why I have decided to come to the meeting today. I am here not really to have you listen to what I have to say because I don't have things to say that will be much different from what you have been hearing in the last two days with better more technical background and more vigorous analysis that I could ever think of giving but I thought my presence here would help in giving our colleagues in this Commission the backup that they should be getting. I have been discussing the work of the Commission with our colleagues at DFID in the last couple of days and they have also demonstrated to me their support and agreement and the pace that they have shown for the work that has been done by this Commission. It seems to me, with the controversial issues that have been

brought in connection with the affairs of the WTO, that if there were more commissions like this it would help to bring in the elements of the angles and the viewpoints from different countries and provide the kind of balanced approach in which all of us can participate, can raise issues, can ask about the possible consequences and how to address them, how to cut the costs of introducing the TRIPS Agreement into the legal framework of one's own country and how to enforce all these multiple rules and laws in a way that will make them really effective. Many times in the past I have seen there has been effort to enforce some of these IP laws, so it is not because of lack of effort. There was, however, a complete lack of the infrastructure that would go towards an effective enforcement. For example, if you look at the Chinese situation. Years ago China introduced the kind of IP laws that even the WTO could agree with. But enforcement was of course nothing much that was a major criticism on the lack of enforcement in China and when I talk to the people at MOFTECH in China I know that they realise the need to enforce them. But getting now from Beijing to far away places in Guangdong, in Sichuan etc in this area, it is a big assignment in China. Before they could reach to the root causes of all these difficulties, it would take them quite sometime and a huge degree of adjustment so that the rules of laws apply at all levels. I cite China, it is a huge country, but smaller countries have different problems in enforcing all these laws also. I would like to talk a bit about the historical background, as Martin Khor has done, but in different ways. I admit the fact that, of course, the WTO has been a place where TRIPS has been parked, mainly because the WTO has teeth as has the EUS, whereas the WIPO may not have. The process of arriving at TRIPS is an interesting one to my mind and it needs to be considered and talked about unless we forget the lessons of our history and then repeat them. The first point, because I was part of the Uruguay Round also right from the beginning until the end. One of the remarks that need to be made is that developing countries didn't have the kind of advice to negotiate fully to trade-off between what they will have to accept in terms of the TRIPS Agreement for some other interests of their own in the area of agriculture and textiles. I looked through the history of these negotiations. Developing countries should have actually maintained the position that they have asked for in respect of agricultural liberalisation and the introduction of textiles into the GATS Agreement as early as possible. With that kind of condition in exchange for the acceptance of the IP protection, I think they would have reached something, because at the end of the day, negotiators from the advanced country were so adamant in getting the IP part accepted that there would be a greater degree of also acceptance for progress to be made in the fields of agriculture and textiles that would have actually exceeded what we've seen that has been achieved in reality during the Uruguay Round. There was a lack of so-called reciprocity in this approach. The trade-off has not really been that balanced. People call it imbalance. I think this was a total lack of understanding, a lack of a united front to be able to move more substantially on agriculture and textiles. The second point is the fact that I discovered during negotiation that we started off on TRIPS not by having all kinds of IP protections in TRIPS as we have ended up with, patents, copyright, trademarks, geographical names etc. I thought we started off with something of a very simple approach in trying to have a common multinational framework on the fight against anti counterfeiting codes. Everyone would agree with the anti counterfeiting codes that would have to be agreed on in a multilateral framework. Apart from that, to also try to find a code to enforce the IPR standards that we have already agreed according to the Paris and Berne

Convention. Those are established well known codes. Counterfeiting codes will have to be added to that and this was a simple start. As you know, the negotiation went on and on and, of course, more and more items have been added so that this has become a different animal altogether. Actually, it is not right to accuse negotiating parties that we started off on a wrong note. Everyone knows where we started off from, but where we ended was on a different note altogether. Again another reminder about something somebody was saying about the Doha discussion and the transparency of the options that we will take up during the Doha Round. We need to be thoroughly well versed in the things that we are going to discuss and we need to be able to keep the mandated framework of things we have to discuss and do not let things be extended to become a different room altogether. Because of the proliferation of the issues, it has become somewhat intractable for the DCs and LDS and that has become so costly for enforcement. The third point, of course, the WTO has been criticised time and again that sometimes we serve not actually the interests of countries but sometimes we have been accused of serving the interests of multinationals or private firms and we do not like this kind of criticism because we like to think that we serve the interests of all member countries of WTO, countries interests and not interests of private corporations. If you look at the text of the TRIPS Agreement, there seems to be a conspicuous similarity between the final TRIPS Agreement and some of the earlier text that has been submitted by private associations and corporations. It might be that governments agree with the position of the private sector, that is fine but, of course, then we cannot avoid having this criticism of whom we are really serving. Is it the well-balanced national interests or only the interests of some groups of firms? I think we need to try to find ways to get out of this sort of position because in the future we have to bring in the considerations that would take us away from mainly only a corporate stance that would be incorporated into a national stance. We need to have more national interests in mind when we discuss any operationalisation of the TRIPS Agreement in the future. Fourth is a very canny point about the EC participation. The EC was in the beginning, I thought, a bit reluctant that GATS should be the right institution to look after these codes and international and multilateral standards for IP protection. The EC was quite reluctant. Only when the EC could introduce the issue of the protection of geographical names indications did the EC accept, well that is what I thought, the final agreement. Again, here I see that there is a great need to look into different kinds of trade-offs. Trade-offs sometimes take place only between advanced countries. An inclusion of the Uruguay Round for the single undertaking is give or take. You can take the whole thing or you can leave it, a take it or leave it kind of stance and, of course, there have been countries at the end of the day who will apply to take it because to have something in their hands is probably better than nothing. I hope this time that we will learn the lesson that trade-offs will have to be among all countries concerns while a party to the negotiations. Of course, my last point is that some developing countries at the end of the day refused to accept the agreement and there was a stance made by a few developing countries that WIPO should be the organisation that should have the competence to take on this disagreement. Of course, ultimately they have lost out, mainly for the fact that they were told that in the case of developing countries and least developed countries certain sets of principles on differential and special treatment will be given to them. Again, this has been debated and you must have discussed it many, many times because the operationalisation of the S&D principle leaves a lot to be

desired. These are some of the points that are history now and I think we always need to look at some bits of history in order to understand why we are in such a difficult position at the moment and to see our way out of these difficulties. I will say something about the need for some adjustment in developing countries and give a few recommendations. Of course, people talk about the need, particularly in developing countries and least developed countries, to accept the implementation of the TRIPS Agreement mainly to be able to attract foreign direct investment, attract transfer of technologies, and encourage more research and development in their own countries. We need to do more research work and if the Commission could help by showing the successful cases and all the things that have been achieved, it would be conducive for other countries to follow. I would recommend that it is not only successful cases that should be studied, but also those cases that fail. In cases where we see that in spite of the adoption of all the principles of TRIPS and all the rights laws and yet there is nothing to show for the technology that was supposedly promised. That ultimately foreign direct investment always flows to countries that have the size, the economy and the purchasing power and ultimately the R&D would flow to countries where there is a market for the drugs and for the medicine that could be sold at market. There are facts that would point otherwise than to the kind of things that we are told to believe, so maybe more research with a neutral research from the Commission would highlight now what really determines the transfer technology, what determines the flow of foreign direct investment, what determines the emergence of research and development activities in some countries. Have those been related to TRIPS, maybe and, of course, should be. But in many cases they are related to some other things also, so we would know for sure what we have to do in order to improve upon our performance. The cost issue has been discussed time and again and you know that the costs are not just to put up new laws, to train judges, legal officers, those who have to examine and to be able to investigate the validity of the patents and many other things. There are sometimes costs to whole countries in terms of having some sort of a political instability, countries that do not have a well informed public or do not have a well informed parliament, for example, who have a difficult time in coming to grips with all these difficult issues and sometimes it has become rather costly in political terms to push through. We are talking about tangible costs but there are sometimes intangible costs. People may raise some social issues when you discuss TRIPS and that cannot really be measured easily. People may raise issues of having some foreign rules or laws being imposed on them. We have seen in some countries that the adoption of TRIPS and IP protection has been linked to special privileges. These are all things that are costly to countries besides training people and setting up IP courts etc. I hope we are mindful of these short of things and if we can really point them out and just hope that advanced countries would be more understanding in providing a system that can help cut costs. I think one of the targets in making TRIPS more feasible and acceptable is to try to cut costs. In some areas I have seen that instead of setting up a whole new set of databases to work on giving the registration of patents maybe developing countries can have access into the database systems of some of the more advanced countries. That can help cut costs also. We have to look also into the increasing outflow of the so-called rent payments because some developing countries have to pay an increasing level of fees. If you want to be more advanced in terms of having new technology then, of course, you have to pay more. It doesn't mean that when you have TRIPS and

patents and protection of all these rights that automatically you will get all this technology for free. For some countries that have become advanced developing countries you can see also the advanced level of expenditures that they have....**tape change** Again, I have the example of China paying at least US\$5 billion a year in terms of patent fees, so these are really substantial and going to be more substantial in the future. The costs of imports into the agriculture sector has to be addressed also because for developing countries their main source of income is to try to export their agricultural products but, of course, in the areas of imports, agriculture, chemicals, some of the new technology i.e. inventions, new plant breeds, all these have prices and they have to be paid in terms of hard foreign exchange to be earned. If you look at trends, you see declining trends in the prices of agricultural products and you see rising trends of the imports that need to be bought with hard currencies by developing countries. Here again, there is an issue of course that needs to be addressed. Costs to me are not only the costs of introducing, laws, training officials, setting up courts, but intangible costs, social costs, rent payments and also costs to the agriculture sector. In this new Doha Round there have been various aspects of TRIPS that developing countries are the so-called demanders and I hope they are being pursued in a way that developing countries know about their own options and the trade-off. I should not interfere with that, but I would just like to finish by giving some recommendations to the Commission. I think, before we give capacity building, technical assistance etc. we need to have programmes to build up understanding in the poor countries. Even if you have the best lawyers there, if you don't have the kind of understanding, I was told by friends in the World Bank that some of the best decisions in Africa, they don't know about their rights they have their own rights, copyrights and things like that they don't care even when they are told. I think there is a need for understanding at the grassroots level for the public at large to understand how this sort of thing operates, how it cost them, how it helps to advance their cost, how they can earn from it, and particularly in the parliaments. We need to talk more to parliamentarians because they are the ones who represent their people. If they understand the issue correctly, it is not for them to pass new laws, but also to explain to their constituents about the need for this new protection of IPs, how they are going to gain, how they are going to lose. The second point is the issue of enforcement. Sometimes we look only at the existing laws of enforcement as we commit ourselves to the WTO Agreement i.e. patent laws, trademarks, geographical names and all the standard laws etc. However, sometimes there are other laws in some countries that could be helpful and should be brought in. Some of these laws might have to be amended so that they are consistent with the body of the IP laws. I found this out in various countries that sometimes instead of going directly for the IP laws to help the countries that observe the IP commitment they go through some of their different laws such as import and export, foreign trade laws for example. Some countries may have some instrument that permits them to intervene. They might need some legal adjustment in their administrative law, particularly for the police force. In various countries they have to set up special police forces in order to exercise some of the measures that are required by the legal framework of the IP protection. So, enforcement in itself is a really crucial issue. There are countries that have all the IP laws in place but no enforcement and mainly they might have to work more on the amendment of other laws so that they can be more consistent and application of instruments that might be found in other laws. The third point is the need to emphasise the benefits to be

derived from the TRIPS Agreement. You may have been discussing the provisions in TRIPS that are really flexible. The weakness of some articles in TRIPS gives a great deal of leeway for interpretation, but poorer countries are not really well informed, well versed, in trying to make use of some of these weaknesses or different provisions in the TRIPS Agreement. Sometimes they do not even know how to bring the flexibility within the TRIPS Agreement into their own national laws in order to have the authority to intervene as is supposed to be happening in cases of emergency that we discussed, for example in cases where they need to protect the public health conditions etc. There must be legal procedures that these poorer countries can learn about in order to introduce some of these provisions and interpret these provisions into their own laws. Advanced countries must help, particularly in convincing their own corporate sectors that in order to have a feasible TRIPS Agreement their help is needed. They can help by giving more transfer of technology, by setting up R&D facilities, by introducing joint ventures and investment in these countries. I have seen in various countries around the world, the moment prices of goods that have some relationship with IP protection are reduced these countries don't have to spend much on enforcement in arresting people for counterfeiting and violating all these products. Because the price differentials are so large, companies are actually making a lot of profit and they should be able to live with a lower margin of profit in these countries. If we can work on price differentials, if prices are reduced because of the system of investment by multinationals in some of these areas then I see a most feasible, pragmatic eradication of all violation and counterfeiting. The fourth point is the issue of Dispute Settlement. I am sure there might be different disputes on the interpretation of the TRIPS coming to the DSP frequently. We have seen the dispute with Brazil and South Africa. I don't think we should expect more of these disputes; in fact we should try to avoid these disputes coming to the panel. We should not always use the panel to resolve these disputes. I am pleased that most of the disputes will not actually be subjected to the final wording of the panel. It is best to find a resolution before we have a litigation process that will again be very costly for all concerned. Particularly very costly for the poorer countries, despite the fact that we have already set up a legal advisory centre. We should, therefore, not need to spend too much time on disputes. I have been told that the Office of the Director General of the WTO has the authority to intervene, to prevent these conflicts from going to the Dispute Settlement Body. I intend to explore this avenue. I am told that because of the need to remain neutral sometimes the Office of the Director General dare not interfere in these disputes. I intend to explore the possibility of trying to intervene before the disputes come to a head. The fifth issue is the need for the periodic assessment review of the effects of TRIPS. I am sure you are thinking about this now, but it would be really very useful to keep reviewing them in terms of progress, lack of progress in some areas, the number of patents being issued. Someone on the panel has been discussing these issues to find out whether they are influential in terms of creating the right kind of benefits for developing countries. The last point, and this is a task that I have set for myself, is that the coexistence, the coherence of policies of work between the WIPO and the WTO should be as efficient as possible. This doesn't mean that this has not been efficient in the past. I think they have been working quite smoothly along the same lines. The WIPO has a great deal of expertise and financial and human resources that can be used to enhance the compliance of developing countries. While the WTO may have the

interpretation, they know how negotiations might develop, the WIPO should be the main body which disseminates information, keeps track of the consequences and helps the WTO in making optimum use of the TRIPS Agreement, particularly for trade and development purposes.

John Barton

Let me thank you again Dr Supachai for an absolutely excellent keynote for two days of programmes. I have had a chance to talk to my colleagues every now and then during these two days, and I know that I can speak for all of us when I say that we appreciate all that we have learned from the panels and from the questions from the floor. We have learned many new things and I think most all we are inspired with a greater sense of excitement about the task we have before us. I want, before we close, to thank Charles Clift and his staff who have done an excellent job (tumultuous applause and standing ovation). I cannot imagine a better-chosen group of people or a better organised meeting. My thanks to all of you.