

NCCR Trade Regulation
Work Package 3 – Project 3b

The legal concept of abuse of patent rights

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What is the project about?

- ▶ Debate on patent law and potential counterproductive effects/potential abuses of the system
- ▶ Patent system is abstract and flexible, yet also positivistic
- Question is how patent law deals with settings considered as abuses and whether (and how) the system could benefit from the doctrine of abuse of rights

Abuse of rights

- ▶ This concept is incorporated in international law (including WTO law), competition law (abuse of monopoly position), contract law, etc.
- ▶ However, it is scarce in patent law (Article 5 (A) 2 Paris Convention; defence mechanism of patent misuses in the US).
- ▶ This project aims to screen a number of cases, considered as abuses, to see whether:
 - legislative action is necessary or not; and whether
 - the concept abuse of rights could be used and useful
- ▶ Pro: flexibility
- ▶ Contra: legal security (?)

Abuse of Patent Rights?

- ▶ Cases where a patent is used against the rationale of the system?
- ▶ Cases where a patent is used in an abusive way towards a specific user or group of users?
- ▶ Cases where a patent is used against (other) higher ends

Identification of the case studies

- ▶ Settings reported as abusive are numerous, yet it comes find pertinent cases
- ▶ Identification of the cases (2 or 3)
 - Screening literature
 - Workshop (this) 25 June 2010
- ▶ Distinction *post-grant* v. *pre-grant* cases
 - Focus rather on post-grant/non-competition cases
- ▶ Example: Transit of generic drugs
 - May require an explicit ceiling on the TRIPs level: amendment of footnote 13 of Article 51(?)
 - In the meantime, abuse of rights could be used at the domestic level(?)

Future of the project

- ▶ Papers will be drafted in the fall 2010–winter 2011
- ▶ Symposium with WIPO is planned in 2011
- ▶ Thank you for your attention!