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COMMISSION STAFF WORKING DOCUMENT

IPR Enforcement Report 2009

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1. INTRODUCTION

As foreseen in the European Union's *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*¹, the Directorate-General for External Trade of the European Commission conducted in 2008 a new survey about the situation of IPR enforcement outside the EU, following a similar survey in 2006². The results of the survey constitute a valuable tool for businesses, in particular to small and medium sized enterprises, by making them aware of risks they might face regarding the protection and enforcement of IP rights when dealing with certain third countries.

In addition, this assessment is a key element for the Commission to define countries/regions on which to focus its activities and resources, namely by establishing an updated list of "priority countries" for strengthening cooperation on IP.

2. METHODOLOGY

The Enforcement Survey was based on a questionnaire requesting specific information about actual infringements suffered, measures undertaken against such infringements and the reaction from national authorities. The questionnaire also asked general information about the state of enforcement in the country concerned, the overall approach adopted by national authorities to counter the problem, and its main strengths and weaknesses. The questionnaire was sent to right holders, associations, EU Delegations and Embassies of EU member States. It was also made available on the External Trade DG's website and any concerned parties were publicly invited to participate via External Trade's newsletter. More than 400 replies were received, covering about 70 countries³.

The respondents to the survey are not publicly identified. The questionnaire indicated that information regarding the authors of the replies would remain confidential and several parties required such treatment.

It should be highlighted that the results of the survey are only one element upon which the Commission bases its identification of priority countries. Another factor considered is the Commission's assessment of the political engagement (or lack thereof) by the countries concerned to tackle problems.

¹ OJ C129 of 26.5.2005 – http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/c_129/c_12920050526en00030016.pdf

² see http://ec.europa.eu/trade/issues/sectoral/intell_property/survey2006_en.htm

³ These replies have been considered together with other information, but have not been subjected to a detailed verification by the Commission.

The following additional sources of input also played a significant role in this assessment and prioritisation exercise:

- the outcomes of IP Dialogues conducted by the Commission with certain third countries,
- information received by EU embassies and commercial representations,
- data on suspect goods detained by customs at EU borders,
- data on actions against IPR infringement published by various governments,
- reports and assessments made by other relevant bodies and organisations (e.g. the OECD),
- the assessment of the respective legal systems by the Commission services,
- other information regarding bilateral trade relations between the EU and third countries, as well as the stance of third countries in multilateral IP *fora*.

This Report is not intended to provide an exhaustive analysis of the IPR situation around the world. The "priority countries" may not be those where the protection and enforcement of IPR is the most problematic in absolute terms, but are those where such deficiencies cause the largest injury to EU interests, depending on their relevance in terms of trade.

3. RESULTS

The IPR section of DG Trade's website⁴ contains summaries of the replies received (for those countries for which sufficient information was provided by the respondents). These summaries are exclusively based on the replies received, and do not necessarily reflect the views of the European Commission.

Despite the inevitably uneven quality or level of detail of the replies, one of the most interesting aspects of this survey was the similarity of the problems and concerns faced by right holders. Moreover, also positive aspects are highlighted, acknowledging the efforts made by several third countries in improving their IPR system.

4. UPDATED LIST OF PRIORITY COUNTRIES

First of all, it should be underlined that many of the countries mentioned below are making substantial efforts to improve and strengthen their IPR protection and enforcement systems, e.g. by reviewing national legislation, increasing number of actions carried out by law enforcement bodies, and improving institutional capacity in the administrations concerned (in particular through the training of staff).

Nevertheless, with regard to the number of goods suspected of infringing IP rights, detained by customs at EU borders⁵, there has been in 2008 a significant increase, of 126% compared to 2007. Moreover, increases have been registered in sectors that are potentially dangerous to consumers, such as medicines (+118%) and electrical equipment (+38%).

Thus, in the knowledge-based economy more than ever, IPR enforcement remains a key objective, which is vital for the competitiveness of European industry and for EU's growth and jobs as well as for the safety of its citizens. To better focus EU cooperation on IPR

⁴ http://ec.europa.eu/trade/issues/sectoral/intell_property/index_en.htm

⁵ http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2009_statistics_for_2008_full_report_en.pdf

protection and enforcement with third countries, it is important to update the list of priority countries identified in 2006.

One of the main conclusions of the *IPR Enforcement Report 2009* is that China remains the highest priority country regarding IPR enforcement, not only because this is the country that attracted the most responses (expressing strong concerns from EU industry), but also because 54% of all suspect goods detained at EU borders originated from China. However, in some categories, other countries are the main sources, such as India for medicines or Indonesia for foodstuff and beverages.

Moreover, it is worrying to note that deficiencies in IPR systems are noted not only in emerging countries but also in certain developed countries. This is for instance the case for Israel (major deficiencies regarding pharmaceutical-related IPR issues) and Canada (deficiencies regarding the protection of copyright, pharmaceuticals, geographical indications, ...).

Lastly, it is necessary to stress that attempts by the European Union and other supporters of an effective IPR system to constructively address enforcement problems in multilateral *fora* (World Trade Organisation, World Intellectual Property Organisation, World Customs Organisation) have been opposed by countries like Brazil and India, often supported by China, Argentina and others. This has prevented some of these institutions from addressing pressing IPR enforcement issues that could suitably be resolved multilaterally.

On the basis of the replies received and other sources of input, the list of priority countries was updated. It includes three categories, starting with those countries in which the situation regarding IPR protection and/or enforcement is the most detrimental to EU competitiveness. The updated list is as follows:

- | | |
|----|---|
| 1. | China |
| 2. | Indonesia, the Philippines, Thailand, Turkey |
| 3. | Argentina*, Brazil*, Canada, India, Israel, Korea, Malaysia, Russia*, Ukraine*, USA, Vietnam. |

(In each category, countries are listed alphabetically.)

The * symbol identifies countries in which substantial improvements have been noted, in the wake of the IPR Dialogues established between them and the Commission. The respective IPR situations will be closely monitored, with a view to reassessing the status of these countries on the basis of the continuation of their progress.

It should be noted that, compared to the 2006 list, Canada, Israel, India and the USA have been added, while Paraguay and Chile have been removed.

5. SUMMARY OF ASSESSMENT OF IPR SITUATION BY COUNTRY

The sections below summarise the Commission's current assessment of the local situation regarding IPR protection and enforcement in these countries (based on the findings of the 2008 survey and on other sources of input, as specified in chapter 2).

It is important to note that bilateral agreements are being negotiated, and/or political (IP) "dialogues" held, with several of these countries (Argentina, Brazil, Chile, China, Korea, Russia, Ukraine). In addition, many of them have launched national initiatives aimed at strengthening their IPR system, from a legislative and/or operational point of view. As a consequence, it is hoped that the local situation will improve in many of them, even though certain significant problems justify their presence in this updated list of priority countries.

5.1. China

During the last years, in particular with a view to its accession to the WTO in 2001, China has made considerable efforts to align its legal system with international IPR standards⁶. The new Patent Law, which was adopted in December 2008 and will enter into force on 1 October 2009, is in this respect a major step forward. The ongoing revision of the Trademark Law, as well as the expected revision of the Copyright Law, will also constitute key components of the future IPR environment in China. Moreover, the National IP Strategy clearly demonstrates the importance given by China to IPR protection and enforcement.

However, a number of serious IPR problems remain to be urgently addressed. China remains the main concern of EU companies, on the basis of both the comments provided by survey respondents and the fact that 54% of all suspect goods detained at EU borders in 2008 originated from this country (without mentioning the significant damages reported by European companies due to Chinese counterfeit goods put on the Chinese or on other non-European markets).

The improvements recently introduced have not kept pace with the scale of infringements, especially regarding online piracy⁷ and fake markets (in particular, the Beijing Silk Market remains a matter of concern). This is partly due to the fact that access to the Chinese judicial system is made difficult in practice because of burdensome and costly legalisation and notarisation requirements, the ineffectiveness of the preliminary injunction system and the inadequacy of the damages awarded. It is also reported that criminal sanctions are difficult to obtain. Moreover, the improving willingness of authorities is affected by a lack of effective cooperation between themselves, by insufficient training of the staff involved, and by a very low level of public awareness regarding IPR.

Additionally, China is often defensive regarding plurilateral and multilateral efforts to fight piracy and counterfeiting, opposing in-depth enforcement discussions in international *fora*.

In order to address IPR issues, the EU and China have established a co-operation and dialogue, which has two components: an EU-China IP Dialogue, which takes place once a year in Brussels or in Beijing and allows both sides to exchange information and views on a wide range of IPR issues, including legislative, regulatory and enforcement aspects of trademark, patent, design, geographical indication and copyright protection; and an EU-China IP Working Group, which takes place in principle twice a year in Beijing, with the participation of European industry. Unlike the Dialogue, the Working Group focuses on more specific issues or sectors (e.g. pharmaceuticals, ICT, copyright, engineering sector, etc.). This

⁶ China has clear objectives and a long term strategy in the field of IPR, with the ambition to become an innovation economy by 2020, as reflected in its *National IP Strategy* (NIPS) which was adopted in June 2008. However, this Strategy is largely domestic IPR-oriented.

⁷ This is for example a matter of great concern to the music industry since digital music piracy in China is estimated to comprise 99% of music consumed.

co-operation and dialogue are supported by technical co-operation activities within the IPR2 project (of about 16 million euro for the 2007-2011 period). China has demonstrated openness to meet specific concerns raised by the EU, but so far only limited progress has been made in this framework. Therefore more significant progress on priority issues for the EU is still urgently needed⁸.

Another positive development is the adoption of an action plan concerning EU-China customs cooperation on intellectual property rights in January 2009. This plan foresees the exchange of information and best practices, the creation of networks, and the development of partnerships between business communities and customs authorities in China and the EU.

5.2. Indonesia

Indonesia has showed considerable political will to combat IPR violations, e.g. through the establishment of a *National Coordination Team on IPR*, a national task force reporting directly to the President. Moreover, interest in IPR protection is increasing: national authorities appear committed to implementing and enforcing IPR legislation, and senior staff is reported to be competent.

Despite these positive developments, serious problems regarding deficient enforcement of the domestic IPR regulations, high level of counterfeiting and piracy (for instance, it is estimated that 92% of the video market is in the hands of pirates), uncertainty of the outcome of court proceedings and corruption have been identified as the main problems by the respondents to the Survey.

In addition, the implementation of certain TRIPs requirements does not yet appear to be complete, particularly in relation to the lack of legal protection of confidential information submitted by pharmaceutical companies to obtain marketing approval for drugs (data exclusivity).

5.3. The Philippines

In the Philippines, the IPR enforcement situation has improved to some extent. The Government's IPR campaign including an IPR action plan and the President's *Executive Order establishing the National Committee on IPR* were identified as the main positive points.

Nevertheless, the lack of political will to combat the violations of IPR and properly enforce IP laws, as well as insufficient trained officials and resources, remain the main weaknesses of the system. Particularly, border control measures are weak, conspicuous selling areas of pirated and counterfeit products have not been closed down, and it appears difficult to successfully prosecute and convict IPR violators.

Additionally, the implementation of the new *Universally Accessible Cheaper and Quality Medicines Republic Act 9502* will need to be carefully followed, particularly regarding the issue of compulsory licensing.

⁸ As an example, there is a case – questioning China's willingness and capacity to fulfil its promise to prevent abuse of IPR impartially – in which a Chinese company obtained a utility model which is a clear copy of a prior French patent. This case is seen as an example of local protectionism, where (Chinese) "national champions" are treated better than foreign companies – although the latter contribute considerably to China's development, employment and stability.

5.4. Thailand

In Thailand, IPR enforcement remains weak in general and some areas seem to have deteriorated. In particular, specific problems are reported regarding civil procedures (which are lengthy and expensive; civil actions are not adapted to infringing activities), provisional measures (injunctions are rarely granted), criminal procedures (search warrants are difficult to obtain, criminal sanctions are not deterrent enough, there is a lack of experienced judges) and customs procedures (available only against trademarks and copyright infringement; lack of transparency and burdensome nature of evidence to submit to the customs).

Additional weaknesses identified concern deficient enforcement of domestic IPR regulations and the length of proceedings, lack of political will and cases of corruption. Moreover, deficient cooperation between enforcement bodies and IPR holders, and expensive raid actions (particularly due to informal "management fees" required by the police, whose budget is not sufficient to cover such interventions) executed without coordination and not always followed by a transparent destruction of goods were mentioned.

Strong concerns have also been expressed relating to the Thai policy on compulsory licensing of pharmaceutical products followed by the military-installed government. Without questioning the right of Thailand to issue compulsory licences, there are concerns regarding the possible consequences of a *systematic* recourse to compulsory licences, which should remain an exceptional and last resort solution. From a policy point of view, in terms of ensuring sustainable and long-term access to medicines, systematic recourse to compulsory licensing has to be carefully assessed. The current administration seems to have taken a more balanced approach through confirmation that no new compulsory licenses would be issued without sufficient consultations with all relevant parties. However, the situation needs to be closely monitored in the hope that the government's declaration on compulsory licensing will be implemented and that Thailand will continue to move forwards and successfully build on other IPR enforcement efforts.

Besides, recent efforts in 2009 have been taken by the Thai Government (under direct supervision of the deputy Minister of Commerce) to strengthen the implementation and enforcement on both foreign and domestic IP rights, in particular an increase in suppression actions against trademark counterfeiting and copyright piracy in key distribution areas, and in public awareness raising. Large destruction ceremonies jointly involving several enforcement agencies were also organised. The expected amendment of some major IP laws (in particular trademark and copyright laws), and other enforcement actions such as IPR related prosecutions or the imposition of deterrent penalties for IPR infringements, will be closely monitored in order to assess Thailand's progress in this field.

5.5. Turkey

On the mere basis of the comments provided by survey respondents, it appears that the local IPR enforcement situation has slightly improved: better public awareness, increase in numbers of trained official and judges, introduction of new IP legislation, etc.

However, many serious problems remain to be addressed, in particular deficiencies in judicial procedures, provisional or temporary protective measures, administrative measures and customs procedures. Length of proceedings and deficient enforcement of the domestic IPR regulations were identified as the main weaknesses of the current system.

More specifically, enforcement authorities are not empowered to conduct *ex-officio raids* if industrial property rights are violated. Moreover, *ex-officio* interventions concerning goods infringing copyright are limited. Additionally, improvement is necessary regarding border controls and the efficacy of *ex-officio* seizures.

There is also a strong need for an improved dialogue between right holders and the administration. As IPR is a very technical issue, the participation of stakeholders is crucial in order to elaborate effective legislation and ensure its proper implementation.

On the basis of its Decision No. 2008/2 of July 2008, the Turkish Constitutional Court cancelled the provisions on criminal sanctions of the decrees regulating industrial property rights. Up to July 2009, only a legislative act re-introducing criminal sanctions for trademark infringements was adopted. Moreover, its late adoption created a legislative vacuum of 23 days which caused considerable legal uncertainty and a large number of acquittals regarding on-going trademark proceedings.

Besides, based on the report on EU Customs enforcement of IP rights, Turkey is the second source of suspect goods detained at EU borders regarding clothing accessories and other ready-to-wear clothing, and ranks third in categories such as foodstuff and beverages, electrical equipment and sportswear. These problems are especially worrying for the implementation of the EU-Turkey Customs Union and in the perspective of Turkey being candidate to become a EU Member State.

In this context, in April 2008, the EU proposed to Turkey the establishment of an IP Dialogue (a constructive and result-oriented mechanism aimed at addressing IPR related issues). It is expected that such a Dialogue will help Turkey enhance its legislative framework and its implementation, as well as its enforcement capacities. This would contribute to improving the image of this candidate country to the EU in the IPR field, and to encouraging investment. Up to mid-2009, the EU has not received a positive reply from Turkey regarding the establishment of such a Dialogue.

5.6. Argentina

In Argentina, several improvements have taken place in the IPR protection and enforcement systems, e.g. through various enforcement actions by Customs and Police forces, with positive results in 2007 and 2008, leading to the seizure of important quantities of infringing products especially in street markets. We have also observed efforts and encouraging commitments of local authorities in particular INPI.

However, despite efforts and encouraging commitments, the local situation regarding customs, IPR judicial enforcement, data protection and the backlog of pending patent applications remained almost unchanged since the publication of the 2006 IPR Enforcement Survey. This also applies to illegal Internet downloading, that keeps increasing due to the expanding broadband access.

The customs surveillance system, which started to operate in 2007 with a mandate to look after all IPRs, has recently and regrettably been limited to trademarks and copyrights only, leaving aside patents and industrial designs.

Concerning substantive infringement proceedings, there are only few cases where Federal Courts have granted provisional protection of patents. Insofar as criminal procedures are

concerned, they are broadly considered by right holders to be ineffective; reported causes include the lack of specialised courts and the low level of sanctions.

Regarding data protection, there has been no progress, as domestic competitors, taking advantage of a very restrictive interpretation of Article 39.9 of the TRIPS Agreement by Argentinean authorities, still use third-country proprietary data.

The patent applications examination backlog remains large (although decreasing), affecting particularly the pharmaceutical and agrochemical industry. At the same time, there are no signs that Argentina will adhere to the Patent Cooperation Treaty.

Additionally, Argentina is often defensive regarding plurilateral and multilateral efforts to fight piracy and counterfeiting, opposing in-depth enforcement discussions in international *fora*.

A dedicated IPR meeting between the EU and the Argentinean government took place in February 2008. It allowed for a comprehensive discussion on IPR issues. Efforts have been made to address each issue raised by the EU, by involving a wide range of government agencies in the process. Although this process is unlikely to lead to short-term results, it should allow to address all areas of concern. It is much hoped that the Argentinean authorities will not miss this opportunity to establish a regular and comprehensive IPR result-oriented dialogue.

5.7. Brazil

In Brazil, there is a growing commitment towards an effective system of protection and enforcement of intellectual property. There is a general perception by a majority of right-holders that the fight against IPR infringements has improved. Positive evolutions relate to the growing engagement by Brazilian domestic authorities, translated into constructive public-private cooperation under the *National Council to Combat Piracy* (CNCP) to fight IPR infringements, improved border enforcement and concrete efforts to reduce the excessive delays to register industrial property rights. It should also be noted that Brazil has engaged in 2008 in a positive in-depth IP Dialogue with the Commission, allowing very useful clarification of a number of issues. It is much hoped that this process will be continued in order to address the interests of both sides.

Problems are however reported regarding the deficient enforcement of domestic legislation, the length of judicial proceedings, the absence of a customs registration mechanism, the lack of deterrence of the sanctions effectively imposed by courts, the deficient fight against Internet piracy, and the lengthy and difficult registration of patents, particularly for pharmaceutical products.

The overall positive evolutions registered on the domestic side are not yet perceived in Brazil's external positions, where it adopts a more defensive stance regarding IPR and often opposes plurilateral and multilateral efforts to address the fight against piracy and counterfeiting. This is the case *inter alia* at the WTO, WCO and WIPO. It is important that IPR enforcement discussions take place in these institutions. A Brazilian participation in the debate, in an open and result-oriented spirit, would be highly welcome.

5.8. Canada

The Canadian IPR system features several significant shortcomings, regarding which regular interactions between the EU and local authorities, since several years, have failed to result in adequate changes. Even an official Canadian report⁹ states that witnesses consider that "*Canada's laws are generally adequate to deal with ordinary infringement, but not counterfeiting and piracy*" and that "*Canada's enforcement regime lags behind those of other developed countries*". A parliamentary report of 2007¹⁰ also states that "*The vast majority of the witnesses that appeared before us noted the inadequacy of the human and financial resources allocated to the curtailment of counterfeiting and piracy*". The weak underlying political will – resulting both in the poor implementation of existing legislation and in the consistent failure of reform legislation being enacted – is indeed very worrying from a developed country.

Problems relate in particular to the lack of ratification by Canada of major IPR treaties relating to trademarks and copyright (WIPO's "Internet Treaties"), deficiencies in the protection of pharmaceuticals and of geographical indications, ineffective enforcement mechanisms (in particular regarding customs seizures), and limited sharing of information between Canadian authorities and right holders.

Moreover, some of the proposed amendments to the latest Canadian copyright law included worryingly lenient provisions regarding Internet service providers' liability. When a new draft Bill will be developed, it will need to be carefully assessed against Canada's obligations under existing international treaties.

5.9. India

The IPR situation in India is progressively improving. The Indian IPR legislation has been amended positively in recent years through various legislative improvements. Co-operation between the enforcement departments has also considerably improved and greater IP awareness amongst officials has been reported. However, further progress remains necessary, including through a better commitment of relevant authorities.

Moreover, it still appears that implementation of IPR enforcement mechanisms also needs further strengthening. Weaknesses have been reported in the length and uncertainty of the outcome of proceedings as well as in the lack of trained officials, in particular judges and prosecutors. Active participation of authorities in IPR enforcement policy, improvement of implementation of civil, criminal and customs procedures should remain a priority for India.

The large number of locally produced infringing goods remains a source of serious concern, especially regarding patents and trademarks. Detentions of goods of Indian origin by EU customs are particularly alarming for pharmaceuticals (a sector where India represented more than 50 % of all 2008 seizures).

⁹ "*Counterfeiting and piracy are theft*" (June 2007) – <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3060548&Language=E&Mode=1&Parl=39&Ses=1&File=9>

¹⁰ "*Counterfeit goods in Canada – A threat to public safety*" (May 2007) – <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securp10/securp10-e.pdf>

In addition, adoption of appropriate legislation transposing the relevant TRIPS provisions on data protection is of significant importance in order for India to meet its international obligations.

Externally, India is generally defensive regarding IPR and often opposes plurilateral and multilateral efforts to fight piracy and counterfeiting in *fora* such as the WTO, the WCO and the WIPO. It is important that IPR enforcement discussions take place at these institutions and that India participates in the debate in an open and result-oriented spirit.

5.10. Israel

Israel has recently changed its copyright legislation but several problems remain as far as piracy activities are concerned. Problems also persist regarding the absence of compensation of foreign right holders for retransmission of their works by local cable distributors.

However, the biggest issue for European business is the inadequate protection of patents, especially as patent applications are not published (before a patent is eventually granted). Research-based pharmaceutical companies face major delays and difficulties with regard to the protection and commercialisation of innovative pharmaceutical products. Because of the Israeli system of "pre-grant opposition" and of the long duration of the examination of pharmaceutical patent applications (more than 6 years in the average), the period during which patent applications remain unpublished and thus unprotected can be extended for several more years as the competitors have interest to extend as much as possible the patent review process. These delays are detrimental to right holders: as patent applications are already published in other jurisdictions (EU, USA), competitors (mainly local generic manufacturers) can use the products concerned in Israel without patent owners having any legal basis to claim interim measures or damages during this interim period (because of the lack of official local publication of the applications).

Furthermore, there are also problems regarding test and other data needed for marketing approval of pharmaceutical products. In particular, marketing approval takes between 15-18 months, while the exclusivity period with regard to patent term extension and data exclusivity is limited due to a linkage to the period of protection existing to one of the so-called "recognised-countries" (mainly EU, USA and some other developed countries).

5.11. Korea

In Korea, some improvement in the IPR environment is noted, including elements such as timely upgrades of IPR legislation and the commitment shown by competent authorities (e.g. the Korean Customs Service) in raising public awareness or in setting up a specialised IP panel at the Seoul Central District Court.

However, it still appears that implementation of IPR enforcement mechanisms needs further strengthening. Weaknesses have been reported in the length, costs and uncertainty of the outcome of proceedings. The large number of locally produced counterfeit goods that can be found easily in retail shops and markets remains a source of serious concern. Some observers consider Korea as a transit area for counterfeit goods. It also appears that tourists from neighbouring countries tend to knowingly buy counterfeit in local (Korean) markets. Piracy and in particular online piracy remains a serious concern in Korea. Active participation of authorities in IPR enforcement policy, improvement of implementation of civil procedures

and remedies, and of customs procedures to prevent export or transit of IP infringing goods, should remain a priority for Korea.

The EU and Korea are currently negotiating a Free Trade Agreement, which will include regulatory provisions on IP rights and their enforcement. The FTA will constitute an important and useful tool for strengthening the implementation of IP protection and enforcement.

5.12. Malaysia

As regards Malaysia, there is an increasing awareness of the importance of IPRs. Both the Government and chambers of commerce have been proactive in raising the profile of IP issues and focussing their efforts on organising public awareness campaigns. Despite these efforts and campaigns, public awareness is still low and public does not directly condemn street sellers or IP violations. A major effort on public awareness raising remains therefore necessary.

Furthermore, deficient enforcement of the domestic IPR regulations and lack of trained officials with investigative powers (particularly customs officials) and of IPR specialised judges seem to represent the major problems. The national authorities fail to effectively combat violations of IPR and administrative measures; criminal and customs procedures were identified as deficient, i.e. lengthy and burdensome. Additionally, IPR enforcement has suffered due to the transition to a new methodology: in the new system, raids are mostly triggered by complaints from IP right holders, but so far the number of complaints has been low. The *ex-officio* raids are still being conducted, though their number has decreased. The resulting sharp decline in raids had led to a visible increase in the sale of pirated and counterfeit goods on the streets. As regards civil enforcement, civil procedures were reported as rather expensive and lengthy, leading to low fines (based on the value of the seized goods, i.e. the retail price of the infringer) with a limited deterrent effect. Nevertheless, the recent introduction of four specialised IP courts might improve the general situation despite the fact that currently, they seem overwhelmed.

5.13. Russia

In Russia, several improvements have taken place in the IPR protection and enforcement systems, e.g. through various changes in Russian IPR legislation in recent years, including an amendment of criminal law ensuring that IPR infringements (copyright and trade marks) now falls under the category of "serious gravity crimes", and through better cooperation from the police. The Supreme Court has also issued a resolution on application of article 146 of the Criminal Code of Russia (copyright infringements), summarizing court practice in this area as guidelines for judges. Enforcement agencies, police and customs, have also stepped up their efforts to conduct regular raids and inspections.

Nevertheless, domestic sales and use of counterfeit trademark goods, software, music and films remain widespread. Complaints have been expressed regarding insufficient commitment from the relevant authorities. Although police conducts raids, often there is no proper follow-up to apparently successful operations, with seized pirate products often finding their way back to the market. It is also reported that courts fail to apply deterrent and timely sanctions, and that the enforcement system is affected by corruption, insufficient resources, and substantial lack of enforcement at the borders.

The EU has strengthened its resources in Russia to help spot risks of IP theft and deal with domestic authorities.

The Commission has also engaged in a regular IP Dialogue (result-oriented process, including the involvement of relevant stakeholders) with the enforcing authorities to resolve IPR problems. This Dialogue has proven very useful and Russian authorities have also engaged in wide scale cooperation activities concerning IPR enforcement, which is a positive step. Moreover, the Commission has also, together with the copyright industry, organised a number of training events on Internet piracy through the TAIEX scheme addressed to various enforcement agencies, including the State Judicial Academy and the General Prosecutors.

5.14. Ukraine

Ukraine has made serious efforts to upgrade its legal framework to TRIPS and EU standards, and to reduce the level of piracy and counterfeiting (e.g. regarding copyrighted music). There is also a better transparency vis-à-vis the Commission and right holders.

Moreover, Ukrainian authorities have engaged in a regular bilateral Dialogue with the Commission. This is a result-oriented process involving all competent enforcement authorities and certain right holders. In addition, in 2008 the Commission initiated negotiations for a deep and comprehensive Free Trade Agreement (FTA) with Ukraine (as part of the Association Agreement). This FTA will include an ambitious IPR chapter aiming at regulatory approximation with the EU *acquis* and enforcement practices.

However, improvement is still needed, in particular regarding commitment at governmental level, to have enforcement authorities apply the available laws in an effective and dissuasive manner. Training and capacity building of enforcement bodies (judges, prosecutors, police, customs, etc.) should also be seriously enhanced.

Concerning piracy and counterfeiting, there are still problems with the prevention and repression of sales of counterfeited and pirated goods in shops and street markets, as well as on domestically based websites. Complaints have been expressed regarding the effectiveness of the prosecution of cases triggered by right-holders, and police actions should be increased. Although the police conducts raids, often there is no proper follow-up to apparently successful operations, with a risk that the seized goods find their way back to the market.

In the copyright sector, a pending issue is still to ensure remuneration in respect of public performance (restaurants, bars, clubs, etc. refuse to pay royalties for the use of protected music, and police is reluctant to take any action) and also by the State broadcasting companies (right holders are not fairly compensated).

5.15. USA

The protection and enforcement of IP rights in the USA is globally effective, and the EU and the USA have established in recent years a cooperation to discuss common IPR enforcement challenges in third countries that is fruitful and efficient. However, several problems are noted. Although the issues at stake are limited to very specific sectors, the importance of the US market and the lack of any progress regarding these persistent problems justify the inclusion of the USA in our list of priority countries.

Firstly, some divergences are noted in our respective approaches to patent legislation, such as the fact the USA relies on the first-to-invent approach (rather than the first-to-file approach

which the rest of the world uses). This approach creates legal uncertainty and has other detrimental consequences, such as costly "interference" procedures.

Secondly, there are a couple of specific cases that remain unresolved after several years of efforts by the EU to obtain a solution:

- the lack of progress in implementing the WTO panel decision on Irish Music (Section 110(5)(B) of the US Copyright Act was found to be incompatible with the WTO/TRIPs Agreement); disrespecting WTO dispute settlement decisions on IPR establishes a negative precedent and undermines the credibility of countries such as the EU and US which share an interest in promoting effective IPR enforcement practices, notably in emerging economies;
- the US administration's decision to refuse the renewal of the *Havana Club* trademark on the basis of the embargo against Cuba. It is hoped the administration's rapidly evolving Cuba policy may allow early resolution of this long standing dispute.

More information can also be found in the IPR section of the Commission's "*United States barriers to trade and investment report for 2008*"¹¹.

5.16. Vietnam

In Vietnam, the legislative framework has improved. Vietnam has made clear efforts and progress in IPR area. It is worth of note that Vietnam implemented its WTO commitment to criminalise, in the course of 2008, instances of "large commercial scale" piracy and counterfeiting (i.e. enactment in March 2008 of a *Criminal Circular* offering guidelines on criminal prosecution against acts of piracy and counterfeiting on a commercial scale). In June 2009, the National Assembly of Vietnam also approved a new version of the Criminal Code. While the former Criminal Code provided for lower criminal penalties than the recently adopted Criminal Circular (thus acting indirectly as a "promoter" of IPR infringements), the modifications introduced by the new version appear to be a step forward in the direction of deterrent sanctions against IPR violations. In addition, at the end of 2008, we also witnessed preparations of what is believed to be a truly effective regulatory framework for the protection of data exclusivity for pharmaceutical companies. Moreover, Vietnam also seeks to reduce the current levels of piracy by means other than improving IPR legislation.

Regarding enforcement in 2008, little data is available so far. The National Office of Intellectual Property communicated that, by June 2008, 426 cases of IPR violations had been resolved. Data for 2007 is much more comprehensive: an important number of enforcement actions have been conducted. Furthermore, while pirated and counterfeited merchandise remains quite available indeed, it is not at the level hitherto seen in the country.

Despite the above-mentioned positive developments and increased proactiveness from the government, progress in the IPR field is only marginal. Deficient enforcement of the domestic IPR regulations, lack of trained IPR officials and length and burdensomeness of proceedings were still identified as the main weaknesses of the system. Moreover, most of the respondents to the Survey described civil procedures, provisional measures, criminal procedures and particularly customs procedures as being deficient or not implemented.

¹¹ http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf

5.17. [Chile]

Chile has made important improvements, in particular as regards the creation of a new IP authority and an already efficiently working special IP-branch of its police forces. Chile has also adhered to the *Patent Cooperation Treaty*.

These circumstances, together with the fact that important legislative improvements are at an advanced stage, lead to the conclusion that Chile should no longer be included in the priority list.

5.18. [Paraguay]

In comparison with the results of the previous survey, certain improvements have been noted in Paraguay regarding the fight against piracy (software, music, movies, ...). Customs have adopted border measures to improve control of imported products and to protect the interests of individuals and companies. Large-scale seizures of fake goods have taken place. On the other hand, Customs and Capacinfar (chamber of international pharmaceutical companies) signed in 2007 an agreement in order to cooperate in the fight against piracy and counterfeiting. Customs implemented in 2008 a new system of trademark monitoring with the purpose of increasing controls and of decreasing the import and export of fake products. Public awareness has been developed by public institutions and private firms at national level in order to sensitize about damages caused by the violation of IPR to national economy and the involvement of piracy in the drug trafficking and organised crime.

Given all the above and the fact that in the previous survey Paraguay was indirectly mentioned in the priority list (as part of the Mercosur), it is proposed to withdraw it from the list in order to recognise the impact of the efforts undertaken, and to encourage Paraguay to continue in this direction.

6. CONCLUSIONS

Although serious problems are still noted in a number of countries insofar as the protection and enforcement of IP rights is concerned, efforts from national authorities and actual improvements have been noted. These positive developments partly result from our cooperation initiatives – including "IP dialogues" with third countries and technical assistance projects –, which should certainly be continued and enhanced in the future.

