A S I P I

ASOCIACION INTERAMERICANA DE LA PROPIEDAD INDUSTRIAL
INTER-AMERICAN ASSOCIATION OF INDUSTRIAL PROPERTY [1]

Fair Trade: A Balance of Intellectual Property, Competition and Other Rights

I – **Dispute Settlement Understanding**; II – **Antitrust**, II.1. **Corporate Governance - Trade and Investment**, II.1.1. **Trade and Environment**; III – **Trade and Transfer of Technology**; IV - **Biological Resources, Folklore and Traditional Knowledge**; V – **Geographical Indications**; VI – **Declaration on the TRIPs Agreement and Public Health**; VII – **Enforcement of IP Rights and the Role of National Offices**, VII.1. **Compensation**;

> *"Competition is a desideratum in our economic system, but it ceases to serve an economic good when it becomes unfair. The concept of fair play should not be shunted aside on the theory that competition in any form serves the general good. Only fair competition does that. Unfair competition is not competition at all in the truest sense of the word."*[2]

The Inter-American Association of Industrial Property, ASIPI, is a non-profit organization which groups a large number of professionals and persons working with industrial property belonging to countries of very different development level in the Americas.

ASIPI, concerned with the ongoing discussions and negotiations at the World Trade Organization (WTO), especially those regarding Intellectual Property matters, would like to state now on the 5th Ministerial Conference in Cancún, Mexico, its points of view over the following topics:

[1] To learn more about ASIPI and its work, please visit our web site on www.asipi.org
[2] Schulenburg v Signatrol, Inc. (1964), 142 USPQ 510.

I – DISPUTE SETTLEMENT UNDERSTANDING:

On July 24, 2003, acknowledging the fact that the Dispute Settlement Body needed more time to conclude its work, the General Council agreed to extend negotiations for one year, to May 2004.

ASIPI is concerned at the present moment with the lack of possibility to use the Dispute Settlement System of the WTO to resolve questions derived from regional and bilateral agreements, according to Article 3(2) of Annex II (Dispute Settlement Understanding)[3]. Besides, Article 31.2 of the Vienna Convention establishes that each Treaty should be interpreted in accordance with its ordinary meaning in their context and in light of its object and purpose.

Under this scenario, the competence of the WTO to settle controversies regarding regional and bilateral agreements should clearly exist at least in the cases of literal reproduction of the provisions of TRIPs in such agreements, when Members of the WTO were involved and if such agreements contain a clause remitting the solution of conflicts to the WTO Dispute Settlement System.

ASIPI, therefore, expects that at least the existing rights and obligations, especially those of the TRIPs Agreement, even if later also covered by bilateral or regional agreements, be maintained under the Dispute Settlement Understanding System of WTO when the parties of these agreements, being also parties of the WTO, so desire. ASIPI understands that the Dispute Settlement System can be improved and therefore suggests that, in order to enhance harmony among members of this multilateral trade agreement, an umbrella clause should be adopted, permitting that the WTO Member Countries that have taken part in other bilateral or

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[3] Article 3 General Provisions:

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and ruling of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

regional agreements choose the Dispute Settlement Understanding System of WTO to resolve conflicts derived from these agreements.

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II – ANTITRUST:

The importance of the development of an effective framework for competition policy lies on its ability to enhance international trade, multilateral cooperation and the flow of investments especially towards developing and least-developed countries. Such countries have long been subject to unfair competition practices, usually on account of the poor antitrust enforcement.

As a matter of fact, some countries have already adopted specific regulations on this matter, such as the European Union and the United States, aiming at setting parameters to companies and investors, and applying severe penalties in case of misuse of economic power.

In this connection, the new set of rules on competition adopted on December 16, 2002, by the European Union Council of Ministers, and which shall apply from May 1, 2004, is particularly interesting. These new rules alter the procedures and responsibilities of existing competition rules, enhancing their enforcement. The new Technology Transfer Block Exemption Regulation, for instance, is much more restrictive than the regulation which is currently in force.

Nonetheless, in other regions, regulation over competition and related issues are scarce or even do not exist at all, fact which undermines the economic balance between countries, affecting negatively the economic activity by artificially reducing competition and increasing prices.

In this connection, the three basilar principles, on which trade and competition policy are based and which are for discussion now at the 5th Ministerial Conference, are transparency, non-discrimination and procedural fairness, as provided in article 25 of the Ministerial Declaration adopted in 14 November, 2001 (WT/MIN(01)/DEC/1)[4] . Much has been discussed on how these principles should be interpreted so as to allow the development of a consistent and effective framework for competition policy.

ASIPI understands that the enforcement of both IPRs and antitrust laws is of fundamental importance to foster economic development and innovation. Corroborating this

understanding, many authors have pointed out the importance of enforcement of antitrust laws and IP laws for this purpose:

> *"The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. (...) The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers." (Antitrust Guidelines for the Licensing of Intellectual Property, issued by the U.S. Department of Justice and the Federal Trade Commission on April 6, 1995: http://www.usdoj.gov/atr/public/guidelines/ipguide.htm)*

In the same direction is the opinion of Jean-François Pons in the speech for the 50th Anniversary of the Japan Trade Commission:

> *"In fact, given the importance of the R&D and innovation process in the economic competition today and given also the pace of technological changes in many sectors, the surveillance of this relationship will be more and more crucial for competition authorities all over the world."(Jean-François PONS, Deputy Director-General - DG IV, Extracts from a speech for the 50th anniversary of the Japan Trade Commission in Tokyo - 1st December 1997, in: Competition Policy Newsletter 1998 Number 1, February 7).*

The internationalization of the unfair competition laws should thus correspond to the simultaneous harmonization and simplification of the several national antitrust systems. The development of an international framework for competition should, therefore, not await further harmonization of existing national Laws on competition nor be limited to hardcore cartels. Indeed, an overall reflection over the different systems points to a certain

[4] In order to access the full-text, please visit the WTO documents database at http://docsonline.wto.org

convergence of several elements regarding competition policy and their applicability to IP rights given similar contexts.

ASIPI, supporting the communication from Canada, submitted on March 12, 2003 (WT/WGTCP/W/226)[5], understands that developing common core principles is likely to reduce conflicts between jurisdictions and to improve institutional capacity of competition regimes in developing and least-developed countries.

Nonetheless, it is also important that a multilateral framework be developed beyond the establishment of simple core principles or be limited to hardcore cartels. International Guidelines for the Licensing of Intellectual Property and for Technology Transfer could certainly be considered. This might also be studied in the Working Group examining the relationship between Trade and Transfer of Technology.

Besides, ASIPI is also worried by the development of the International System of Registration of Industrial Property Rights, which is increasingly subsidizing the granting of these rights, mostly in favor of the large users of this system. The substitution of the national registration practice by the international one seriously undermine the small community of industrial property specialists in developing and least-developed countries thus creating a gap of IP knowledge and of professionals capable of giving sound assistance to inventors in developing and least-developed countries, creating barriers to entry that should not be encouraged.

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II.1 - CORPORATE GOVERNANCE - TRADE AND INVESTMENT:

Corporate Governance consists of the methods and practices adopted by a company with a view to balance different interests therein involved, and is based on the following principles: *fairness; disclosure; accountability* and *compliance*.

During the last years, companies around the world have faced a series of financial scandals and some went bankrupt due to accounting problems. In the United States these scandals led the Stock and Exchange Commission and the North-American Congress to adopt regulations aiming at restoring the managing disclosure and business fairness. The latest act issued in this sense has been the Sarbanes-Oxley Act, which reinforces the principle of disclosure by making, among other things, both American and foreign CEOs certify and attest companies' accounts.

[5] In order to access the full-text, please visit the WTO documents database at http://docsonline.wto.org

The consequences of the latest events had a negative impact on the international economy, evidencing the failure of national laws to counter unfair trade practices which may affect foreign investments and the international trade system in general. Therefore, ASIPI understands that the WTO should establish a framework also on Corporate Governance, especially as regards the enforcement of the principles of disclosure and fairness.

For that, ASIPI suggests that the working group studying the relationship between trade and investment should also study the interaction between trade and governance, aiming at establishing general rules to serve as guidelines to governments and private actors.

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II.1.1 - TRADE AND ENVIRONMENT:

Whether the above corporate governance principles should reach environmental practices and list them in the accounting of companies as assets and/or liabilities is certainly an issue to be considered by both WTO's above mentioned working groups (See **Environmental Accounting Guidelines** 2002, **Ministry of the Environment, Japan:** http://www.env.go.jp/en/ssee/eag02.pdf ; http://www.env.go.jp/en/ssee/eag02_p.pdf ; http://www.env.go.jp/en/ssee/eag_qa.pdf **- Eco-Management Accounting Network:** http://www.eur.nl/fsw/eman/ **- Global Reporting Initiative's Sustainability Reporting Guidelines:** http://www.globalreporting.org/guidelines/2002.asp).

It should be noted that this accounting method would provide to national governments detailed internal data on environmental actions, positive or negative, being taken by private and public companies and, therefore, would help enabling these governments to set their own appropriate level of environmental protection.

Perhaps the environmental liability of large companies, as opposed to small and medium size companies, could already be dealt with at the international level, as a first step towards the establishment of international environmental standards.

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III – TRADE AND TRANSFER OF TECHNOLOGY:

The TRIPs Council is working specifically on incentives for the Transfer of Technology to least-developed countries, in view of Article 66.2 of the TRIPS Agreement.

The Working Group on the relationship between Trade and Transfer of Technology is also considering any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall

report to the Fifth Session of the Ministerial Conference on progress in the examination of the relationship between trade and transfer of technology. (Paragraph 37 of the Doha Ministerial Declaration)

A number of provisions in the WTO agreements mention the need for transfer of technology between developed and developing countries. However, it is not clear how such a transfer will take place in practice and what specific measures may be taken within the WTO to encourage such flows of technology.

The delegation of the European Community introduced its submission (WT/WGTTT/W/2)[6] at the second session of the Working Group and stated that the Working Group should focus on developing a common understanding of the definition of technology transfer, pay particular attention to examining the importance of foreign direct investment (FDI), trade in goods and services, licensing of technology subject to intellectual property rights, government procurement, development co-operation, multilateral environment agreements, and private and public partnerships in facilitating transfer of technology.

The delegation of Canada submitted the "Canadian Experience", describing the type of domestic policies that the country has implemented in various fields, which should include intellectual property regulations, competition policies (see item II above), specific programs on Technology Transfer and general regulatory system (WT/WGTTT/2)[7], underlining the ability to attract, absorb, use and export technology.

The delegation of the European Community made a second submission entitled "Reflection Paper on Transfer of Technology to Developing and Least-Developed Countries" (WT/WGTTT/W/5)[8] at the fifth session of the Working Group.

The paper stated that the concept of Transfer of Technology, as discussed for decades in the context of development policy, is based on the assumption that developing countries and least-developed countries need the techniques invented and used in developed countries to acquire technological capacity. It further points out that there are several channels through which the technologies are usually transferred, and in each case there are some practical difficulties, which the least-developed countries may have to overcome. It is recognized that these new technologies, if successfully incorporated into the production system, may lead to improvements in productivity and, as a consequence, to a higher growth rate. Intellectual property rights would be instrumental in making technological knowledge accessible and

[6] In order to access the full-text, please visit the WTO documents database at http://docsonline.wto.org
[7] Idem
[8] Idem

securing business partners and foreign investors, being one of the many factors that determine whether technology transfer occurs or not.

Some members thus believe that the pre-establishment assessment and long-term commitment of foreign direct investors increased the likelihood that transferred technology would be adapted to local needs and be made suitable for the local production environment.

However, ASIPI, as well as some other members, feels that although Foreign Direct Investment could eventually result in the transfer of technology, its importance in that regard had been overstated. Some Members were skeptical about Foreign Direct Investment providing a solution to the problem of technology transfer in much of the developing world, especially since in many cases it had only resulted in the transfer of low levels of technology.

Besides, one has to consider the trade-distorting effects of developed country public funding schemes in support of research and development as well as the serious consequences for the competitiveness of developing countries.

As indicated in item II (Antitrust) above, the internationalization of the unfair competition laws should be developed in parallel to the internationalization of the intellectual property laws. The oligopolization of R&D activities in developed countries should not be further subsidized or receive tax benefits which are not offered to the R&D activities carried out by the same multinational companies of developed countries in their R&D activities in developing or least-developed countries.

All submissions have stressed once more the need to engage in a creative effort on practical means to increase flows of technology transfer and the implementation of relevant trade methods, in particular technological capacity building. In this regard, it is essential that the R&D benefits granted by developed countries to their R&D activities be extended to the R&D activities of the developed countries' companies in the developing and least-developed countries, pursuant to article 66.2 and 7 of TRIPS. Denying the same tax incentives to R&D activities in developing and least-developed countries is certainly contrary to the expressed objectives of the TRIPs agreement and of the Doha Development Agenda.

In parallel, the availability of funds to R&D activities in developing and least-developed countries, either by means of the World Bank or other institutions, should be increased considerably, especially in those areas of particular need to these countries, such as Health, Food, Agriculture and Environment.

Upgrading technology shall indeed assist developing and least-developed countries in reaching development objectives, leading them, therefore, to a more balanced integration into the global economy. Nevertheless, as stated before in item II (Antitrust) above, International Guidelines for the Licensing of Intellectual Property and for Technology Transfer should be established in the international level so as to promote the transfer and dissemination of the transferred technologies within a fairly competitive environment.

The above proposals might help to reduce the trade-distorting effects caused by the subsidies granted to R&D activities in the developed countries and the low level of technology transfer activity occurring between subsidiaries of Multinationals and local companies.

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IV – BIOLOGICAL RESOURCES, FOLKLORE AND TRADITIONAL KNOWLEDGE:

Taking into account that the protection of biological resources, traditional knowledge and folklore is directly related to intellectual property issues and has been emerging in different areas such as food and agriculture, environment and human rights, discussions about this matter are inevitable.

ASIPI understands that it is important to maintain a balance between protection against misappropriation[9] of biological resources, traditional knowledge and expressions of folklore, on the one hand, and of freedom and encouragement of their further development and dissemination, on the other.

In accordance with the Model Provisions of WIPO[10], sanctions should be provided for each type of offense determined by the Model Provisions, pursuant to the criminal law of each country concerned. The two main types of possible punishments are fines and imprisonment. ASIPI is of the opinion that the monetary punishments should be the rule and imprisonment only a last resource.

Furthermore, ASIPI understands that the improvement of international measures would be indispensable for extending the protection of expressions of folklore of a given country

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[9] According to Roger E. Schechter, "*A plaintiff makes out a case of misappropriation if (i) it has created a valuable intangible, (ii) the defendant has appropriated that intangible without permission and for profit and (iii) the defendant's taking has harmed the plaintiff economically". (Roger E. Schechter, Unfair Trade Regulations and Intellectual Property, page 12; Black Letter Series, 1986)*

[10] http://www.wipo.int/globalissues/documents/pdf/1982-folklore-model-provisions.pdf

beyond the borders of the country concerned. There is no international standard protection for folklore and the copyright regime has in many circumstances proved inadequate to ensure such protection.

ASIPI believes that WIPO and UNESCO should increase and intensify their work in the field of folklore protection, by including in future work related to this area the development of an effective regime at an international level for the protection of expressions of folklore.

In this regard, ASIPI notes with interest the proposal to introduce a system such as a "self-standing disclosure requirement" on biological resource and traditional knowledge and agrees that such mechanism would help WTO Members to keep track, at a global level, of all patent applications for which they themselves had granted access.

On the other hand, although ASIPI believes in the importance of protecting biological resources, folklore and traditional knowledge, this issue should not constitute a distraction to deviate the attention from the subsidy that the centralized international registration system, the expansion of which is being proposed, represents to the large holders and exporters of I. P. Rights, despite the damages it will cause to the small local capabilities of developing and least-developed countries (please see item 2 Antitrust above).

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V - GEOGRAPHICAL INDICATIONS:

ASIPI, concerned with the ongoing discussions and negotiations over the implementation of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits pursuant to article 23 (4) of the TRIPs Agreement and the possible extension of such an agreement to products other than wines and spirits, acknowledges the revised report of the "Discussions on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits: Compilation of issues and Points" (TN/IP/W/7/Rev.1)[11] of 23 May, 2003, and would like to raise a few issues and suggest alternatives to the current proposals now on the 5th Session of the Ministerial Conference.

ASIPI considers that it is of fundamental importance that Geographical Indications be granted an equal level of protection to the one conferred to other types of intellectual property, especially on account of the express recognition of Geographical Indications as a type of Intellectual property, according to section 3 of the TRIPs Agreement.

[11] In order to access the full-text, please visit the WTO documents database at http://docsonline.wto.org

ASIPI agrees that the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs) should keep up its commitment to work on the implementation of a multilateral system of notification and registration of wines and spirits, and that the TRIPs Council in the Special Sessions under the Doha Development Agenda is the appropriate forum for discussions and decisions on the relevant issues concerning Geographical Indications.

ASIPI also recognizes that a final decision on the implementation of a Multilateral System still depends on the reaching of a consensus on several controversial points such as: (i) What constitutes a Geographical Indication and what criteria should be used to define it as elegible for protection under the System; (ii) How an eventual system of notification and registration shall be administered; and (iii) What sort of implications for national laws would the adoption of this System entail.

ASIPI agrees that the definition provided by article 22.1 should be restrictive. Nonetheless, the registration of certain terms, which designate products or services typical of a particular country or culture, should be listed and granted protection under the auspices of the WTO.

Another important issue that should be carefully discussed is the possibility of applying the multilateral system retroactively, creating another exception in article 24.9 of the TRIPs Agreement. Due consideration for this one sided obligation would have to be clear and direct in order to avoid nationalistic bias towards the Agreement and assure its enforcement before national courts. Besides, a system of further exceptions should be restrictive, and open to the indispensable due process.

According to the paper submitted before the WTO, entitled "Establishment of a Multilateral System of Notification and the Registration of Geographical Indications for Wines and Spirits pursuant to TRIPs Article 23(4)", the International Trademark Association- INTA recommends that the System should follow a Madrid-like approach. However, it is important to highlight that the Madrid System contains several issues that are against the right of equality foreseen in the Constitution of several ASIPI Member Countries which forbid discrimination between national and foreigners. Indeed, while foreigners have the possibility to obtain the immediate issuance of a trademark registration without prior exam, at a lower cost because of the expiry of the term to undergo examination, nationals of several ASIPI member countries would not enjoy the same benefits due to the fact that their trademark applications are ruled by the local provisions.

Moreover, the due process would become imprecise with the adoption of the Madrid System since, according to this System, the publication is in English or in French and occurs in

Switzerland. This scenario creates difficulties and further costs as far as the presentation of oppositions and the following up of Swiss publications are concerned.

Therefore, although ASIPI supports the ongoing negotiations to establish a system of notification of geographical indications, ASIPI notes that there are still many delicate issues pending which should be solved paying due regard to the different interest and legal systems involved.

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VI – DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH:

The Ministerial Declaration on the TRIPs Agreement and Public Health has been adopted by Ministers during the 4th WTO Ministerial Conference held in Doha, in 2001. This Declaration was based on the proposals presented mainly by the African group and supported by developing countries.

The topics that are of major concern to developing countries and least-developed countries are the lack of clarity in the actions that governments are allowed to take to protect public health (including the implications of the TRIPs Agreement for access to medicines); and the meaning and interpretation of specific provisions provided in the TRIPs Agreement.

In this connection, it is important to highlight that the Declaration emphasizes that the TRIPs Agreement does not and should not prevent members from taking measures to protect public health and reaffirms the right of members to use to the full the provisions of TRIPs.

Also, the Declaration recognizes in its paragraph 6[12] the difficulties Members with insufficient or non-manufacturing capacities in the pharmaceutical sector may face in granting compulsory licenses under the TRIPs Agreement. This issue, however, remains unresolved since the Council for TRIPs did not reach a consensus over this topic, failing to meet the deadline of December, 2002.

It is undeniable that developing and least-developed countries are the most afflicted by public health problems. In this regard, the lack of specific medicines to combat mass-diseases not common in other countries, in addition to nutrition, educational and economic problems, contribute to enhance the urgent support needed by these countries.

[12] Paragraph 6 of the Doha Ministerial Declaration: "*We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement . We instruct the Council for TRIPs to find an expeditious solution to this problem and to report to the General Council before the end of 2002*".

Furthermore, the provisions established in article 6 of the Doha Ministerial Declaration should not be limited to the concession of compulsory licensing of medications that only fight diseases such as HIV/AIDS, tuberculosis and malaria, as the recent outspread of SARS has shown the world. In these cases, the licensing should be extended to any relevant patentable drugs and vaccines that aim at fighting other endemic diseases or epidemics that occur in developing and least-developed countries. In fact, a privileged compulsory license system should be applied on a case-by-case basis.

ASIPI understands that articles 8.1 and 31 of the TRIPs Agreement should be interpreted in a way that when a public health crisis exists in developing or least-developed countries with insufficient or no manufacturing capacity in the pharmaceutical sector, a license could be granted to have that product produced in another country which has technological base for such production.

One should not forget, however, that obtaining cheaper patented drugs to endemic diseases, epidemics or emergency health cases in general through compulsory license does not solve by itself the problem of still having to manage the delivery of these drugs to those in need.

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VII – ENFORCEMENT OF IP RIGHTS AND THE ROLE OF NATIONAL OFFICES:

The sovereignty of countries, which are not part of a consolidated project of political and economical Union, requires that the State shall be the one to grant or deny rights to its citizens. Therefore, the substantive analysis of Intellectual Property Rights in the Americas is an essential condition for their effective enforcement.

In fact, having intellectual property laws is not enough. They must be enforceable. According to article 41 combined with article 49 of TRIPs governments have to ensure that intellectual property rights can be enforced under their laws, and that penalties for infringement are strong enough to deter further violations. The procedures must be fair and equitable, and not necessarily complicated or costly. They must not entail unreasonable time-limits or unwarranted delays. These principles apply to both Courts and National Patent and Trademark Offices.

It is with regret, however, that ASIPI notes that the National Patent and Trademark Offices are not performing their functions with the necessary agility and in accordance with the TRIPs standards. Actually, although the services rendered by these Offices are paid by the official fees charged to Applicants, a great part of this income does not remain in their possession,

being usually applied in other governmental activities. This situation causes damages to the Industrial Property's protection system and the non-compliance of the TRIPs Agreement, preventing users from obtaining services with the quality needed and expected.

In these circumstances, and in light of all the above, ASIPI believes that the financial autonomy of National Offices should be clearly made an obligation under TRIPs so that they may duly comply with articles 41 to 49 of TRIPs.

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VII.1 - COMPENSATION

In cases of intellectual property rights violation, the certainty of the damage results from the practice of the illicit act. A remuneration would always be due for the unauthorized use of an immaterial property. There is, therefore, no need to prove the actual damage suffered in order to have the certainty of the damage caused by the intellectual property rights violation.

ASIPI notes, however, that the difficulty in proving the damages effectively suffered is leading those who had their rights infringed to receive compensations corresponding to an amount usually inferior than the damage caused.

In light of the above, ASIPI understands that damages should be compensated according to the most favorable criteria to the owner of the industrial right violated, who should be able to choose among the following:

a) the benefits that the owner would obtain in case the violation had not occurred; or

b) the benefits obtained by the infringer; or

c) the remuneration which would be due to the owner in case of a license agreement concerning the use of a product or service.

When it is not possible to quantify the damage (usually due to the lack of proper or any accounting by the infringer) judges should be allowed to establish the amount due taking into consideration the economic situation of the infringer and the nature of the goods or services involved.

In addition, considering that the costly penitentiary system usually does not succeed in making good citizens out of criminals and, therefore, that the imprisonment penalty should be applied only as a last resort, ASIPI suggests to those countries bearing criminal procedure and penalties in the field of the Intellectual Property to create punitive compensation as an

alternative to be applied by judges in cases of industrial and intellectual property violations. This compensation could be applied whenever the judges believe that such measure could avoid the contumacy of the crime committed. In addition, the payment of such compensation (which may be determined either by judicial decision or by agreement reached by the parties involved) could lead to the waiver of the criminal claim or to forgiveness.

ASIPI sustains that a special effort must be made by WTO to harmonize the different enforcement systems. Enforcement is one of the pillars of the intellectual and industrial property system and, therefore, a harmonized enforcement system could result in enhanced protection and legal certainty, both to owners and third parties.

A stronger enforcement system would add value to industrial property rights, thus reducing what has been labeled the "cost" of the industrial property system.

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