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**RECENT DEVELOPMENTS UNDER THE
WORKING PARTY ON INTERNATIONAL LEGAL AND
COMMERCIAL PRACTICE (WP.5)**

DOCUMENT FOR INFORMATION

Note by the secretariat

Introduction

1. The following note is divided into two parts. Part I briefly describes the activities of the subgroups of WP.5, which have taken place since the last session of the Committee. Part II presents a proposal on the future work orientation of WP. 5 that will be discussed at the fifty-first session of the Working Party. As it is only a first presentation of this proposal, the secretariat submits this to the Committee for information. If it is agreed at the next session of the Working Party, a detailed proposal will be formulated and then submitted to a future session of the Committee for its approval.

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I. ACTIVITIES OF THE SUBGROUPS OF THE WORKING PARTY ON LEGAL AND COMMERCIAL PRACTICE (WP.5)

Advisory Group on the Protection and Implementation of Intellectual Property Rights for Investment

2. While the level of copying and piracy has declined to some extent, partly as a result of the activities of the IP Advisory Group, problems still persist in many countries, exacerbated to an extent by the way in which the Internet now offers new scope for IP infringement. Accordingly, the demand for the services of the Group continues. The Group held meetings in June 2002 in Poland, in October 2002 in Latvia and in October and November 2002 in the Russian Federation. On 4-6 December 2002, the Group held a special consultation in Krygyzstan (see below and see annex for a report of the meeting). In February 2003, it held a seminar in Serbia and Montenegro. In addition, the Group has received an increasing number of requests from Governments for assistance in educating and raising the awareness of the value of intellectual property for the domestic business community. A number of the above-mentioned meetings have been aimed at training local businesses in how to use their IP for commercial advantage. It is expected that this aspect of the IP Advisory Group's work will grow in importance in the future.

The Public-Private Partnership Alliance

3. Public-Private Partnerships (PPPs) are now attracting considerable interest from Governments eager to modernize their infrastructure but lacking the resources to undertake this work themselves. The Public-Private Partnership Alliance, officially constituted at its first meeting in March 2002, aims at building awareness of the potential of partnership between States and the private sector in modernizing infrastructure and in cultivating the skills and capacity of Governments to identify projects and to bring them to fruition. One of the ways in which the Alliance will do this is helping Governments to establish PPP units. To date over 26 Governments have joined the Alliance, thereby establishing a network whereby experience and best practice can be exchanged in a cost effective way. A first meeting of the legal and regulatory Working Group of the PPP Alliance was held in the Netherlands in June 2002. The next meeting of the Alliance is planned for September 2003 and will focus on improving the tendering procedures and transparency surrounding PPPs as well as continuing the programme of establishing successful PPP Units. International cooperation with the Economic and Social Commission for Asia and the Pacific (ESCAP) on establishing successful PPP units will continue.

Real Estate Advisory Group (REAG) and the "Land for Development" Programme

4. There is a growing appreciation amongst Governments that stimulating the market for buying and selling property can transform land into a commercial asset that can have economic and social benefits. The Real Estate Advisory Group (REAG) has launched its Land for Development programme to help Governments formulate more effective policies. The first conference, which brought together governments from all transition economies, was held in Rome in 19 and 20 September 2002. Tecnoborsa a body representing the Chamber of Commerce of Rome supported the event. The participants have agreed that a special high level task force be established to draw up a set of critical policies that Governments can

implement to make land useful for development and to help the vulnerable and socially disadvantaged groups in societies. The conference also has established three working groups to help Governments in the areas of valuation, finance and legal and regulatory advice. At the conference, the international economist Hernando de Soto agreed to head the high level body that will prepare the policy agenda and vision for the Land for Development programme. It is expected that the next REAG event will be held in October 2003 at the same location. This time, it is proposed that it will have a focus on investment in specific sectors where commercialization of land can have an impact and a contribution to sustainable development, such as in tourism.

II. POSSIBLE ROLE OF WP 5 IN ASSISTING COUNTRIES, PARTICULARLY THOSE IN THE CIS AND THE SOUTH CAUCUSES, WITH THE APPROXIMATION OF EUROPEAN UNION (EU) LAWS

5. As a result first of the transition process and then of EU enlargement, countries have entered into their statute books a host of new laws dealing with trade, investments and enterprise development. One of the challenges faced by these countries is to ensure that these laws are properly enforced¹. This challenge particularly concerns the countries of the CIS and those of the South Caucasus. Many of the latter, despite not having as yet asked to join the EU, have established so-called Partnership and Cooperation Agreements under which there is an obligation to approximate their laws with those of the EU. These Partnership and Cooperation Agreements also provide for partial approximation.

6. The approximation process consists of three stages:

- a. Transposition of EU law into national law (it is to be noted that regulations have direct effect and therefore need not be transposed);
- b. Implementation of EU law, i.e., setting up the necessary bodies to implement the directive or another piece of EU law; making the required budget available, etc.;
- c. Enforcement of EU law: law enforcement bodies need to be set up or relevant tasks have to be assigned to existing law enforcement agencies with a view to make the public comply with the law.

7. While all countries will face challenges with regard to items (b) and (c), the countries of the CIS and South Caucasus will require special assistance in order to ensure that enforcement of new laws are successful. Many governments in the region understand that enforcement has to be improved if their countries are to boost trade and investment and develop a competitive enterprise sector².

1 One of the requirements for accession to the EU is the adoption of the entire so-called *acquis communautaire*, i.e., the body of EU legislation consisting of primary legislation (EU treaties), secondary legislation (directives, regulations, and other decisions of EU bodies, including the decisions of the European Court of Justice), and further legislation, including recommendations, etc. The *acquis* comprises many fields of law; in total, there are 31 chapters.

2 It should be noted that the EU itself has assumed the task of assisting both candidate countries and non-candidate countries that have entered into agreements with the EU providing for approximation of legislation. Technical assistance projects are carried out aimed at helping the recipient countries to adjust their laws to EU standards. The EU TA Programmes include PHARE (candidate countries); Tacis (CIS Countries); Obnova/Cards/EAR (South East Europe).

How WP.5 might assist in improving the enforcement of legislation

8. WP.5 can assist in improving the enforcement of laws dealing with trade, investment and enterprise development by using the approaches employed by its various advisory groups. The latter, it should be recalled, were established to help governments to implement the guidelines and recommendations of WP.5. One of the most successful examples of these groups is the Advisory Group for the protection and implementation of intellectual property rights for investment. Its approach was demonstrated at the consultative meeting that took place in Bishkek, from 4 to 6 December 2002. We have presented the report of this meeting in full as an annex. The approach employed by the IP group to improve enforcement consists of : (a) partnership; (b) private sector mobilization; (c) sustainable development; and (d) multilateral cooperation:

- Partnership: Many enforcement issues will need to be addressed by forging close cooperation between governments and the private sector. The IP group in its work has helped to encourage this cooperation. The mission to Kyrgyzstan for example, allowed domestic companies to participate in a discussion with government representatives on their concerns related to IP infringements. The IP advisory groups meetings in Estonia, Latvia, Lithuania, and Poland and in the Russian Federation have similarly provided a platform for this public and private cooperation.
- Private sector mobilization and sustainable development. Implementation of laws depends, too, on a strong and active private sector able to make demands to the enforcement officials to obtain legal redress. As stated by the national prosecutor at the meeting of the IP advisory group in Kyrgyzstan, there is a real problem in Bishkek when the rights holders do not seek to obtain redress in the courts. According to the prosecutor the private sector, as rights holders, were not present in Bishkek and were reluctant to come to give evidence. Over the longer term, the IP group is mobilising local companies to take their IP rights seriously. Thus the IP Group has a programme on SME development with seminars on how to value IP assets. This approach of local business development contributes directly to sustainable development
- Resources. Better enforcement measures require more resources to hire and train the new officials, judges, lawyers, and customs and police, etc. The IP group has successfully raised resources for implementing substantive training programmes involving judges, the police and customs in cooperation with other bodies such as the World Customs Organization (WCO).
- Multilateral cooperation The role of central European countries in giving advice is growing and is important. Poland, the Czech Republic and Slovakia for instance, have gained experience and know the challenges other countries will have to face. Their involvement in advisory groups can strengthen the multilateral cooperation.

9. Following this model of the Advisory Group, WP.5 could carry out missions to countries in transition for consultation with government bodies on the enforcement of commercial legislation. During working sessions, questions raised by the host Government could be discussed by WP.5 experts under the neutral framework which the United Nations provides. The reports and fact-finding from such missions would

provide the parties with detailed information on enforcement matters that could be of real benefit to all concerned. It would be in some cases more efficient, if such sessions could be combined. In this respect, one could think of one session in a Central Asian country, in which other Central Asian countries participate. This took place at the above-mentioned IP Advisory Group mission to Kryrgyzstan when on the third day the representatives of Uzbekistan, Kazakhstan, and Turkmenistan also participated.

CONCLUSION

10. The Advisory Group approach successfully employed in the Working Party could be applied to help countries face the challenges of the approximation of laws particularly regarding enforcement and implementation. This approach using the private sector as a partner can help to mobilize support for enforcement and to share the burden of raising the necessary resources for more effective enforcement.

ANNEX

UNECE ADVISORY GROUP ON THE PROTECTION AND IMPLEMENTATION OF INTELLECTUAL PROPERTY RIGHTS FOR INVESTMENT REPORT OF CONSULTATIVE MEETING IN KYRGYZSTAN

BISHKEK, 4–6 DECEMBER 2002

The Consultative Meeting took place as Day One of a three-day visit by a UNECE Advisory Group (AG) Task Force at the request of the State Agency of Science and Intellectual Property under the Government of the Kyrgyz Republic (Kyrgyzpatent). Day Two was devoted to two short seminars on IPR Enforcement and IPR Valuation and Day Three to a Regional Seminar with representatives from Uzbekistan, Kazakhstan and Tajikistan on WTO/TRIPS.

Receptions during the consultations were hosted by Kyrgyzpatent and the Advisory Group, and Kyrgyz patent also organised a cultural programme for the Task Force members.

General

- Widely noted was the commitment and drive of the senior Kyrgyzpatent officials, and in particular that of the Director, Mr Roman Omorov. His enthusiasm for all aspects of the administration of Intellectual Property Rights was evident and his contributions to both the Consultative Meeting and the Seminars were significant. Both Kyrgyzpatent and the Kyrgyz Government in general are demonstrably supportive of the objectives of the UNECE programme. Further assistance is recommended to help overcome problems resulting, amongst other things, from lack of resources, and sustain the protection and implementation of IP rights for investment.
- Senior Customs officials took a very close and participatory interest in all the proceedings. The challenges faced by Customs were noted, and the need for co-ordination between the other enforcement agencies was discussed.
- Further action is recommended in the form of training for Customs officers and for Judges in particular.

Participants

Other than senior Kyrgyzpatent officials, there were representatives from the Ministry of Justice, the Prime Minister's Office, The Ministry of Foreign Affairs, the State Anti-Monopoly Committee, The State Standards and Metrology Committee, the State Customs Inspectorate, The Economic Crimes Division of the Ministry of the Interior, The State Tax Inspectorate, Supreme Court, Supreme Court of Arbitration, District Court of Arbitration, Ministry of the Interior, the Public Prosecutors Office, Committee for State Property and Inward Investment, Department of Internal Affairs of Bishkek City, Ministry of External Trade and Industry, General Prosecutor's Office, USAID.

The Consultative Meeting – Morning Session

- The Deputy Prime Minister of the Kyrgyz Republic, Mr Otorbaev Dzhomor, made a speech, quoting a letter from the Prime Minister indicating the full support of the Government for the priority development of the IPR Protection and Implementation regime. He pointed out that Kyrgyzstan had been the first CIS country to join WTO and sign up to TRIPS, and said they were ‘determined to comply’ with TRIPS as a means of promoting direct investment and foreign trade.
- The Deputy Prime Minister noted the work of the Kyrgyzpatent ‘Collegium’ on IP Protection matters, which brings together all authorities in Kyrgyzstan. Also mentioned were various relevant reforms and legal developments: “law should develop with life ... IP should become an important strategy in these reforms.”
- Director Omorov welcomed the participants and noted that the discussion should be a dialogue.
- Michael Smith of USPTO introduced the UNECE AG and its objectives and reflected on the importance of enforcement of IPRs to all economies. He highlighted major points from the consultants’ background report, including protection of well-known marks and the legal infrastructure for their protection.
- It was noted that a trademark might be deemed conflicting with a well-known mark if the whole or substantial part thereof represents reproduction, imitation, translation or transliteration of the well-known mark. Improvement of the practical application of this regulation and bringing it into compliance with international standards was discussed.
- Wojciech Dziomdziora of the Polish Ministry of Culture (UNECE AG Chair and task force leader) gave a brief resume of Copyright enforcement, mentioning the weakness of the current royalties collection procedures.
- Director Omorov noted the concerns outlined by Messrs Smith and Dziomdziora and stated that these were concerns of many countries. For example many of the fake CDs circulating in Kyrgyzstan originated from Russia or the Ukraine while other fake goods came from China and these illegal activities were often linked to other crimes: “this is why Customs control is so important”. The conclusion was that Customs had not developed sufficiently to counter such crimes.
- Director Omorov stated that although the level of piracy in Kyrgyzstan was still high, it is being reduced (The figure is currently just over 80%, compared to 3-4 years ago and 90%). 21 people had been charged under administrative procedure. Mr Dziomdziora agreed that the reduction of piracy was a long-term process – he had meet with Polish Customs 10 years previously and initially they had not been interested saying they had more serious things to worry about. Now every region has an IP officer and there is an IP unit at HQ.
- Sergei Zotine, WIPO, introduced the section on enforcement of copyright and remarked that the background report did not reflect the picture on ‘protection’. CDs were not produced in Kyrgyzstan and manufacture was difficult to control. There was progress being made on identifier codes on CDs, matrices and equipment identifiers. He also spoke about licence abuses: sometimes even in the public sector there was collusion with hardware traders. Long-term solutions needed to consider changing the entire psychology of users. It was decided that the pricing structure for public services needed to be reviewed, and collection issues (e.g. for public performances) were discussed. Mr

Zotine here noted the lack of specialised courts and experienced judges.

- Svetlana Gritskaya of the Supreme Court commented on the court procedure and stated that IP cases were mostly dealt with by civil courts. Such cases were relatively rare but very complex; consequently the relevant training was needed for Judges.
- Senior Public Prosecutor Artur Bit -Avragim spoke on the problem of assessing damages to rights holders, adding that rights holders were not present in Bishkek and were reluctant to come to give evidence.
- He gave several examples of pirate and counterfeit activity in Kyrgyzstan, and explained the problems caused by the fact that rights holders were not active in Kyrgyzstan. He also noted the problems associated with the high costs of legitimate software products which were beyond the reach of government organisations to pay for.
- The Head of the Legal Department of Kyrgyzpatent, Ms Omorgul Balpanova, summarised the activities carried out by Kyrgyzpatent regarding right holders' claims of infringements. They co-ordinate the activities of users, enforcement bodies and authors.

The Consultative Meeting - Afternoon Session

- Michael Smith continued the afternoon session with comments on TM enforcement. He emphasised that current legislation is a framework for enforcement and that it is the use of laws in practice that is important. Laws had to be looked at separately: Civil, Criminal, and Border measures in relation to the TRIPS provisions.
- As regards enforcement legislation the following areas were highlighted:
- Inquiries were made into what laws exist that permit rights holders to request provision relief to halt the manufacture, distribution and sale of infringing goods, and whether such requests could be made on an ex-parte basis.
- Inquiry was made with regard to current Customs law and protection of trademarks, proposed changes in the law and coordination between Kyrgyzpatent and customs.
- Inquiry was made as to the scope of an interim relief order. Could the order cover seizure of evidence, records and whether a security deposit is required?
- With regard to laws regarding production of evidence in civil cases, inquiry was made as to whether courts may compel the production of documents.
- Inquiry was made as to whether destruction was permitted under law and the scope of destruction orders (infringing goods, implements, manufacturing materials and machinery)
- Inquiry was made into whether laws provide for pre-established damages.
- Konstantin Panin of Philip Morris and Dmitry Pushkariov of Procter & Gamble spoke briefly about practical enforcement problems in Kyrgyzstan.
- 80% of counterfeit cigarettes originated in China. Problems included closure of factories, destruction of machinery and tracking down storage facilities.
- Mr Panin noted that it was necessary to be creative in countering piracy – involve community and consumer organisations. Companies must co-ordinate with authorities for best results.
- Alexei Kislitsyn of Procter & Gamble spoke of the role of the financial police and the challenge of

potentially dangerous goods. He agreed with Mr Panin that this should be co-ordinated with consumer organisations.

- One of the Customs officials present explained that there existed some co-operation with companies such as Philip Morris. He emphasised however that other rights holders had not registered their interests with Customs. His department suffered from a lack of practical experience, personnel and logistical support and equipment. However he said that the Customs code had been amended and the Customs agency was undergoing reforms. The 'new' management of Customs would take problems more seriously and take account of comments made.
- Mr Omorov asked for comments from the Anti-Monopoly Commission and others. Mr Rustam Asanov described the work of the Commission including resolution of disputes on ownership of trademarks and protecting consumer rights. The State Standards Commission representative Dzhanila Turgumbekova described how they inspected stores and markets and had worked with Philip Morris on seizing and destroying counterfeit cigarettes.
- Mr Omorov made comments about protection of well-known marks in Kyrgyzstan saying that there had been 5 applications/appeals. The companies suffered from a lack of experience in these matters, but have a positive attitude to the problem.
- Mrs Pakharenko-Anderson, Pakharenko and Partners, discussed various issues relating to registration and protection of patents and industrial designs and touched on IP protection matters generally. She highlighted various practical examples and case studies, and emphasised the particular problems of protecting pharmaceutical patents.
- Finally Mr Zotine gave the meeting a brief update on the WIPO Consultative meeting on Enforcement held in Geneva in September.
- Mr Omorov welcomed the WIPO initiative and stated that Kyrgyzpatent would work with the new Advisory Group closely.

Day Two – Enforcement and Valuation seminars

- The morning programme consisted of a seminar on enforcement issues for judges, police, prosecutors and customs. John Anderson of ACG gave an introduction to intellectual property rights, in which he explained the various differences between copyright, patent, trademarks, the importance of their protection and the negative consequences of their infringement.. Michael Smith of US PTO led a discussion on the implementation of the enforcement provisions contained in the TRIPS Agreement. Alexei Kislitsyn of Procter & Gamble gave a presentation on company policy regarding counterfeiting and the problems encountered, illustrated by case studies of recent counterfeiting activity. Konstantin Panin of Philip Morris spoke on the scale of cigarette counterfeiting in the region and the strategies to combat this.
- In the afternoon, presentations were made on the valuation, commercialisation, and capitalisation of the intellectual assets of a company, to an audience of lawyers, academics and government officials. John Anderson of ACG again spoke on the importance of intellectual property rights protection and the negative consequences of their infringement. He then delivered a presentation originated by PriceWaterhouseCoopers on Identification and assessment of IP Assets, how to value different types of IP Assets; the purposes of valuation and valuation strategies.

- In the evening a press conference was held on the importance of intellectual property protection with representatives from television, radio and the press. Eugene Sorokin of the UNECE Advisory Group gave an introduction to the work of the Advisory Group, the scope of projects it undertakes and the countries where it is working. Wojciech Dziomdziora, Ministry of Culture of Poland, Co-Chair, UNECE Advisory Group welcomed the press to the event and explained the significance of the consultations. Mr Roman Omorov of Kyrgyzpatent took questions from the press on the current situation on intellectual property rights in Kyrgyzstan. Michael Smith of US PTO briefed the conference on the work of his department in intellectual property protection. Alexander Kukushkin of Philip Morris spoke on what is intellectual property and why it should be protected. Finally, Raisa Kulatova, President of the Association of electronic mass media of Kyrgyzstan, spoke on raising public awareness of intellectual property issues, and answered questions from the media.

Day Three – Regional seminar on WTO and TRIPS

- For the final day of the consultations, Kyrgyzpatent hosted a regional seminar on WTO Items and the TRIPS agreement. Kazakhstan, Tajikistan and Uzbekistan all sent high-level representatives.
- Mr Almaz Isanov of Kyrgyzpatent spoke on the progress with compliance to TRIPS in Kyrgyzstan.
- USPTO provided an overview of the United States experience in implementing enforcement provisions contained in the TRIPS Agreement
- Wojciech Dziomdziora, Ministry of Culture & National Heritage, Poland, spoke on the experiences with TRIPS in his country.
- Sergei Zotine, WIPO, spoke on the support WIPO is giving to countries in their efforts to comply with TRIPS, through their various educational and instructional programmes.
- Mr Vladimir Fedurin, Representative of the Committee on IPRs of the Ministry of Justice of Kazakhstan, gave a presentation on compliance to TRIPS and practical implementation of intellectual property legislation in Kazakhstan.
- Ms Firuza Ergasheva, Expert of International Relations and Patent Cooperation, Department of State Patent Office, Uzbekistan, spoke on the development of new intellectual property legislation and Uzbekistan's membership of the various international conventions. She highlighted the importance of education in these matters.
- Mr Takhirov Inom, Director, National Centre for Patents and Information, Tajikistan, updated the meeting on developments in his country.
- Mr Bill Wei, Quality Brand Protection Committee, Beijing, gave a dynamic presentation on IP crime prevention in China, strategy and methods of fighting counterfeiting. He highlighted the difficulties faced by the Chinese authorities in the light of the scale of the problem.

Conclusion

The three days of consultations provided a stimulating forum for debate and development of intellectual property in Kyrgyzstan. The visit by the UNECE Advisory Group task force created a basis for further co-operation with Kyrgyzstan and the other countries of the Central Asian region.

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