State of intellectual property in third countries

Please describe the effectiveness of the current IPR protection and enforcement situation for each country and IP right you are commenting on.

In your contribution, please be as detailed and precise as possible so that legal problems and practical challenges can be addressed with relevant authorities. To that end, please include the following information where available:

- In general, how has the level of IPR protection and enforcement in this country changed over the last two years (improved, has not changed, worsened)?
- Legal provisions (with the titles of legal acts as well as their respective articles and paragraphs) which, in your view, are not compatible with international norms and standards in the area of intellectual property or which otherwise negatively affect the commercial exploitation of IP rights;
- Practical challenges and limitations (such as procedural deficiencies, backlogs, non-deterrent level of sanctions, lack of expertise, corruption, lack of political will, lack of awareness and lack of transparency) which have a negative impact on IP protection and enforcement;
- Concrete examples of deficiencies of administrative and judicial mechanisms in the area of IPR (e.g. IP offices, customs, police and courts);
- Any other systemic problems in the country concerned, including information on the nature, scope and economic dimension of counterfeiting and piracy as well as on the level of cooperation between enforcement authorities and rightholders;
- Any action or measure taken by the respondent to address the problems identified and the outcome of such efforts;
- Concrete suggestions on how the problems and challenges identified could be addressed by the EU.
- Please describe whether and to what extent progress has been made over the last 2 years by the countries listed (e.g. legislative or administrative reforms, structural reorganisations such as the establishment of specialised IP courts, new IP strategies, training programmes, awareness raising campaigns and cooperation with rightholders).

China
In general, new legislation has been adopted over the past years in China, for instance the establishment of courts specialised in dealing with IPR cases or amendments introduced in the legislation to tackle unfair competition. Still, the level of IPR protection and enforcement in the country remains a concern for European businesses. This is also exemplified by the mismatch that exists between interpretations of local judges and the Supreme Peoples' Court, preventing a homogeneous IPR protection in China. Moreover, companies report (unofficial) practices where they are obliged to transfer IPR as a condition to be able to access the market in key sectors, for instance through the establishment of standards, joint ventures or acquisition of rights.

Many different sectors are affected in China, including fashion, music, publishing, pharmaceutical and manufacturing.

Trademarks and copyrights:

- *Company name and trade mark right conflict* - This is a long-lasting problem for the companies, particularly for those EU companies enjoying good reputation in the respective industries. EU Companies still perceive the Administrations for Industry and Commerce (AIC) being reluctant to render a decision to de-register a company name. One reason is for sure because these cases are treated on the basis of anti-unfair competition law, and therefore they are complex and complicated. Another reason may be that the same AIC has been the authority which had legitimately registered the same company before.

- *Trademark enforcement* – The Administration of Industry and Commerce interprets trademark law as preventing the AIC from seizing counterfeit products from resellers which have blocked brand owners from going after counterfeit resellers. Brand owners complain about a lack of transfers (in the form of fines) from counterfeiters to brand owners. There is also a significant growth of counterfeit goods sold online, aggravated by the increase in delivery of goods in small shipments. These include goods that could pose serious health and safety risks, such as: medicines, consumer electronics, toys, computer accessories.

- *Specification of goods and services* - The Chinese national classification system is not fully congruent with the international classification system. Therefore, it happens often that in spite of a foreign TM registration covering a whole international class, an identical national trademark can be registered for similar goods using the national classification system.

- *Well-known trade mark recognition* - This has been a long-lasting challenge for European companies with well-established reputation and sizable operation in China. The recognition practice, for instance, sufficiency of evidences, has been inconsistent and unclear, the negative rulings lack of reasoning and fail to guide trade mark owners what are requirements and evidences needed for proving well-known. Meanwhile, a long list of the well-known trademarks recognised but also the ruling and relevant practice are not transparent. European companies would like the newly formed CNIPA to improve the relevant practice regarding following aspects: (i) clarify evidences requirement for evaluation reputation, and (ii) provide reasoning in the ruling regarding insufficient evidence.

- *Compensation in litigation* - An increased compensation in litigation would be welcome to deter infringements and strictly enforce the ruling regarding compensation. Lowering the burden of proof of IP owners for IP infringement concerning compensation would also be beneficial. Moreover, European companies report complex procedures when it comes to litigation. For instance, damage and compensation claims have to be filed at the same time as claims for cease and desist and disclosure, although – especially in large and

complex cases – the amount for the damages becomes clear in the late stage of the litigation process.

- *Complex litigation proceedings* - Different IP rights concerning one single infringement are usually not combined in one litigation process. The result is a multitude of proceedings and increased costs both for the companies and the authorities.

- *Copyrights* - most concerns are concentrated on the limited enforcement by Chinese authorities. Copyright holders that would like to enforce their rights via courts face barriers, high costs, delays and inconsistencies in jurisdiction of local courts, for instance on the issue of treatment of online content.

Trade Secret Protection

- The recent amendment to the unfair competition legislation has been a positive step forward, in particular the provision on trade secrets. However, our Members still call for a specific legislation on trade secret protection.

- European companies would like to see a lower burden of proof of trade secret owners requiring, e.g. only preliminary proof of each relevant aspect such as accessibility, security measures, illegal disclosure and value of the secrets.

- European companies would appreciate the Public Security Bureau at city level to establish a specialised task force or department dedicated to the reporting of trade secret cases from IP owners.

- Moreover, awards for damages are not adequate to compensate trade secret owners against losses.

- Finally, the standardisation law expands public disclosure requirements, adding costs and risks for companies. There is also a preference for indigenous innovation, which could potentially be a trade barrier and needs to be checked against the WTO Technical Barriers to Trade Agreement.

Patents

- European companies have pointed out that the Chinese Utility Model Patent System has a different level for the assessment of the inventive step and prior art than for the Invention Patents. This is probably one of the main reasons why there are that many Utility Model Patent Applications. Actually, obviousness is limited to the same technological class and novelty can only be challenged based on publications in China. Therefore, these unexamined IP rights are harder to nullify than Invention Patents. Together with the fact that Utility Model Patents are favoured over Invention Patents to get the tax beneficial HNTE status, this gives domestic companies an unfair advantage over international companies. A solution would be to treat Utility Model Patents and Invention Patents the same as far as prior art and inventive step is concerned. This would not only reduce the

tremendous amount of Utility Model Patent filings but also give equal chances to all market participants

- Third parties should be given chance to initiate examination procedure for Utility Models.

- There is a lack of patent term restoration provisions to compensate for regulatory review and patent office delays. This is particularly problematic for the pharmaceuticals sector, as China permits the development of a follow-on pharmaceutical product free of patent infringement allegations (this is the so-called Bolar provision). Plans to establish a patent term extension are underway. European companies call for the new system to be robust and transparent. The European system of supplementary protection could serve as a model.

Other issues:

- *Anti-monopoly issues* - the most recent draft AMC guidelines continue to raise serious concerns among companies regarding provisions that would impose anti-monopoly sanctions on IPR abuses.

- *Regulatory Data Protection* – the current system is not effective and breaches China's commitments under its WTO accession Protocol, for instance against unfair commercial use of clinical tests and other data submitted to secure the approval of products containing a new chemical ingredient.

- Finally, it would be also interesting to look at *draft Export Controls Law of China*, as there is a possibility to create uncertainties about whether technology developed by foreign companies in China-based R&D centres can be exported. This is important for companies to be able to use and commercialise their technology.

India

European companies raise concerns on the implementation and enforcement of IPR protection laws in the country, which is inconsistent with obligations under the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement and WIPO's Treaties, including Performances and Phonograms Treaty (WPPT). This is for instance the case regarding the exercise of exclusive rights in recorded music affecting both broadcasting and the online market.
Issues of corruption at the level of customs offices are reported by companies, especially by the fashion industry.

Trademarks:

European companies also raise concerns on the process for registration of brands, which takes a long time and is often disputed by local brands.

Argentina

The main issues that European companies raise concern the enforcement of the Intellectual Property Act, no 11723. For instance, although a system of criminal sanctions is foreseen, there are effectively very few cases in which offenders are convicted.

Copyright:

European companies report gaps in enforcement, including criminal, civil or administrative cases. This includes especially the treatment of online content, as third-party injunctions to block copyright infringing websites are not easily available and local internet service providers resist applications files by copyright holders.

Patents:

Argentina is not a party to the Patent Cooperation Treaty. There is however cooperation with the European Patent Office (EPO) and a Memorandum of Understanding with WIPO. Nevertheless, the latter's ratification is still pending. Argentina also has severe restrictions for patentability of pharmaceutical products.

Argentina (under Mercosur) and the EU are currently negotiating a Free Trade Agreement, which will include rules on IPR protection. From the perspective of European business, this should help level the playing field and contribute in the enforceability of rules at national level.

Brazil

Overall, the level of IPR protection and enforcement has improved in the last two years. However, important challenges remain, that affect many different sectors, such as the audiovisual, textile and clothing, spare parts and toys.

For instance, in the area of enforcement, a gap exists between main cities and rural areas due to the lack of local courts specialised in IPR protection. At the same time, the procedures are lengthy and costly.
Furthermore, a key concern for European companies in the country remains the fact that Brazil has not ratified the WIPO Internet Treaties. Overall, Brazil is part of 14 out of 26 of WIPO Treaties.

Copyright:

Over the past years, progress is observed in the enforcement of copyright online, as a number of cases against unlicensed online music services indicate. Nevertheless, the level of counterfeiting and piracy, including on-line piracy and use of unlicensed software remain high. Jurisdictional issues regarding digital and online piracy need to be clarified by law and inter-agency coordination to effectively address online copyright theft improved.

Trademarks:

Brazil has legislation that covers the registration of geographical indications under the National Institute of Industrial Property (INPI). However, when it comes to implementation, a number of problems are reported. The number of pending trademark applications is significant and the processing time also long (this issue is also related to pending patents – look relevant section

below). Brazil has taken steps to ratify the Madrid Protocol on international trademarks registration. Once the Protocol is ratified, efforts should be concentrated on implementation and the monitoring of the implementation.

Patents:

The timelines which the Patent and Trademark Office of Brazil (BPTO) takes to process, examine and approve new patent filings are very long, averaging 11 years. This affects many sectors, including the pharmaceuticals industry. In addition to the assessment by the INPI, pharmaceutical companies are also obliged to obtain a prior consent from the National Agency for Sanitary Health Surveillance (ANVISA) before a patent is granted. The BPTO of Brazil should consider solutions, such as parallel but uncoupled procedures. In general, the experience of the European Patent Office would prove valuable and closer cooperation between the two authorities should be promoted.

Another source of concern for European companies is legislation that does not adequately protect patents, for instance by not allowing patent term adjustments, removing the guarantee that patents will have at least 10 years patent term. An important on-going case should be looked at: A case has been filed by the Federal Prosecutor's Office against the alternative 10-year term from the date of the issuance of the patent. If granted, patents granted after more than 10 years from the filing date will no longer benefit from the term.

Trade secret protection:

Although Brazil applies RDP for veterinary, fertiliser and agrochemical products, the same protections in not given to biopharmaceutical products. Furthermore, regulatory data protection does not extend to pharmaceuticals made for human use, creating problems for biotechnology companies operating in Brazil.

Furthermore, companies complain that Brazil has very restrictive patentability criteria.

Brazil (under Mercosur) and the EU are currently negotiating a Free Trade Agreement, which will include rules on IPR protection. From the perspective of European business, this should help level the playing field and contribute in the enforceability of rules at national level.

South Africa

New IP legislation in the country, adopted in 2018, was developed with the significant support of the United Nations Conference on Trade and Development (UNCTAD) and the UN Development Program (UNDP). Another positive development is also the creation of the specialised IP enforcement units.

Over the past years, the Customs authorities in South Africa have gathered experience due to an increased number of seizures. However, problems remain. Seized goods are stored for long periods at the cost of the rightholders.

At the same time, European companies report in particular a broader lack of enforcement of IPR protection. This results in high online piracy rates, parallel imports and large amounts of counterfeit goods. Furthermore, local systems which have been established to register IP are largely inaccessible, time consuming and are often difficult to follow or use.

Copyright:

South Africa has not yet ratified the WIPO Internet Treaties. Furthermore, the country's new law makes references to concepts, such as "fair use", which are not clearly defined, therefore creating uncertainty to companies.

Nigeria

Overall, the legal and regulatory framework in the country is weak and limited, with major forms of IPR protection not in place. Enforcement challenges persist. For instance, there is no national coordination, only ad hoc efforts.

Copyright:

There are persistently high rates of physical and growing online piracy. Software piracy estimated at 80% by the Software Alliance (BSA). Piracy is widespread and rights holders face significant challenges in enforcing their rights. Despite the efforts by the Nigerian Copyright Commission (NCC) over the past half-decade to amend the Copyright Act, there has been no legislative action. With last year's accession to the WIPO Internet Treaties, there is now an added sense of urgency to amend Nigeria's copyright laws to bring them in line with Nigeria's international obligations.

Localisation barriers:

Nigeria has in place significant barriers to both technology transfer and licensing activities. The National Office for Technology Acquisition and Promotion (NOTAP) oversees all technology transfer and licensing between Nigerian entities and foreign licensors and has the power to evaluate and approve or disapprove technology transfer agreements, including evaluating royalty amounts.

Ukraine

A major concern for European companies remains the non-application from the part of Ukraine of their obligations under the EU-Ukraine Deep and Comprehensive Free Trade Agreement and the failure to address problems under the amended copyright law of 2018.

Most important issues:

- the payment of broadcasting services by state-owned broadcasters
- the slow pace of reform of the collective management accreditation system
- the collection of royalties by unauthorised agencies, which results in rightholders effectively never being paid. A well-known problem to the government, however, these agencies are not being prosecuted
- the extended use of unlicensed software
- online piracy
- counterfeit goods of registered trademarks

- illegal use of destination of origin and geographical indications

USA

Overall, enforcement of IPR protection is the U.S. is satisfactory. However, problems are reported in the publishing sector, where there are worrying trends in case law on educational uses under the Fair Use doctrine and a large number of infringement cases in online marketplaces.

Patents:

Additional patent quality checks and new anti-troll legislation have produced results. At the same time, European companies complain that they have raised the bar on patentability. Furthermore, cases are considered by one examiner, in a short process. Given the increased complexity of the cases, this may not be enough.

Turkey

Overall, European companies report problems in IPR protection in a number of different sectors, including the automobile (cars and car parts), medical equipment, textile and clothing, footwear, cosmetics, agrifood.

Trademarks:

European companies detect problems with regards to short timelines (3 days) for the verification of detained goods. The relevant timelines in the EU are 10 days. A similar extension would facilitate companies significantly. There are also reports that authorities in Turkey operate on unlicensed software.

There is also a serious counterfeiting problem, reported in particular by the fashion sector. However, companies report that once the status of “well-known trademark” is obtained, enforcement is much faster and more effective.

Although Turkey has adopted legislation aligning standards with the EU, issues remain in particular on issue related to:

- The exhaustion regime of patent rights
- Compulsory licenses
- Geographical Indications
- The full implementation of the WIPO Internet Treaties

IPR protection issues should be also discussed in the context of the EU-Turkey Customs Union Agreement.

Mexico

Overall, European companies report important problems in the enforcement of IPR protection in the country, as well as a lack of full implementation of the WIPO Internet Treaties. The legal framework on IPR protection in Mexico needs to be modernised. Enforcement: A significant problem for companies concerns the chain of custody related to customs procedures, where a different interpretation of legal criteria by different authorities leads in significant costs and delays for rightholders, as well as large imports of counterfeit goods. Mexican authorities deal with a large number of cases without having the necessary capacity, especially in highly complex cases.
Canada
Although the situation on IPR protection in Canada is overall satisfactory, European companies point at a number of concrete issues. Trademarks and copyright: The proceedings of the Copyright Board could be made more efficient and predictable, also taking into account market factors when they propose solutions. Trade secret protection: Companies communicated concerns with Canada's Food and Drug Act, which leaves at the discretion of the Minister of Health to disclose confidential business information, when the Minister considers that there is a serious risk of injury to human health, without prior notice to the owner of the information. However, questions remain under what circumstances information will be disclosed. In this context, Canada should respect obligations under the WTO TRIPs Agreement. Patents: Issues related to delays in patent decisions are reported as well as on patent utility, where Canadian authorities apply a patentability test on inventions that companies complain is not objective and requires the provision of evidence in an unreasonable and burdensome manner.
Switzerland
European companies report concerns regarding the country's copyright law, which is outdated, especially in comparison to legislation in the EU. They also report issues on enforcement. These are primarily reported by the music industry, which faces important limitations, for instance on the ability of record companies and performers to monetise their broadcasting and public performance rights. Further roll-backs in this area, which are currently under consideration, would be incompatible with the WIPO WPPT treaty.
Russia

European companies report an overall weak protection of IPR, below the level of protection provided by the WTO TRIPs Agreement or the EU-Russia Partnership and Cooperation Agreement. This is affecting many different sectors.

Issues are mainly concentrated in the following areas:

- Insufficient legal protection
- Increased number of infractions
- Legal uncertainty and lack of transparency, for instance when it comes to the treatment of IPR protection legislation in Russian courts

Many cases are particularly reported with regards to infringements in patent rights and commercial secrets on highly innovative sectors, such as pharmaceuticals, engineering, technology and telecommunications.

Vietnam
European companies an overall week protection of IPR and a lack of transparency in the legal system, resulting in lack of enforcement. Violations include: - Copied labels of products, for instance cosmetics, baby food, meat products - Copied design and architectural projects - Misappropriation of brand names on .vn internet domain The EU and Vietnam have negotiated a Free Trade Agreement, which includes provision on IPR protection. However, the FTA has not yet entered into force.
Country
Description