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COMMISSION STAFF WORKING DOCUMENT

Report on the protection and enforcement of intellectual property rights in third countries

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1. INTRODUCTION

As foreseen in the European Union (EU)'s *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*¹, the *Directorate-General for Trade* of the European Commission undertook a new survey of the protection and enforcement of intellectual property rights (IPRs) outside the EU in 2010, following similar surveys in 2008² and 2006³.

The principal objective of the survey is to identify third countries in which the state of IPR protection and enforcement gives rise to the greatest level of concern, and thus to enable the Commission to focus its activities and resources in this area accordingly. This is namely done by establishing an updated list of "priority countries" for strengthening cooperation on intellectual property (IP). The results of this survey will also enable right holders, in particular small and medium-size enterprises, to be more aware of potential risks to their IP when engaging in business activities in or with certain third countries and thus how to design business strategies and operations to protect their corporate value in intangibles, such as IP, as part of their IP value management. This report may also be useful for authorities in third countries, as a source of information regarding the perception of the European users of their IPR systems and as a source of inspiration since it contains descriptions of other countries' initiatives in this area which they might consider undertaking.

2. BACKGROUND

In today's knowledge society, and in particular for economies such as the EU whose competitiveness relies essentially on creativity and innovation, effective protection and enforcement of IP rights is crucial. This applies not only to physical goods, but also increasingly to digital goods, considering the ease with which they are illegally copied and disseminated.

While the ratification of the Agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) by our trading partners resulted in the adoption of generally satisfactory IP legislation, regrettably the situation is far more varied in terms of the practical implementation of such legislation and the ways in which such laws are enforced in practice. When it comes to enforcement of IP rights, serious deficiencies have been noted in some countries.

The level of infringement is evident from the annual statistics regarding the detentions at EU borders of goods suspected of infringing IP rights. The figures are troubling, which is exacerbated given that they only show a fraction of all infringements (e.g. they do not include internet-based infringements, nor infringing goods that have evaded customs controls).

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

² http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145204.pdf

³ see http://ec.europa.eu/trade/issues/sectoral/intell_property/survey2006_en.htm

An upward trend is clearly evident from these annual statistics. In 2011, more than 91,000 detention cases were registered by EU customs authorities – an increase of 15% compared to 2010. This increase in detention cases is largely explained by the growth in the e-commerce market and by the fact that such goods tend to be shipped as individual packages by air, express and postal traffic. The genuine value of the more than 114 million detained articles is estimated to be over € 1.2 billion.

A particularly worrying trend is that products for daily use (i.e. body care articles, medicines, toys, electrical household goods) accounted for 28.6% of the total number of detained articles, given the potential risks such products pose for public health and safety. Medicines are at the top of the list of detained articles (24% of the total number of detained articles), followed by packaging materials and cigarettes.

The importance of IP is for example illustrated by the following data:

- IP as intangible assets now represent as much as 85% of companies' corporate value;
- In 2011 the income from EU services exports of licences (i.e. granted to non-EU economic operators) resulted in payments of royalties valued at € 39 billion.
- On top of that, an "IPR value" is present in many if not most of the goods exported by EU businesses.
- Moreover, regarding geographical indications (GIs), the total sales value of EU GI products was close to € 54 billion in 2010, with extra-EU trade representing about 20% of this amount.

These figures are only a few examples underlining the economic significance of IP rights and the potential impact infringements may have on the EU economy. EU companies need stable and safe IPR regimes, not only in the EU where this is already ensured to a large extent, but also abroad, where infringement of IPR causes significant financial losses for EU right-holders and legitimate businesses. This becomes even more important as EU companies, to remain competitive, must be able to pursue value chain specialisation without jeopardising their intellectual property.

While many of the EU's trading partners in recent years have taken steps to make their IPR system more effective, significant improvements are still needed to combat the distorting and illegal practices that undermine the EU's comparative advantages in the areas that depend on innovation and creativity. To respond to this threat the EU is taking action in different ways, ranging from the negotiation of multilateral treaties and of bilateral trade agreements which include an IP chapter, to non-legislative initiatives such as IP Dialogues or technical IPR assistance projects with specific third countries. Such action enables the EU to address weaknesses in the IP environment of third countries. When pursuing such action it is important to reach an equitable balance between the interests of right-holders and those of users and society, including the specific needs of our trading partners that belong to the group of low-income developing countries.

3. METHODOLOGY

This Report is based on a variety of information and data, including the responses received to a questionnaire that sought specific information about the protection and enforcement of the various IP rights, infringements suffered, measures undertaken against them, and reactions from national authorities to requests for enforcement or assistance. Invitations to take part in the survey were sent to right holders, associations, EU Delegations and embassies of EU

Member States. More than 400 replies were received, covering about 80 countries. Most of the respondents were businesses (about 60 %), while replies were also received from other organisations, especially associations representing right-holders (e.g. industrial federations or royalty collecting societies) (18 %). The vast majority of the respondents (90 %) are based in the EU, or represent EU interests in the country concerned.

The questionnaire indicated that information regarding the authors of the replies would remain confidential. Consequently, the respondents to the survey are not publicly identified.

It should be highlighted that the results of the survey are only one element upon which the Commission services have based their identification of priority countries. The following additional sources of input have also played a significant role in this assessment and prioritisation exercise:

- the efforts undertaken and the political engagement shown by the countries concerned to make improvements, as well as the stance of that country in multilateral IP *fora*,
- the outcomes of discussions the Commission services have had with third countries in the context of IP Dialogues/Working Groups,
- information received from EU Delegations and commercial representations,
- data on suspect goods detained by customs at EU borders⁴,
- data on actions against IPR infringement published by various governments,
- reports and assessments made by other relevant bodies and organisations (e.g. the OECD),
- information made public through WTO's *Trade Policy Reviews*,
- assessments carried out by DG Trade's *Market Access* teams,
- assessments of IPR systems by the Commission services,
- other information regarding bilateral trade relations between the EU and third countries.

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

4. RESULTS OF THE SURVEY

Summaries of the replies received in respect of those countries for which sufficient information was provided will be posted under the *Enforcement* section of DG Trade's IPR web site⁵. These summaries – with the obvious exception of the section summarising the Commission's actions – will be based exclusively on the replies received, which have not been subjected to a detailed verification by the Commission, and therefore do not necessarily reflect its views.

Just like in 2009, one of the most interesting results coming out of this survey is the similarity of problems and concerns shared by right holders. The Report also acknowledges positive efforts made by third countries in improving their IPR systems.

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http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2012_ipr_statistics_en.pdf

⁵ <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/enforcement/>

4.1. Global results

On a scale from 0 to 10 (with 0 being the worst), more than 70 % of the respondents gave marks of 5 or lower in regard to the effectiveness of the current IPR (protection and enforcement) situation, reflecting a poor perception of the average level of IP protection in a number of third countries and confirming the need for continued action. Not surprisingly, the protection of IP was viewed by respondents as particularly problematic in certain third countries and these will require particular attention in the years to come.

Assessing the extent to which IPR protection and enforcement has improved over the last two years, more than two thirds of the respondents gave marks of 5 or lower (also on a scale from 0 to 10), reflecting a stable situation, i.e. without noticeable improvement nor worsening at a global level.

4.2. Specific issues

The replies were variable in regard to the effectiveness of the **IP protection mechanisms**. The data suggests that problems in the area of copyright, designs, data protection and geographical indications were somewhat less frequent than for patents and trademarks (for both of which respondents gave scores of 3 and 4 with a higher frequency).

No clear trend in the replies could be identified on the effectiveness of **enforcement mechanisms** in connection with the various IP rights, with all of them attracting evenly distributed scores (centred around 2 which was consistently the most frequently assigned score).

Regarding the various enforcement mechanisms (administrative, civil, criminal measures, customs procedures, etc.), the replies suggests that the situation is worrying, with average marks below 2.5 for each of them (on a scale from 0 to 5), and marks of 1 and 2 attracting the most replies.

The **most frequently suffered infringements** related to trade marks (mentioned by 44 % of the respondents⁶), followed by patents and copyrights (each mentioned by about 24 % of the respondents) and then the other IP rights to a lesser extent.

These infringements were mainly linked to local sales and local production (mentioned by 43 and 37 % of the respondents respectively), followed by importation into the country concerned (29 %), while exportation from the country concerned either to the EU or to other third countries attracted lower scores (each of these two cases being mentioned by about 12 % of the respondents).

30 % of the respondents declared that infringement of their IP rights resulted in risks to the health or safety of customers which is particularly worrying.

25 % of respondents considered that there are **differences in the treatment of enforcement cases between nationals and foreigners** in the country concerned, and 17 % considered that certain provisions of national IP law in the country concerned are specifically detrimental to foreign right holders (e.g. maximum damage thresholds). About 25 % of the respondents reported local measures which, while not constituting IPR infringements as such, are

⁶ with multiple replies being possible for this question

nevertheless considered to be particularly detrimental to foreign right-holders (e.g. related to non-voluntary technology transfer, abusive compulsory licensing, etc.).

5. UPDATED LIST OF PRIORITY COUNTRIES

IPR enforcement is critical now more than ever, not only for the competitiveness of industry, especially in a knowledge-based economy such as the EU's, and thus for the EU's growth and jobs, but also for the safety of its citizens.

The number of goods suspected⁷ of infringing IP rights, detained by customs at EU borders, remains disturbing, with more than 114 million articles detained in 2011 (corresponding to 91,245 interventions of customs services). Products for daily use and products potentially dangerous to the health and safety of European consumers now account for 28.6% of the total amount of detained articles (i.e. suspected trademark infringements concerning food and beverages, body care articles, medicines, electrical household goods and toys), up from 14.5% in 2010.

To better focus EU cooperation on IPR protection and enforcement with third countries, it is important to revisit the list of priority countries first identified in 2006 and updated in 2009. It should be noted at the outset 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), etc.

One of the main conclusions of this Report is that China remains the main challenge regarding IPR enforcement, not only because it attracted the most responses and the strongest concerns from EU industry, but also because 73% of all suspect (imported) goods detained at EU borders in 2011 and not released came from China⁸. However, in certain product categories, other countries were the main source, notably Turkey for foodstuffs, Thailand in the case of non-alcoholic beverages, Panama for alcoholic beverages, and Hong-Kong for mobile phones.

Deficiencies in IPR systems are identified not only in emerging countries, but also in certain developed countries. This is for instance still the case for Israel (significant issues regarding pharmaceutical-related IPR) and Canada (e.g. regarding the protection of pharmaceuticals and geographical indications). The USA has still not implemented two IPR-related WTO panel decisions that affect European right-holders.

Attempts by the EU and other supporters of an effective IPR system to constructively address enforcement problems in multilateral *fora* (WTO, *World Intellectual Property Organisation* (WIPO), *World Customs Organisation* (WCO)) continue to be opposed by countries such as India, Brazil, Ecuador, Argentina, Nigeria and others. This has prevented these institutions from addressing IPR enforcement issues that could be discussed and resolved multilaterally.

On the basis of the replies received and other sources of input, the list of priority countries has been updated. It includes three categories, starting with those countries in which the situation

⁷ It is worth noting that in almost 90% of the cases of detentions by customs, either the goods were destroyed after the holder of the goods and the right holder agreed on destruction, or the right holder initiated a court case to establish the IPR infringement.

⁸ Hong-Kong is a distant second representing only 7.7 % of all articles

regarding IPR protection and/or enforcement is the most detrimental to EU right-holders. The updated list is as follows:

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

(In each category, countries are listed alphabetically.)

The * symbol identifies countries in which improvements have been noted, in the wake of the *IP 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.

The ° symbol identifies countries in which the deficiencies identified may justify a listing in a higher category in future *IPR Reports* if they are not adequately addressed in the short term.

Compared to the 2009 list, Mexico has been added, Thailand has moved from category 2 to 3, and India has moved from category 3 to 2. Russia and Ukraine were already listed with the symbol (*) in the *IPR Enforcement Report 2009*, but the improvements which took place in those countries are not deemed sufficient yet to justify their removal from the list of priority countries.

6. 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 2010 survey and on other sources of input, as specified in chapter 2).

It should be noted that bilateral agreements are being negotiated, and/or "IP dialogues" held, with several of these countries (e.g. Argentina, Brazil, Canada, Chile, China, India, Korea, Malaysia, Russia, Ukraine, Thailand, Turkey, Vietnam). In addition, many of them have launched national initiatives aimed at strengthening their IPR systems legislatively and operationally. Although their IPR regimes should as a consequence improve, continued concerns about certain aspects of IPR protection and enforcement in the countries concerned justify their presence in this updated list of priority countries.

6.1. China

Progress

In recent years, China has made important efforts to align its legal system with international IPR standards. It has clear objectives and a long term strategy in the field of IPR, with the overall ambition to become an innovation economy by 2020. In this area the reference is still the *National IP Strategy* (NIPS) adopted in June 2008, which has been complemented by the 12th *Five Year Plan* released in March 2011 with the objective of developing an "innovative country".

The new Patent Law that entered into force in 2009 was in this respect a major step forward. The – still on-going – revision of the Trademark Law, as well as the launch in 2011 of a new revision of the Copyright Law, will also constitute key components of the future IPR environment in China. The "*Special Campaign against the infringements upon IPR and the Manufacturing and Sales of Counterfeit and Inferior Commodities*" ended in June 2011 and the decision – influenced by the EU and others – to continue on a permanent basis the structure created to coordinate the Campaign demonstrates the increased importance given by China to IPR protection and enforcement. It is also evident that the Chinese authorities are making efforts to improve the understanding and knowledge of IP and the importance of its protection, among relevant officials involved in the protection and enforcement of IP. The strong increase in patent and trademark applications, including among Chinese stakeholders (92% of the patent applications in 2011 were filed by domestic applicants), also demonstrate the need for a well-functioning IPR system.

Concerns and areas for improvement and action

China remains the main concern of EU companies, as evidenced by both the comments provided by respondents to the survey and the fact that 73% of all suspect (imported) goods detained at EU borders in 2011 and not released came from China (without mentioning the significant damages reported by European companies due to Chinese counterfeit goods found on the Chinese or other non-European markets).

The improvements recently introduced have not kept pace with the scale of infringements, especially regarding online piracy and fake markets. The improvements that had been observed during the "*Special Campaign*" are under threat because the efforts of Chinese authorities has somewhat decreased, in particular at provincial level, after the end of this initiative. The situation is also due to the fact that access to the Chinese judicial system remains difficult in practice, because of burdensome and costly legalisation and notarisation requirements, the lack of an effective preliminary injunction system, and the inadequacy of the damages awarded. It is also reported that criminal sanctions are still difficult to obtain. Moreover, the willingness of authorities to take effective action is at times – although improving – affected by a lack of effective cooperation between involved authorities, by insufficient training of the staff involved, and by a very low level of public awareness regarding IPR. A more recent worrying development is a noted increase in cases involving the theft of trade secrets in China, as well as cases of trade secret theft that occur outside China for the benefit of Chinese entities, combined with difficulties in gaining appropriate remedies through Chinese courts in such cases .

To an important extent the weaknesses of IPR enforcement in China are also due to the very unequal picture that exists between the provinces and cities. In the most advanced provinces or cities like Beijing or Shanghai the standards of the courts are reasonably good and improving while in other cities this is not yet the case. Moreover, the lack of independence of the judicial system in China creates additional burden to EU companies, locals are often favoured in opposition to foreigners, in particular in cases involving strategic industries or state-owned enterprises.

Additionally, China also tends to be reluctant to plurilateral and multilateral efforts to fight piracy and counterfeiting, and thus has to date not demonstrated real engagement for in-depth enforcement discussions in international *fora*.

EU action

The need for China to better protect IPR is a constant message conveyed by the Commission to Chinese authorities at all levels of government, including the highest level.

The EU and China in 2004 established a framework for co-operation and dialogue in the area of IPR, with 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 prospective 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 twice a year in Beijing, with the participation of European industry. Unlike the Dialogue, the Working Group focuses on more concrete issues or sectors and is more technical in nature.

The co-operation and dialogue have been supported by technical co-operation activities within the *IPR2* Project (of about € 16 million for the 2007-2011 period). This program ended in September 2011. A new co-operation programme is being prepared between China and EU which should be launched early in 2013.

The *IP Dialogue*, the *IP Working Group* and the *IPR2* project have provided a unique opportunity for the EU to engage China in a constructive dialogue on IP issues of concern to the EU. As a result, China has for example taken a number of EU comments and concerns into account when revising some of its IPR legislation, relating namely to patents, copyrights and trademarks (especially, in this case, regarding bad faith trademark applications and *well-known* trademarks). However, despite these positive developments, significant progress on priority issues for the EU is still needed, especially insofar as IPR enforcement in China is concerned.

Another positive development was the adoption in 2009 of an EU-China Action Plan concerning customs co-operation on IPR enforcement. This plan foresees the exchange of general risk information and trends, the creation of networks of seaports and airports to target high risk consignments, strengthening cooperation with other law enforcement agencies, and the development of partnerships between business communities and customs authorities in China and the EU. The second phase covers the period 2011-2012. Agreement has been reached to extend the Action Plan to a third phase starting in 2013. The creation of a network has provided the EU very valuable insights into the possibilities for collaboration between customs of the associated airports and seaports. This has resulted in a number of concrete detentions and cases, some of them high-profile ones. The port-to-port approach has also facilitated information exchange and established strong working relations that should be maintained. The same applies with regards to the enhanced collaboration with business in the EU-China Customs activities on IPR enforcement. In 2012 a successful seminar took place on strengthening cooperation between customs and other law enforcement agencies (the police, the judiciary, etc.) in China. Overall, the EU is reasonably satisfied with the implementation of the Action Plan so far; however, at the same time it should be stressed that there is still much room for improvement.

So as to help EU small and medium-sized enterprises (SMEs) understand the peculiarities of the Chinese IPR system, the Commission has been providing support since 2008 through the

*China IPR SME Helpdesk*⁹. This service provides free-of-charge helpline, trainings, and web-based self-help materials.

Progress is also sought through negotiating an ambitious bilateral agreement on geographical indications. That would include a high level of protection from all the agencies, an ex-officio protection in China for our names (shortlist), and a single window to which to apply in the future. In parallel, we seek a joint action against counterfeiting in wines and spirits. These two initiatives were underlined at the September 20, 2012, EU-China Summit in Brussels.

6.2. India

Progress

Some limited improvements have been noted in Indian IPR legislation, e.g. regarding enforcement by customs services, as well as co-operation between various enforcement departments, IPR awareness amongst officials, and increased manpower in the Patent Office.

Concerns and areas for improvement and action

In India, several constraints applicable to the protection of patents are detrimental to EU companies. This applies in particular to certain aspects of patent law where restrictive patentability criteria combined with difficulties to enforce patents granted, and with extremely broad criteria being applicable for granting compulsory licences or for the revocation of patents, make the effective patent protection in India very difficult, notably for pharmaceuticals and chemicals but also for other sectors where local innovation is being promoted. Another area of concern is the apparent absence of an effective system for protecting undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products against unfair commercial use, as well as unauthorized disclosure.

Further progress remains necessary regarding IPR enforcement, including through a stronger commitment of relevant authorities to fight IPR infringements, and through sanctions against infringers that act as an effective deterrent. It still appears that the implementation of IPR enforcement mechanisms needs further strengthening, especially outside of Delhi. Concerns have also been reported by respondents with respect to the length and uncertainty of the outcome of court proceedings, as well as insufficient trained officials, in particular in the judiciary. Strong engagement from the authorities to enforce IP and to improve the implementation of civil, criminal and customs procedures will remain very important not only for right-holders but also for creating a climate favourable to innovation.

The large number of locally produced infringing goods remains a source of serious concern, especially regarding patents and trademarks. Detentions of suspect goods of Indian provenance by EU customs are worrying notably for medicines and related products (a sector where India represented 28% of all articles detained in 2011), especially when considering the associated potential risks for patients' health. Another issue, making it more difficult for customs to take action, is that IPR-infringing medicines are often sent in small consignments (in terms of number of articles detained in postal traffic into the EU, about 36% were medicines in 2011, and about 35% of all postal articles detained by EU customs were shipped from India).

⁹ <http://www.china-iprhelpdesk.eu>

Externally, India often opposes plurilateral and multilateral efforts to address piracy and counterfeiting in *fora* such as WTO, WCO and 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. The same considerations apply to the on-going international climate change (*United Nations Framework Convention on Climate Change* (UNFCCC)) negotiations, where India (with other countries) push for measures which would weaken IPR protection in that area (such as patentability exclusions, systematic compulsory licensing).

EU action

The EU is pursuing a number of avenues of action. Most importantly, the EU is currently negotiating with India a *Free Trade Agreement* (FTA) including an IPR chapter, but so far progress has been very limited. An IP Dialogue was agreed with India in 2005, but has regrettably never been implemented due to reticence on the Indian side. Such a mechanism has demonstrated (with other third countries) its utility as a mean to informally and rapidly discuss emerging IPR issues, including concrete difficulties faced by right-holders.

The Commission recently adopted a proposal to amend the EU Customs Regulation¹⁰ (May 2011), which includes specific language clarifying the status of generic medicines in transit, and published related guidelines¹¹. One of the aims of this proposal was to ensure that the problems that arose in recent years regarding the detention by EU customs of Indian generic drugs transiting via the EU would not reoccur.

6.3. Indonesia

Progress

Some improvements and positive developments have taken place in Indonesia over the last few years. Indonesian authorities have expressed more political will to improve their IP environment. The laws on the protection of patents, trademarks, designs, copyright and trade secrets appear to be relatively clear although some still lack implementing rules. Trademark registration is reported to be faster than in the past. Moreover, some further positive points were mentioned by respondents regarding enforcement, notably the willingness of Indonesian authorities to eradicate corruption (even if it is still reported as a serious problem), and to improve the effectiveness of the police and of the Commercial Court which handles IP civil legal cases.

Concerns and areas for improvement and action

Important weaknesses persist in the enforcement of IPRs in Indonesia, in particular in view of the absence of efficient and coordinated actions by enforcement bodies, and the lack of deterrent sanctions (many of the cases initiated are not prosecuted). In addition, there appears to be insufficient allocation of well trained staff.

Respondents also noted the lack of transparency in IPR registration procedures, involving limited public access to data, and stressed the lack of public awareness about the importance

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http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/legislation/com285_en.pdf

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http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/legislation/guidelines_on_transit_en.pdf

IP protection and enforcement in Indonesia. Inadequate customs enforcement was mentioned in particular since inefficient border controls allow easy access for Chinese counterfeit products into the country. Digital piracy and, more broadly, corruption have also been reported to be widespread.

EU action

The EU has engaged in high-level discussions on IP with Indonesia, most recently in the framework of the *EU-Indonesia Business Dialogue*. Moreover, the third phase of the *EU-ASEAN Cooperation Project on IPR* (ECAP III) is in the process of being finalised and launched.

Given the positive feedback from users of the *China IPR SME Helpdesk*, and the IPR challenges in Indonesia, the Commission is now setting up an *ASEAN IPR SME Helpdesk*. This service, starting early 2013, will provide free-of-charge helpline, trainings, and web-based self-help materials.

6.4. The Philippines

Progress

Some improvements have taken place in the Philippines in the last 2-3 years, in particular regarding awareness-raising and training provided, increased cooperation between public and private sectors as well as amongst IP authorities themselves. IP laws and regulations are, despite some shortcomings, described as "solid" by most respondents. The issuance (in November 2011) of guidelines and approved Rules of Procedure on IPR cases, which recommend the designation of 22 special IP courts, were signalled as one of the most recent and important positive developments in the IP field.

Concerns and areas for improvement and action

Reported weaknesses relate in particular to low public awareness, slow IP rights registration procedures. Moreover, insofar as IPR enforcement is concerned, deficient interagency coordination seems to remain a particular obstacle to effective IPR protection and enforcement. In particular respondents noted a lack of leadership, systems and procedures in the inter-agency task force that leads to weak coordination, gaps in enforcement and prosecution. The lack of data and information for effective decision-making, transparency of operations and monitoring of execution policies was also being reported. It also seems to be difficult for right holders to seek assistance from enforcement authorities, such as police agencies, in case of an infringement. As regards court proceedings, court cases are slow to be resolved, the system is reportedly overburdened and inefficient and sufficient IPR expertise seems to be missing at many levels. With regard to criminal enforcement, low numbers of arrests and successful prosecutions, along with inadequate punitive sanctions, fail to deter IPR violators. Overall strong political will to improve the situation both for IP protection and enforcement appears to be missing.

EU action

Work on re-launching the technical assistance program ECAP III (which would also cover the Philippines, in addition to other Asian countries) is underway and should enable training and capacity building to take place. An *ASEAN IPR SME Helpdesk* is also being set up¹².

6.5. Turkey

Progress

Tracking of piracy has improved as a result of training organised jointly by the Ministry of Culture and Tourism (MoCT), the Ministry of Interior (police), anti-piracy commissions and the judiciary. Anti-piracy commissions are working efficiently, and specialised IPR police units have conducted successful operations in the fight against piracy. The administrative capacity of the Turkish Patent Institute (TPI) has further improved as a result of tailor-made and jointly organised training programmes. Jointly organised events also helped improve the dialogue among IPR stakeholders. Consistency of the TPI final decisions with IPR courts has improved and appeals decreased. Latest statistics indicate that rejections of the TPI decisions by IPR courts were down by 30% compared to 2009. The speed of trademark registrations has also increased. Turkey is now an observer at the *Customs Code Committee* (IPR section) and shows willingness to cooperate regarding of customs enforcement.

Concerns and areas for improvement and action

Issues linked to bad faith registration, "similar" trademarks and industrial designs remain unresolved (although a positive development in this area is the on-going elaboration of new Examination Guidelines for the registration of patents, designs and trademarks). Existing structured dialogue mechanisms, such as consultation meetings between the TPI and IPR-holders, are still too weak to address systemic problems. Draft laws on patents, industrial designs, geographical indications and trademarks were prepared by the TPI in consultation with stakeholders. However, they have been pending for a long time at different levels of the law-making process. Judicial procedures including injunctions, and search and seizure warrants are still lengthy and the decisions of different courts in similar cases are not always consistent. Another concern is that the number of specialised IPR judges has decreased in recent years. Concerning customs enforcement, the centralised customs database and IT management system is not used effectively by the customs points to prevent counterfeit goods from entering the market. No accurate data are provided about checks and seizures against counterfeit goods. The effects of the 2008 decision of the Turkish Constitutional Court, which allowed the release of goods identified as counterfeit back to the market (estimated to be around two million items), are still being felt. Equally detrimental is the order to return counterfeit goods to the offenders, together with storage problems of the confiscated materials experienced by right-holders and difficulties in getting preliminary injunctions continue.

EU action

The second *EU-Turkey IPR Working Group (WG)*, held in January 2012 in Ankara, included representatives of European industry, who were able to raise their respective concerns. The *Office for Harmonisation in the Internal Market* also presented its practice on bad faith trademarks, followed by discussions on likelihood of confusion and well-known marks. Turkey agreed to provide information on its review of its examination guidelines with regard

¹² See section 6.3.

to bad faith trademarks registrations. Overall, the meeting helped improve understanding between the two sides and has contributed to creating the basis for more open and fruitful discussions in the future. The third meeting of the IPR WG is foreseen for the first quarter of 2013.

6.6. Argentina

Progress

In general, the IP laws in Argentina are good and should provide tools for right-holders to defend their rights in court. Certain actions have been pursued in the area of customs and police against counterfeiting and piracy and some structural changes have been implemented to speed up trademark and patent examination and registration.

Concerns and areas for improvement and action

However, it has been reported that the process for obtaining judicial remedies is slow and disappointing in terms of its efficiency, the level of compensation and deterrence. The backlog of patent and trademark examinations is still problematic and there is a lack of adequate protection of proprietary test data linked to medical and agrochemical products. The EU may also have concerns on new guidelines for patent examination in the field of pharmaceuticals. On-line piracy of music is widespread. The uncertain legal framework around internet service providers is potentially detrimental for the access to remedies for right-holders. Large quantities of counterfeit products are still on sale in the big towns and cities, often in special markets, and customs authorities do not make wide use of their ex-officio powers.

EU action

Although an IP Dialogue was launched in 2008, regrettably only one meeting has taken place so far. It would be important to continue this Dialogue, as it is a valuable platform for a constructive discussion and increased mutual understanding on IPR matters, and to improve the IPR situation in Argentina.

Given the positive feedback from users of the *China IPR SME Helpdesk*, and the IPR challenges in Argentina, the Commission is now setting up a *Mercosur IPR SME Helpdesk*. This service, starting mid-2013, will provide free-of-charge helpline, trainings, and web-based self-help materials.

6.7. Brazil

Progress

Domestic commitment towards a more effective system of protection and enforcement of intellectual property has continued. Resources and staffing levels have been raised within the national IP office (INPI) to speed up patent and trademark examinations and further increases are planned in the near future. The public-private cooperation under the *National Council to Combat Piracy* is also on-going and has carried out considerable training activities, organised seminars and workshops for enforcement authorities and the judiciary and set up visible campaigns such as the '*City free of Piracy Project*' which has covered 6 of the major cities and will expand to a further 6 in the immediate future. The Brazilian copyright legislation is in the process of review in conjunction with a new law on the internet. Brazil is also developing a

register of Geographical Indications (under INPI): 35 GIs were protected by end of October 2012, of which 5 EU GIs. More GIs are now in process of individual registration, both from Brazil and foreign countries.

Concerns and areas for improvement and action

Despite this visible local reform and activity, concrete improvements on the ground for IP right-holders have not fully materialised yet. Judicial proceedings remain slow and sanctions do not for the most part act as a deterrent. Internet piracy is rife and registration of trademarks and patents still take too long. Although Brazil promotes innovation and is interested in technology transfer, it appears that Brazilian taxation of licensing contracts and royalty payments can act as a disincentive to foreign companies. The role of Brazilian Health Surveillance Agency (ANVISA) in the patent examination remains an area of concern.

At an international level (in WTO, WIPO and WCO) Brazil is still reluctant to engage in discussions on the enforcement of IPR.

EU action

On a bilateral basis, however, discussions with Brazil which started in 2008 have continued in a positive and constructive manner through the annual IPR Dialogues. Geographical indications have also been addressed at the recent first meeting of the Dialogue on Agriculture, with a view to improving mutual understanding and protection. This forum for detailed exchange of information is providing a good basis for mutual positive developments. A *Mercosur IPR SME Helpdesk* is also being set up¹³.

6.8. Canada

Progress

Positive developments have been noted recently in Canada, such as (1) a recent copyright reform bringing Canadian legislation better in line with WIPO's "Internet Treaties" (which still remain to be ratified by Canada, more than 10 years after their signature); and (2) improvements planned regarding IPR enforcement (based on ACTA). Canada has also shown political will to address certain IPR issues, e.g. with its domestic copyright reform and by accepting to discuss with the EU the protection of geographical indications under the framework of the *Comprehensive Economic Trade Agreement* (CETA).

Concerns and areas for improvement and action

The Canadian IPR system still features shortcomings, which were noted a few years ago already, not only by foreign countries but also by domestic organisations^{14,15}. Despite recent positive developments, many issues remain to be addressed, in particular the lack of ratification by Canada of major IPR treaties relating to trademarks and copyright, weaknesses in the protection of pharmaceuticals and of geographical indications, in enforcement mechanisms (in particular regarding ex-officio customs seizures), and in the sharing of

¹³ See section 6.6.

¹⁴ "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>

¹⁵ "Counterfeit goods in Canada – A threat to public safety" (May 2007) – <http://cmtc.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securp10/securp10-e.pdf>

information between Canadian IPR enforcement authorities and right-holders. Moreover, the new copyright law includes broad exceptions which may prove detrimental to right-holders.

EU action

Finally, in the on-going negotiation of the bilateral "CETA" trade agreement between the EU and Canada, the EU still aims to attain the level of ambition expressed in the joint scoping report of 2009.

6.9. Israel

Progress

Positive developments have been noted especially regarding the amendment of several laws dealing with the protection of IPRs for medicines. In particular, an amendment was adopted extending the period of data protection for medicines based on new chemical entities to 6 years (or 6 years and a half as from marketing approval in another recognized country). In addition, the Patent Act was amended to provide for the publication of patent applications after 18 months from filing. The legislative process is currently on-going as regards modifications to the patent term extension regime in Israel. Also steps have been taken to reduce the duration of the marketing registration procedure from 16 to 12 months.

Concerns and areas for improvement and action

The inadequate protection of IPRs in Israel remains a major concern. In particular, research-based pharmaceutical companies faced (in past tense as situation changed now and too early to draw conclusions) significant delays and difficulties as regards the protection and commercialisation of innovative pharmaceutical products in Israel. Patent applications were not published prior to the grant of the patent, which resulted in lack of any provisional protection for patent applicants. In addition, due to the Israeli system of pre-grant opposition and the lengthy examination of pharmaceutical patent applications (on average more than 6 years), the period during which patent applications remained unpublished and thus unprotected could last for several years.

In addition, the exclusivity period of protection for medicines, including, in particular, patent term extension is considerably limited due to a linkage with the period of protection available in one of a number of "recognised" countries (currently including the EU, the USA and a number of other countries). These measures are clearly detrimental to foreign innovative pharmaceutical companies.

As regards copyright, Israel has recently changed its copyright legislation but several concerns remain with regard to on-line piracy. Problems also persist as regards illegal live Internet streaming (affecting, in particular, European sports rights owners). Israel also needs to adopt clear rules on the liability for online intermediaries.

EU action

The EU has engaged in discussions with the Israeli authorities on some of the patent issues referred to above and these discussions have shown a willingness of Israel to take into account some of the concerns expressed.

In particular we have been closely following the work on legislative amendments concerning IPR protection for medicines in Israel and have had constructive exchanges with Israeli authorities regarding some provisions that could negatively impact EU industry.

6.10. Korea

Progress

Improvements have taken place in particular regarding the amendment of IP laws, notably on copyright, as well as measures taken to address on-line piracy and sales of counterfeit goods, new customs IT tools, and actions taken by the relevant authorities when infringement was brought to their attention by the right-holders. The conclusion of FTAs with the EU and the US are also highlighted as positive points by respondents.

Concerns and areas for improvement and action

Serious concerns are still being reported by respondents, in particular concerning the requirements for patent applications and the way foreign operators are treated in the granting of patents and in their ability to enforce these before Korean Courts. In addition, there are still concerns raised regarding the high level of Internet piracy and the low – insufficiently dissuasive – level of penalties. Regarding copyright, the cumulative effect of certain Korean legislative measures – including the public performance right in sound recordings (2009) – has the practical effect of exempting the vast majority of businesses in Korea from the need to obtain a license for the public performance of music. In particular, the Korean measures could deprive EU right holders of the full exercise of their rights as agreed under the EU-Korea FTA.

EU action

A number of initiatives are intended to address these deficiencies. In particular, the EU and South Korea have concluded a *Free Trade Agreement* (FTA) which entered into force on 1 August 2011 and which includes an ambitious and balanced IPR chapter¹⁶. Moreover, an annual *IP Dialogue* is established in the FTA between the EU and South Korea. Operators either already do work with relevant authorities or are willing to organise IP-related technical assistance or awareness-raising activities.

6.11. Malaysia

Progress

Positive developments regarding the IPR situation in Malaysia include the establishment of a specialised *Intellectual Property Court*, the amendment of the *Trade Descriptions Act*, the on-going amendment of the *Copyright Act* and the increased number of anti-piracy awareness campaigns. The result is that awareness regarding the importance of IPR protection is slowly improving.

Concerns and areas for improvement and action

As a general comment several respondents mentioned a certain apathy, insufficient understanding and political will of the Malaysian authorities as the main problem when it

¹⁶ http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145180.pdf

comes to IP protection and enforcement. More specifically, the following issues were pointed out regarding IPR protection: deficient regulation of IPR issues in general; lack of clear regulation of customs interventions and on the distribution of competences between concerned authorities; and a missing patent term restoration regime. Also, some respondents complained about Malaysia's data protection system, where the protection starts running from the first marketing authorisation anywhere in the world, and expires if a marketing authorisation is not applied for in Malaysia within 18 month from the granting of the first authorisation. Moreover, insofar as IPR enforcement is concerned, there is a need to address the lack of express authority and power of the Customs Administration under the *Customs Act 1967* and to put in place the required laws and procedures to facilitate the exercise of this power. Also, the sanctions for IPR infringements are considered insufficiently deterrent.

EU action

The EU and Malaysia are currently negotiating a *Free Trade Agreement* which would include an ambitious yet balanced IPR chapter. Malaysia also declared the objective of becoming a high-income country in 2020 through their *New Economic Model* (NEM) strategy, which specifically singles out innovation and the improvement of IP protection as one of the five key policy areas for reform, and whose provisions must be responsive to the changing needs of industry and researchers. An *ASEAN IPR SME Helpdesk* is also being set up¹⁷.

6.12. Mexico

Progress

Mexico has made substantial efforts to enhance protection and enforcement of IPRs. In particular, in 2010 the Mexican Criminal Code was modified to provide ex-officio powers to the Attorney General enabling detection and detention of counterfeit goods. In addition, a trademark database for customs was launched in January 2012 to enable customs authorities to check whether goods crossing the border are infringing a trade mark registered in Mexico. The *Mexican Institute of Intellectual Property* (IMPI) also recently successfully concluded a cooperation project with customs authorities which consisted in sending IP experts at custom points.

Concerns and areas for improvement and action

Notwithstanding the progress made, the level of IPR infringements in Mexico remains very high. Additional measures are rapidly needed to strengthen and render more effective the fight against counterfeiting, in particular by allowing ex-officio action by Mexican customs.

Furthermore, Mexican legislation on geographical indications is not compliant with TRIPS and should rapidly be brought in line. The matter has already been discussed with Mexican authorities for a number of years without any real progress being made. There are many trade irritants related to the use of EU geographical indications in Mexico.

Mexico should also take measures to adhere soon to the Madrid Protocol on the international recognition of trade marks.

¹⁷ See section 6.3.

EU action

An EU-Mexico Sub-Committee on IPR meets every year in order to discuss concerns with the adequate and effective protection and enforcement of IPRs, review the progress achieved and identify areas for further improvement.

6.13. Russia

Progress

Some improvement has taken place in IPR protection and enforcement in 2010, in particular: Russia's accession to international IPR treaties, changes in Russian IPR legislation (in recent years), and Russian law enforcement officials' continued engagement in criminal enforcement activities. Russia's accession to WTO (implying its ratification of the TRIPs agreement) is also an important development.

Concerns and areas for improvement and action

Piracy and counterfeiting however remain a major concern. Russia is still one of the world's largest producers and distributors of illegal optical media. To date Russia lacks efficient legal norms regulating copyright protection and effective dispute settlement regarding IPR infringements; Russian legislation also does not provide for clear rules concerning internet service providers' liability and domestic sales and use of counterfeit trademark goods remain widespread. Respondents also expressed concerns regarding insufficient commitment from the relevant authorities as illustrated for example by: an apparent reluctance by enforcement authorities to take action against large infringers. The lack of uniform methodology for enforcement also hinders these efforts. According to the respondents, authorities and courts also tend to interpret laws and regulations in a narrow way which can create loopholes for infringers.

EU action

The Commission and the relevant Russian authorities have agreed to engage in a regular IP Dialogue (result-oriented process, including the involvement of relevant stakeholders) to resolve IPR problems. This Dialogue has proven useful and Russian authorities have also engaged in wide-scale cooperation activities concerning IPR enforcement, which is a positive step. Moreover, the Commission, together with the copyright industry, has also organised a number of training events on copyright infringements through the TAIEX scheme, targeting various enforcement agencies, which were well attended by the Russian side. The Commission together with the Russian authorities is planning to launch a series of training events concerning trademark infringements.

6.14. Thailand

Progress

Thailand in general has been doing a lot of work in the area of IPR and in particular the *Department of Intellectual Property* (DIP) has been particularly cooperative. The Thai government has made stronger IPR protection and enforcement a national priority, reflected by the creation of the *National Task Force* chaired by the Prime Minister, by setting up an IPR Dialogue with the EU and by putting forward the "*Creative Economy initiative*". Thailand also acceded to the *Patent Cooperation Treaty* in 2009 and prepared various

amendments of IP law, e.g. regarding the authority of Thai Customs to take enforcement actions ex-officio, which unfortunately remain pending.

Concerns and areas for improvement and action

Thailand's IPR enforcement efforts do however remain uneven and serious violations of IPRs continue. The Thai copyright law is considered not to be in line with technological developments, and actions against digital piracy have not been sufficient. Moreover, as regards IPR examination and registration, Thailand's patent office lacks resources to keep up with the volume of applications, resulting in a worrying patent backlog. Moreover, companies have raised concerns about the granting of compulsory licenses for medicines in Thailand. A concern is whether such licences will be granted in accordance with Thailand's TRIPS commitments, including those under Article 31 of the TRIPS Agreement.

EU action

A number of initiatives are intended to address these deficiencies. In particular, an *IP Dialogue* between the EU and Thailand has been launched in February 2011, under which discussions on topics including geographical indications, backlogs in patent registration, pharmaceutical issues and enforcement issues took place. The EU also carries out technical assistance programs with Thailand; at the moment, work on re-launching the technical assistance program ECAP III is underway. An *ASEAN IPR SME Helpdesk* is also being set up¹⁸.

6.15. Ukraine

Progress

During the last survey respondents noted some improvements regarding IPR protection and enforcement in Ukraine, in particular the development and adoption of an IPR action plan; the increased number of actions by enforcement authorities.

Concerns and areas for improvement and action

Piracy and counterfeiting however remain major concerns. Ukrainian legislation does not include adequate provisions ensuring effective enforcement of IPR rights; they are particularly unfit for enforcement in the digital environment. According to respondents, criminal sanctions are not deterrent, and there is a lack of clear rules concerning the destruction of IPR-infringing goods and of equipment used for their production. Concerns have been expressed whether the Ukrainian government has sufficient political will to improve the situation; legal proceedings are also seen as lengthy and there is a shortage of IPR-trained judges. Customs authorities do not have the possibility to take action against IPR-infringing goods in transit, and the customs procedure for registering IPR-protected goods is costly. Furthermore, stakeholders reported serious problems regarding the functioning of collecting societies in Ukraine, in particular the questionable withdrawal of the accreditation of representative collecting societies and the on-going accreditation process.

¹⁸ See section 6.3.

EU action

On a positive note, the 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 2008 the Commission initiated negotiations for a deep and comprehensive *Free Trade Area* (DCFTA) with Ukraine (as part of the Association Agreement); negotiations were concluded and the DCFTA was initialled in July 2012. This DCFTA includes an ambitious IPR chapter aiming at regulatory approximation with the EU *acquis* and enforcement practices. In addition, a € 1.4 m twinning project will start at the end of 2012, with the aim of strengthening the administrative capacity and competencies of the *State Intellectual Property Service of Ukraine* (SIPSU) as well as other stakeholders (judges, customs, state inspectors). It should also propose effective legal measures against counterfeiting and piracy, and ensure effective implementation of the enforcement legislation and sanctions for IPR infringements.

6.16. USA

Progress

The protection and enforcement of IP rights in the USA is globally very effective, and the EU and the USA have established in recent years a very good cooperation on IP issues, that provides for the possibility to discuss common IPR enforcement challenges in third countries. These exchanges have been fruitful and efficient. The Commission also notes positively the progress in terms of approximation of the USA patent legislation to the prevailing international system, the so called "first-to-file approach".

Concerns and areas for improvement and action

A number of problems – circumscribed to very specific sectors – that affect EU right-holders do however remain. The importance of the USA market and unfortunate example these cases set for compliance with the TRIPS agreement justify the inclusion of the USA in our list of priority countries.

Despite the EUs' efforts over several years to find a solution the continued failure of the USA to comply with the following two Dispute Settlement decisions are of concern:

- the lack of progress in implementing the WTO panel decision on *Irish Music* (Section 110(5)(B) of the USA Copyright Act¹⁹ was found to be incompatible with the WTO/TRIPS Agreement, and constitutes a blatant violation of copyright); disrespecting WTO dispute settlement decisions on IPR establishes a negative precedent and undermines the credibility of countries such as the EU and USA which share an interest in promoting effective IPR enforcement practices, notably in emerging economies;
- the USA administration's decision to refuse the renewal of the *Havana Club* trademark on the basis of the embargo against Cuba, which, again, is in breach of a WTO dispute settlement decision that found Section 211 of the US Omnibus Appropriations Act of 1998 to infringe the TRIPS Agreement; the USA's persistent refusal to implement the latter decision sets an unfortunate precedent.

¹⁹ under which most commercial premises in the US (bars, restaurants, etc.) can retransmit broadcast music without paying any royalties to the copyright holders

Moreover, regarding geographical indications, EU right-holders face a number of practical problems and limitations in ensuring the optimal protection of their rights under the US trade mark system.

EU action

The EU regularly raises the problem of the non-compliance by the USA with WTO dispute settlement decisions on "Havana Club" and "Irish Music" at the *WTO Dispute Settlement Body*. Furthermore, the EU continues in its bilateral contacts with the USA to actively seek a satisfactory solution for the problems of the right-holders affected by the lack of compliance with these decisions.

6.17. Vietnam

Progress

Since its accession to the WTO in 2006, Vietnam made a significant legislative effort by enacting revised laws on IP and Criminal Code, aside from nearly 40 pieces of legislation and implementing decrees, circulars and ordinances. Vietnam is increasingly taking IPR more seriously and is seeking to complete its IPR legislative framework. The respondents indicated that the legal framework is generally good and adequate. Public awareness and general understanding of IPR are increasing and the government encourages the training of its officials.

Concerns and areas for improvement and action

Regarding IPR protection, the implementation of IPR laws still requires continuous attention. Improvement is also needed regarding awareness of the general public regarding the importance of IPRs. Moreover, insofar as IPR enforcement is concerned, the complexity of the system and the lack of efficient cooperation between enforcement bodies and IPR stakeholders were mentioned as two important issues. Respondents also highlighted insufficient IPR understanding of the enforcement officials, and shortage of resources, resulting in lengthy and burdensome enforcement procedures.

EU action

Negotiations for a FTA between the EU and Vietnam were launched in June 2012. A first round of negotiations took place in October. This FTA will include an IPR chapter and should therefore provide a good venue for addressing key issues. An *ASEAN IPR SME Helpdesk* is also being set up²⁰.

7. CONCLUSIONS

This prioritisation exercise is important in helping stakeholders to protect their interests, and for the Commission to focus resources and attention on third countries where IPR issues are of most pressing concern. The survey shows clearly that there is much room for improvement in third countries of the protection and enforcement of IP rights, although efforts and improvements from national authorities are also evident. These positive developments partly

²⁰ See section 6.3.

result from our cooperation initiatives – including "IP dialogues" with third countries and technical assistance projects, hence the important role this work can play should continue.

