Enforcement of IPRs in Latin America

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Understanding the issue …

- **Enforcement** of IPRs encompasses legal proceedings initiated by the title holder in an administrative or civil court in the territory were the rights are held and infringement is alleged to be occurring.

- An **infringement** occurs when acts under exclusive control of the right’-holder are preformed by third parties without his authorization.
Historical background on IPR enforcement….

- In the mid ‘80s industry groups of OECD countries thought that WIPO treaties (Berne and Paris Convention) did not sufficiently compel States to implement and enforce protection to intellectual creations and therefore shifted their focus of attention to the GATT.

- In the mid 90s these groups were successful in obtaining the inclusion of an agreement on intellectual property into the new international trade framework (WTO).

- The TRIPS Agreement laid down minimum standards for the effective and adequate enforcement of intellectual property rights.
Although LatAm countries are expected to fulfill TRIPS commitments, right holders of IPRs in the region are currently facing difficult situations because of the difficulty on obtaining adequate and effective enforcement of their rights in these territories.
Some examples ...

Glivec in Colombia

• Case: Glivec


• Denial of Glivec Patent (2003) arguing lack of inventiveness

• Novartis filed an action of nullity before the higher administrative court (Consejo de Estado)

• Currently the final decision on Glivec patent is pending ...
….there is not a clear time frame regarding when to expect a final ruling on the case...
and even more if we take into account the current backlog ...
Timing in Mexico

In order to recoup damages in a patent case, the plaintiff has to wait at least 6 to 9 years in order to have a final ruling on the case issued by the IP authorities.
Since January 1, 2000 the sanitary authority has granted sanitary registrations to **eight** copies of pharmaceutical products, relying without due authorization on test data belonging to other companies and contrary to signed treaties.
Long backlog in Brazil

- Patent backlog estimated at 5-6 years
- Final patent approval granted only after review by the Health Regulatory Agency (ANVISA), creating yet one additional hurdle
Current enforcement trends …

• Taking all of this into consideration, major capital exporting countries have initiated negotiations of Free Trade Agreements with LatAm countries aiming at improving, among others, the level of enforcement and consequently the enjoyment of IPRs.

• These agreements mandate stronger deterrent against IPR infringement, but are not uniformly enforced.
On the other hand …

- Lack of political will of country leaders to defend IPRs.
- Lack of awareness about intellectual property in general.
- Most judges have inadequate technical training to effectively deal with enforcement issues.
- There are not specialized courts deciding exclusively about IPR infringement.
- Judicial systems that fail to prosecute cases actively or to issue deterrent criminal sentences.
- Governments are not assigning high priority and resources to combating piracy and counterfeiting.
Creating tension between countries ….

- **Colombia**: “… judicial system that fails to prosecute cases actively or to issue deterrent criminal sentences…”

- **México**: “… courts have not imposed convictions and deterrent sentences for pirates and counterfeitters…”

- **Brazil**: “…The Tri-Border region of Paraguay, Argentina, and Brazil has a longstanding reputation as a hotbed of piracy and counterfeiting of many products…”

- **Chile**: “… the need for greater efforts to meet standards set out in the TRIPS Agreement, the US – Chile FTA, and other international agreements… Chile has not fully implemented legislation to comply with FTA obligations…”

*Source: Special 301 / 2007*
Additional Considerations

- Lack of clarity on US government position does not help, as new FTAs are “IPR-dilutive”
- False dilemma of Access to Medicines vs. Patents still prevalent
- More treaties / international commitments are unlikely