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USTR Releases “Special 301” Report on IPR Enforcement; Argentina and Brazil Listed in Priority Watch List

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On April 28, 2006, the Office of the United States Trade Representative (USTR) released its “Special 301” annual report on the adequacy and effectiveness of US trading partners’ intellectual property rights (IPR) protections. The report identifies governments that “need to take stronger actions to combat piracy and counterfeiting.” China and Russia’s IPR enforcement and monitoring feature prominently throughout the report. We highlight here USTR’s findings regarding several Latin American countries.

The “Special 301” annual report can be found at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.

Analysis

Upon the report’s release, USTR Rob Portman stated that “[a]s one of the world’s leading innovators, the United States places significant emphasis on intellectual property protection and enforcement.” He added that “safeguarding [US] creations and innovations is a key element of [US] trade competitiveness, but it is also in the interest of our trading partners to strengthen their IPR regimes.” According to Portman, the report “acknowledges the positive steps that several of our trading partners have taken to strengthen IPR protection over the past year, [but] more needs to be

done.” Portman stated that USTR’s review “reveals a continuing need for improvements, particularly with the implementation of effective protection and enforcement against piracy and counterfeiting.”

Background

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) (“Special 301”), USTR must annually identify those countries that deny adequate and effective IPR protections. According to the report, “countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact on the relevant US products” are designated as “Priority Foreign Countries.” Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974, under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce. As part of its Special 301 duties, USTR has created a “Priority Watch List” and “Watch List.” Placement of a trading partner on either list indicates that particular IPR-related problems—including

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protection, enforcement and market access—exist in that country. Countries that have been placed on the Priority Watch List are “the focus of increased bilateral attention concerning the problem areas.” Additionally, under Section 306, USTR monitors a country’s compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to “satisfactorily” implement an agreement.

2006 Special 301 Report

The 2006 “Special 301” annual review examines the adequacy and effectiveness of IPR protection in 87 countries. USTR placed Brazil and Argentina on the 2006 Priority Watch List. It placed Paraguay on the Section 306 list¹ and removed Uruguay from its Watch List. Other countries, including Canada, Chile and Mexico were placed on the 2006 Watch List. We highlight below USTR’s findings regarding these countries.

Argentina

USTR notes that Argentina made some improvements in intellectual property protection throughout 2005, including fast-track procedures for consideration of patent applications and the hiring of a significant number of patent examiners. Despite these improvements, the report notes that Argentina granted relatively few patents in 2005 for commercially significant inventions, and that Argentina still does not provide adequate protection against unfair commercial use of undisclosed test and other data submitted by pharmaceutical companies seeking marketing approval for their products.

Brazil

The report notes that despite improvements, “high levels of piracy and counterfeiting still exist and criminal prosecutions remain minimal.” Concerns include (i) Brazil’s lack of protection

against unfair commercial use of undisclosed test and other data submitted by pharmaceutical companies seeking marketing approval for their products; and (ii) Brazil’s failure to reduce its backlog of pending patent applications, due in part to a requirement that the health regulatory agency issue its approval before pharmaceutical patents are granted by the Brazilian patent office.

Paraguay

Paraguay has had problems in providing protection to intellectual property for many years. Paraguay has poor internal enforcement and weak border enforcement regarding the protection of copyrights and trademarks. Paraguay and the United States signed an MOU on the protection of IPR in December 2003, since the former, signed in 1998, had expired. The US remains concerned with issues such as the involvement of organized crime in piracy and counterfeiting and the enforcement of IPR laws. Nonetheless, the US will continue to work with the Duarte Administration to increase enforcement of intellectual property rights in Paraguay.

Uruguay

USTR removed Uruguay from its 2006 Watch List because it made progress on copyright enforcement.

Canada

Canada made progress in improving its IPR regime but halted patent and copyright reform due to the dissolution of Canada’s Parliament in 2005 and elections in early 2006. The report urges Canada to improve border enforcement to stop piracy and counterfeiting, and to improve its IPR enforcement system to strengthen data protection. USTR is eager to work with the Harper administration to improve enforcement of intellectual property rights in Canada.

Chile

The report raises concerns on three main areas: trademark counterfeiting, copyright piracy, and issuance of marketing approvals for “unauthorized copies” of patent-infringing pharmaceutical products. USTR urges Chile to increase its efforts to meet the standards established under the TRIPS Agreement, the US-Chile Free Trade Agreement (FTA), and other international trade agreements. USTR notes that Chile has not fully implemented legislation to comply with FTA obligations regarding patent term adjustment and must amend its IPR legislation to be in conformity with its bilateral commitments.

Mexico

Although Mexico took significant measures to improve IPR enforcement, serious problems remain in various areas. The IPR unit of the Prosecutor General’s Office (PGR) has increased the number of seizures of pirated goods but has failed to incarcerate and convict counterfeiters. USTR recommends that Mexico implements deterrent penalties and increases the number of convictions. USTR recommends that the PGR increases collaboration with Customs authorities to diminish the flow of pirated items before they reach the Mexican market. USTR also encourages Mexico to enact and implement IPR legislation.

Outlook

Addressing weak IPR protection and enforcement continues to be one of the Bush Administration’s top priorities. The Special 301 Report shows positive progress in many countries but includes far more instances of “rampant counterfeiting and piracy problems” that indicate a critical need for stronger intellectual property protection in several countries.

The results of the 2006 Special 301 report reflect a strong concern in the United States regarding IPR protection in Latin America. The report urges several Latin American countries—namely Argentina and Brazil—to take immediate actions to implement intellectual property laws and provide effective protection against counterfeit and piracy problems. According to the USTR, the failure to improve IPR laws could endanger the region’s efforts to continue attracting trade and investment in many areas.

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1 Paraguay has been under US Section 306 monitoring since the signing of the first Memorandum of Understanding (MOU) on the protection of intellectual property in 1998. The United States and Paraguay are negotiating an extension of the MOU.