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Public Comment on the *Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in FY'07*

Submitted by

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The International Intellectual Property Institute (IIPI), a non-governmental international development organization and think tank based in Washington D.C., submits this public comment regarding the *Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in fiscal Year 2007*. As a non-profit international development organization and think tank, IIPI is dedicated to increasing awareness and understanding of the use of intellectual property as a tool for economic growth, particularly in developing countries. IIPI is submitting this public comment to request the Millennium Challenge Corporation (MCC) to include an assessment of a country's intellectual property system as an indicator in the criteria for determining eligible countries.

Since 1998 IIPI has been engaged in a wide range of activities both abroad and within the United States, including critical research, public education, policy and training workshops, technical assistance, institution building and consultative services. The work of the Institute focuses on establishing constituencies of policymakers, business leaders and legal professionals in the developing world who understand that effective, enforceable intellectual property rights can be a tool to promote economic development in their own countries, and not simply a nuisance or legal obligation imposed by rich western countries. Because we live in a world where wealth generation is increasingly the result of ideas rather than products, it is critical to assist developing countries in complimenting commodities-based economies with the creation of thriving industries rooted in the intellectual assets of their citizens.

**Background: Intellectual Property and Development**

Intellectual property is not a new idea, and the conventional view is that the origin of the patent system in use today stems from a 1474 statute from the republic of Venice granting a limited monopoly in exchange for public disclosure.<sup>1</sup> On 10 April 1790, the United States Congress enacted the first patent statute.<sup>2</sup> The intellectual property system has grown to include not only patents, but copyrights, plant variety certificates, trade secrets, trademarks, certification marks and geographic indications. As such, the intellectual property system has been a primary tool for economic development in emerging economies for centuries. What most developed countries, including the United States, United Kingdom and Germany, have in common today is that while they were still a fragile developing and emerging economy, they rigorously protected home-grown invention and creativity through strong intellectual property laws thereby providing the incentive for greater innovation. That model can be appropriately used today.

Knowledge, innovation, intangible assets and Intellectual property rights (IPRs) have become driving forces for national economies throughout the world. Now, more than ever before, IPRs have become

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<sup>1</sup> Martin J. Adelman, Randall R. Rader, John R. Thomas, Harold C. Wegner, *Cases and Materials on Patent Law*, West Group, 1998, p. 9-11.

<sup>2</sup> *Id.* at 13.

inextricably bound with development as a tool to promote economic growth.<sup>3</sup> Through the creation of healthy intellectual property systems, developing countries can be encouraged and better positioned to engage and compete in the global economic arena, and providing the incentive to create a healthy IP system should be a goal of international development agencies. As such, The MCC occupies a unique position among international development agencies in that to qualify for development funds, the country must demonstrate and meet a minimum standard of good governance, and satisfy a minimum set of qualification criteria. Through these qualification criteria, the MCC has created a system of incentives to developing countries for creating a healthy environment in which economic development can occur. It is through these incentives that developing countries adjust their legal environment to respect the rule of law, ensure the protection of human rights, fight corruption and foster an environment that best supports sustainable economic development. An assessment of the level of IP protection and enforcement within a fund-seeking country should be part of the criteria.

Defining a new country selection indicator based on an assessment of the current level of IP protection and enforcement is an important step for providing developing countries with the incentive to create healthy intellectual property systems. For developing economies, IPR reform is a critical step for promoting economic development. For instance, ensuring patent rights are protected with sufficient enforcement efforts can be instrumental in encouraging firms in developing nations to access technologies and expertise through licensing agreements with firms from developed countries.<sup>4</sup> This kind of technology transfer not only provides a firm in an emerging economy access to the technology, but the access to experts that provide the know-how to exploit that technology as well – often referred to as technology spillovers.<sup>5</sup>

Providing IP protection in developing countries is a positive step for the creation of an investment environment attractive to foreign enterprises. Investment by foreign enterprises favors the transfer of technology and facilitates the building of indigenous technological capacity.<sup>6</sup> For developing countries, like the developed countries before them, the development of indigenous technological capacity has proved to be a key determinant of economic growth and poverty reduction. This capacity determines the extent to which countries can assimilate and apply foreign technology. Many studies have concluded the most distinctive single factor determining the success of technology transfer is the early emergence of an indigenous technological capacity.

### **Piracy, Counterfeiting, and Organized Crime: The Dark Side of Intellectual Property**

As demonstrated above, capacity for intellectual property protection is important for economic development; however, there is a flip-side that casts a dark shadow over development that also must be addressed. Failure to understand the linkage between respect for intellectual property rights, the rule of law and healthy economic growth in developing countries is a major problem. Intellectual property piracy and counterfeiting has created a destabilizing underground economy, and the reach of this underground economy can be traced to diverse illegal activities. According to the European Commission's Taxation and Customs chief, IP fraud, as an extremely lucrative and low-risk crime, threatens to become the major economic crime of the 21<sup>st</sup> century.<sup>7</sup> This underground economy subverts genuine efforts to promote

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<sup>3</sup> The Mission Statement of the World Intellectual Property Organization, a specialized agency of the United Nations, states that "WIPO works to assist all nations, particularly developing and least developed countries, to use the intellectual property (IP) system to promote economic, social and cultural development." see [www.wipo.int](http://www.wipo.int) (last visited 05 October 2006).

<sup>4</sup> See Walter Park and Douglas Lippoldt, *International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries*, OECD Trade Policy Working Paper No. 10, December 2004

<sup>5</sup> Bin Xu & Eric P. Chiang, *Trade, Patents and International Technology Diffusion*, J. Int. Trade & Economic Development, Vol. 14, No. 1, 115-135, March 2005

<sup>6</sup> Beata Smarzynska Javorcik, *The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies*, in Intellectual Property and Development Lessons from Recent Economic Research, Carsten Fink and Keith E. Maskus editors; co-published by The World Bank and Oxford University Press, 2005.

<sup>7</sup> See *IP Fraud Growing*, International Chamber of Commerce, 24 October 2005

sustainable economic development. The lack of meaningful and effective IP protection throughout the world is significantly impairing efforts to create economies that can foster democracy, economic freedom and market-based economic growth. Counterfeiting and piracy have become an extremely lucrative cash-generating operation for organized criminal networks, and many such syndicates utilize the lack of IP laws and enforcement in developing countries to both manufacture and transship counterfeit goods including apparel, software, entertainment and medicine.

In his 13 March 2003 testimony before the United States House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property, then Deputy Assistant Attorney General John G. Malcolm discussed the links between IP piracy and serious organized crime. At one point, Mr. Malcolm described how an attorney from the Department of Justice's Computer Crime and Intellectual Property section was dispatched to Kuala Lumpur, Malaysia in order to assess the IP piracy and counterfeiting situation in the country. The attorney learned that many of the vendors selling counterfeit and pirated goods displayed certain colors indicating which specific criminal syndicate that vendor was associated with. Most of the criminal syndicates represented were powerful criminal gangs or "triads" from Taiwan and other organized criminal gangs in Southeast Asia. Mr. Malcolm articulated how because these criminal syndicates are outside of the United States, the United States must rely on foreign governments for the enforcement effort. Mr. Malcolm elaborated:

If a government lacks the will or the expertise to enforce IP laws, organized crime will continue to proliferate with impunity. Even in countries that have the will and expertise to fight back, a lack of investigative resources, inadequate laws, a judicial system that will not impose serious sentences or corruption can grind IP enforcement to a halt.<sup>8</sup>

In his recent book, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*<sup>9</sup> Moisés Naím, editor of *Foreign Policy Magazine*, documents the linkage between intellectual property theft and socially destabilizing activities including terrorism, illegal arms trafficking, trafficking in human beings, and trade in illegal drugs. Large-scale IP fraud has proved extremely lucrative for financing myriad other illegal activities. In testimony to the United States Senate Committee on Homeland Security and Governmental Affairs, John C. Stedman, Lieutenant County of Los Angeles Sheriff's Department further explains that "it is well documented that organized criminal enterprises engage in IPR crimes, [and] there are mounting indicators of the involvement of terrorist groups and their supporters."<sup>10</sup> In relating other experiences that IP-fraud investigators have uncovered, definite links have been seen to Russian organized crime, Eurasian Organized crime, Asian organized crime and Lebanese organized crime including suspected links to Hezbollah fundraising. If such activities can occur in Los Angeles County, it is happening elsewhere.

Intellectual property piracy has grown to cover every single sector in the economy, including software, music, luxury items, toys, car and aircraft components, and pharmaceuticals. The cost on human health of counterfeit car and aircraft components as well as counterfeit essential drugs, including drugs that combat HIV/AIDS, is nearly incalculable. Piracy in such products can cause adverse impact on consumers, and can cause fatal injuries. Some of the most obvious risks associated with counterfeit drugs relate to severe allergic reactions, a weakening immune system, the causing of diseases, poisonings and possible death. When these counterfeit drugs are sold in developing countries with already vulnerable populations the result is simply distressing.

The problem with counterfeit essential medication in the developing world is a poignant way to illustrate the scale and effect of the problem. Counterfeit drugs are threatening to cause additional sickness and

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<sup>8</sup> Official Testimony of John G. Malcolm, Deputy Assistant Attorney General for the Criminal Division United States Department of Justice before the Judiciary Subcommittee on the Courts, the Internet and Intellectual Property, 13 March 2003.

<sup>9</sup> Moisés Naím, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*. Doubleday, 2005.

<sup>10</sup> Official Testimony of John C. Stedman, Lieutenant County of Los Angeles Sheriff's Department before the United States Senate Committee on Homeland Security and Governmental Affairs, 25 May 2005.

pain in some of the poorest most vulnerable populations on the planet. The scourge of HIV/AIDS in the workforces of many developing countries hinders economic development and creates a demand for prescription drugs. However, it is estimated that nearly 50% of all essential medicines in developing countries are counterfeit.<sup>11</sup> The sources of these counterfeit drugs are debated, but links have been found to Southeast Asian criminal gangs.<sup>12</sup> Counterfeit drugs are not simply legitimate “generic” drugs, but are often drugs that are manufactured in unsanitary conditions lacking active ingredients bound together by potentially lethal chemical agents. These drugs are packaged and stamped with the trade-names and trademarks of the pharmaceutical companies that are usually associated with the medicine giving the drugs the look and feel of respectability, but these are far from the effective medication required.

Clearly, lack of meaningful IP protection and enforcement throughout the world is a significant corrupting force harming efforts to create rule-of-law based economies that can foster democracy and market-based economic growth.

### **Incentives and Technical Assistance: An IP-Based Indicator Benefits Developing Countries**

Foreign Aid agencies can provide incentives to developing countries to build meaningful institutions that foster the effective use and enforcement of intellectual property rights. However, building the infrastructure needed for an effective IPR regime is expensive and beyond the means of cash-strapped developing countries. The only way in which meaningful intellectual property infrastructures – and IP friendly local constituencies – can be built is through development assistance from organizations such as the MCC.

It would be unproblematic for the MCC and USAID to provide meaningful development assistance in the area of intellectual property rights to those countries aspiring to be included in the MCC scheme. A new IP-based country criterion will encourage developing countries to implement IP laws if they haven't already and create an enforcement infrastructure necessary to spur greater investment in the country. The United States can create an effective means to advance the development of healthy IP systems with sufficient enforcement capacity within developing countries through a system of incentives to gain foreign development funds.

As has been stated before, incentives matter. The sixteen MCC indicators serve as guideposts to good governance for countries seeking MCA assistance. Where necessary, those countries lacking sufficient IP laws or adequate IP enforcement will be encouraged to seek, and should be generously offered, the technical assistance necessary to implement an effective IP system.

The world-wide health and safety problem with counterfeit goods has many battlefronts. Adequate training must be provided to law enforcement, customs and boarder guards, judges and lawyers, as well as policy makers. Though, as mentioned above, the enforcement of IP is but one issue in utilizing IP to foster sustainable economic growth. Expert technical assistance must be provided at the earliest instance in order to build an appropriate, sufficient and effective IP infrastructure in developing countries.

Technical assistance is paramount if developing countries are to build appropriate IP systems that offer adequate protection for innovations and investments. Where there is political will, there may be limited resources and expertise to implement effective intellectual property regimes that would protect the rights of innovators within that country as well as promote foreign investment. Often, targeted technical assistance programs funded through foreign assistance agencies can offer the tools, expertise and resources to assist these countries in building a solid institutional foundation equipped with the necessary expertise to confront the challenges faced by these growing economies.

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<sup>11</sup> Tope Akinwade, “Lethal ‘Cures’ Plague Africa,” *World Press Review* 51, no. 2 (February 2004). *See also*, William Burns, WHO Launches Taskforce to Fight Counterfeit Drugs, *Bulletin of the World Health Organization*, Vol. 84, No. 9, September 2006, 685-764. Accessed at <http://www.who.int/bulletin/volumes/84/9/06-010906/en/index.html>, last visited 05 October 2006.

<sup>12</sup> *Id.*

### **Proposed IP-based Criteria**

According to MCC publications, the MCC looks at several elements in creating selection indicators. In assessing new indicators, the MCC favors those that: (1) are developed by an independent third party, (2) utilize objective and high-quality data, (3) are analytically rigorous and publicly available, (4) have broad country-coverage and are comparable across countries, (5) have a clear theoretical or empirical link to economic growth and poverty reduction, (6) are policy-linked, i.e. measure factors that governments can influence within a two to three year horizon, and (7) have broad consistency in results from year to year.

It is not necessary at this time to specify where the MCC should turn to measure a country's IP system, but IIPi does encourage the MCC to call for the submittals of comments and proposals from interested parties in order to identify a valid, consistent and effective measurement of a country's intellectual property system.

With the incentive to strengthen IP systems and the funds available to do so from the MCC, developing countries will be in the best position to benefit from a healthy and strong intellectual property system. Therefore, the International Intellectual Property Institute proposes that an IP component be added to the country selection criteria.

Sincerely,

A handwritten signature in black ink that reads "Bruce A. Lehman". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Bruce A. Lehman  
Chairman, IIPi