



FIGHTING HARMFUL COUNTERFEIT PRODUCTS IN CAMBODIA: CHALLENGES AND RECOMMENDATIONS



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CONTENT

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III- RECOMMENDATIONS

PRELIMINARY REMARKS

- OBJECTIVES
 - FOCUS ON “**HARMFUL PRODUCTS**”- INCLUDE BOTH COUNTERFEIT AND SUBSTANDARD PRODUCTS
 - IP AND NON-IP LEGISLATIVE FRAMEWORK
 - ACTORS OF ENFORCEMENT
 - LOOK AT CASES STUDIES
 - IDENTIFY AREAS WHERE FURTHER IMPROVEMENTS ARE NEEDED
 - PROVIDE RECOMMENDATIONS
- STUDY & METHODOLOGY OF STUDY

FINDINGS

- **ECONOMICAL, SOCIAL, NATURAL AND LEGAL CHALLENGES**

ECONOMICAL CHALLENGES

67.9% OF LABOR FORCE EMPLOYED IN THE AGRICULTURE SECTOR, WHICH CONTRIBUTES TO 29% OF THE GDP

19.5% IN SERVICE SECTOR (EXCLUDING TOURISM INDUSTRY) ACCOUNTS FOR 41%.

12.7% IN THE INDUSTRY SECTOR CONTRIBUTES TO 30%

IMPRESSIVE ECONOMIC GROWTH BUT A PRESSING NEED TO DIVERSIFY THE ECONOMY TO ENABLE THE RURAL POOR TO CONTRIBUTE TO, AND BENEFIT FROM, IT

FINDINGS

SOCIAL CHALLENGES (1/2)

REDUCTION OF SOCIAL INEQUALITIES, ESPECIALLY BETWEEN THE URBAN AND RURAL POPULATIONS

68.2% OF CAMBODIANS LIVED IN 2008 ON LESS THAN 2 US\$ PER DAY

COMPREHENSIVE REFORM AGENDA AIMED AT ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS (MDGs), EMBEDDED IN NATIONAL STRATEGIC DEVELOPMENT PLAN (NSDP) 2006–2010.

KEY PRIORITIES ARE: EDUCATION, MATERNAL HEALTH, ENVIRONMENTAL SUSTAINABILITY, CHILD MORTALITY REDUCTION, HIV/AIDS COMBAT AND PREVENTION, MALARIA, AND OTHER DISEASES.

FINDINGS

SOCIAL CHALLENGES (2/2)

LINK BETWEEN POVERTY AND COUNTERFEIT/SUBSTANDARD PRODUCTS.

EXAMPLE FOR PHARMACEUTICALS

ACCESS TO MEDICINES

AWARENESS AND SELF-MEDICATION

INFRASTRUCTURE DEVELOPMENT

REGULATION

ENFORCEMENT

FINDINGS

NATURAL CHALLENGES: PRESERVING BIODIVERSITY

80% OF CAMBODIANS DEPEND ON NATURAL RESOURCES FOR
SUBSISTENCE AND INCOME

DEFORESTATION AND “BIO-PIRACY” PROBLEMS PROMPTED
CAMBODIA TO JOIN THE CONVENTION ON BIOLOGICAL DIVERSITY
(CBD) IN FEBRUARY 1995.

THE LAW ON PLANT VARIETY PROTECTION WAS ENACTED BY
THE CAMBODIAN GOVERNMENT IN 2008 AS A RESULT.

CAMBODIA HAS ALSO RATIFIED THE ASEAN FRAMEWORK
AGREEMENT ON ACCESS TO BIOLOGICAL AND GENETIC
RESOURCES.

FINDINGS

LEGAL CHALLENGES (1/2)

LEGAL TRANSPLANTATION/INTERPRETATION STRUGGLE

- CRIMINAL CODE AND THE CODE OF CRIMINAL PROCEDURE (FR+USA)
- CAMBODIAN CODE OF CIVIL PROCEDURE 2006 (JP)
- IP LAWS (WIPO)

DRAFT, ENACT AND ENFORCE

- SHORTAGE OF LEGAL EXPERTISE (EX: PATENT AGENTS);
- LACK OF AWARENESS/UNDERSTANDING ON HOW TO APPLY THE LAW;
- CLARITY OF SANCTIONS, PENALTIES AND REMEDIES;
- LACK OF RESOURCES OR OVERLAP OF AUTHORITY AMONG ENFORCEMENT AGENCIES; AND
- COMPATIBILITY, INCONSISTENCY OR REDUNDANCY ISSUES WITH OTHER LEGISLATIONS WHICH NEED TO BE AMENDED.

FINDINGS

LEGAL CHALLENGES (2/2)

CORRUPTION

- TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX 2010 CAMBODIA'S RANKING 154 OUT OF 178 COUNTRIES (THAILAND AND VIETNAM RANKED 78 AND 116)
- UNDERMINES INVESTORS' CONFIDENCE
- OBSTACLE TO ENFORCEMENT (NON ONLY IP BUT ALSO PRODUCT QUALITY LAW)
- 25,000 OFFICIALS WERE REQUIRED BY APRIL 2011 TO DISCLOSE ASSETS HELD OR FACE A FINE OF \$500 AND UP TO ONE YEAR'S IMPRISONMENT YEAR IN JAIL...

SMUGGLING

- IMPORTS AND TRANSIT

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (1/8)

MEDICINES

ANTIMALARIAL TREATMENT: ARTESUNATE, QUININE, CHLOROQUINE AND MEFLOQUINE

ANTIBIOTICS: AMPICILLIN, AMOXICILLIN, CHLORAMPHENICOL, PENICILLINS, AND TETRACYCLINE

EX: INTERPOL STUDY 2006-2007

498 DRUG OUTLETS/451 DRUG SAMPLES MONITORED:

79% OF DRUGS NOT REGISTERED

27% SUBSTANDARD/COUNTERFEIT AMONG THESE UNREGISTERED DRUGS

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (2/8)

MEDICINES

- IMPLEMENTATION OF GOOD MANUFACTURING PROCEDURES (GMP)
- POLICY OF PRE-PACKAGED MEDICINES
- DECREASE BY 65% OF ILLEGAL PHARMACIES AND STRONG DECREASE OF UNREGISTERED DRUGS
- AWARENESS (MINISTRY OF HEALTH CAMPAIGN)
- PUBLIC DESTRUCTIONS

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (3/8)

MEDICINES

DECEMBER 2010, 13 TONS OF COUNTERFEIT PRODUCTS INCLUDING PHARMACEUTICALS, COSMETICS AND FOODSTUFFS WERE SEIZED AND DESTROYED.

SEVEN TONS OF FAKE CHINESE MEDICINE, 15 BOXES OF FAKE JOHNNIE WALKER, 58 BOXES OF FAKE FERMENTED MILK, 170 KILOGRAMS OF FAKE SOAP AND MORE THAN 80,000 CD AND DVD DISKS WERE PUBLICLY DESTROYED.

JANUARY 2011, 22 TONS OF COUNTERFEIT MEDICINES WERE SEIZED AND DESTROYED ON 25 JANUARY 2011.

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (4/8)



Pictures courtesy of FSP Mekong

<p>VKP Pharmaceutical Co., Ltd. Thailand</p> 	<p>Fu Li Pharmaceutical Co., Ltd. China</p>  <p>AMPIMEX Capsule SP 500mg Manufactured by: Fu Li Pharmaceutical Co., Ltd. China</p> <p>AMOXYMEX Capsule SP 500mg Manufactured by: Fu Li Pharmaceutical Co., Ltd. China</p> <p>1-Name: AMPIMEX-500mg 2-Code:050/09Q5/GFR6/RTK 3-Lot N:20081105 4-Mfg: Fu Li Pharmaceutical (China) 5-Mfg date: 11/08 , Exp:10/10 6-Result: failed API (00%)</p>
<p>Shen Wei Pharmaceutical Co., Ltd. China</p>  <p>AMPICILLIN Capsule SP 500mg Manufactured by: Shen Wei Pharmaceutical Co., Ltd. China</p> <p>AMOXICILLIN Capsule SP 500mg Manufactured by: Shen Wei Pharmaceutical Co., Ltd. China</p>	<p>SG. Pharmaceutical. China</p>  <p>1-Name: AMOXICILLIN Capsules B.P. 500mg 2-Code:102/09Q7/GFR6/PVH 3-Lot N: 20081225 4- Register No : NO 5-Manufacturer: S.G. Pharmaceutical. China 6-Mfg date: N/A, Exp:11/2011 7-Result: API 67.52mg (13.50%)</p>
<p>China Southern Da Zhong Pharmaceutical Co., Ltd. China</p>  <p>AMPICILLIN Capsule SP 500mg</p>	 <p>1-Name: Ampicillin Capsules BP 500mg 2-Code:078/09Q7/GFR6/PVH 3-Lot N: 20081226 4-Register No : NO 5-Manufacturer: S.G. Pharmaceutical. China 6-Mfg date: N/A, Exp:11/2011 7-Result: API 00mg (00%)</p>

Pictures courtesy of FSP Mekong

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (6/8)

COSMETICS

MARCH 2010, A 23-YEAR-OLD WOMAN DIED AFTER USING A SKIN-WHITENING CREAM THAT CONTAINED HIGH LEVELS OF MERCURY.

SEVEN TONS OF COUNTERFEIT BEAUTY PRODUCTS WERE ALSO SEIZED IN OCTOBER 2010 IN RUSSEI KEO IN THE OUTSKIRTS OF PHNOM. CAMBODIAN BRANDS OF SOAP, LOTIONS, POWDERS AND COSMETICS INVOLVED ABOUT 15 BRANDS.

FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (7/8)

ALCOHOL

MARCH 2010, 700 BOTTLES OF FAKE JOHNNIE WALKER WHISKEY WERE SEIZED. THE BOTTLES WERE APPARENTLY REFILLED WITH UNDISCLOSED ALCOHOL LEVEL BOOSTING PRODUCTS. IN SIMILAR CASES THE CONTENTS WERE FOUND TO BE HIGHLY DANGEROUS TO HEALTH.

Courtesy of FSP Mekong-
Public Destruction December 6, 2011



FINDINGS

- THE CHALLENGE OF COUNTERFEIT/SUBSTANDARD HARMFUL PRODUCTS (8/8)

OTHERS

COUNTERFEIT CAR AND MOTORCYCLE SPARE PARTS,
CONFECTIONARY, MOBILE PHONES, PRINTER COMPONENTS,
ELECTRICAL APPLIANCE THAT CAN CAUSE SHORTCUTS, TOYS
CONTAINING LEAD OR DANGEROUS CHEMICALS AND BATTERIES.

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (1/9)

- INTERNATIONAL AGREEMENTS

- WIPO CONVENTION SINCE JULY 25, 1995;
- PARIS CONVENTION SINCE SEPTEMBER 22, 1998;
- THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY RIGHTS SINCE 1998;
- WTO AND TRIPS AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS SINCE 2004;
- CONVENTION ON BIOLOGICAL DIVERSITY OF 1992;
- PARTICIPANT OF THE ASEAN FRAMEWORK AGREEMENT ON INTELLECTUAL PROPERTY COOPERATION SINCE APRIL 30, 1999;
- ASEAN FRAMEWORK AGREEMENT ON ACCESS TO BIOLOGICAL AND GENETIC RESOURCES; AND
- CONCLUDED BILATERAL AGREEMENTS ON INTELLECTUAL PROPERTY PROTECTION AND COOPERATION WITH THAILAND AND THE UNITED STATES OF AMERICA.
- AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF CAMBODIA ON TRADE RELATIONS AND IPRS PROTECTION, OCTOBER 25, 1996.¹⁸

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (2/9)

IN ADDITION, CAMBODIA ANTICIPATES THE FOLLOWING:

- PLANNED ADHERENCE TO THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT);
- CONSIDERATION OF MEMBERSHIP IN THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV);
- BECOMING A PARTY TO THE BERNE CONVENTION AFTER THE ENACTMENT OF THE LAW ON COPYRIGHT AND RELATED RIGHTS; AND
- BECOMING A PARTY TO THE PATENT COOPERATION TREATY UPON ENACTMENT OF THE LAW ON PATENTS, UTILITY MODELS AND INDUSTRIAL DESIGNS.

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (3/9)

NATIONAL LAWS: IP LAWS

- **LAW CONCERNING MARKS, TRADE NAMES AND ACTS OF UNFAIR COMPETITION** OF THE KINGDOM PROMULGATED ON FEBRUARY 7, 2002 AND SUPPORTED BY A SUB-DECREE FOR IMPLEMENTING TRADEMARK LAW ADOPTED ON JULY 12, 2006;
- **LAW ON PATENTS, UTILITY MODELS CERTIFICATES AND INDUSTRIAL DESIGNS** OF JANUARY 22 , 2003, SUPPLEMENTED ON JUNE 29, 2006 BY PRAKAS (DECREE) No. 706 ON PROCEDURE GRANTING PATENT AND UTILITY MODEL CERTIFICATES; AND
- **THE LAW ON COPYRIGHT AND RELATED RIGHTS** - (ADMINISTRATIVE, CIVIL AND CRIMINAL PROCEDURE) OF JANUARY 21, 2003 & THE COPYRIGHT AND RELATED RIGHTS REGULATION No. 2498 OF SEPTEMBER 27, 2003

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (4/9)

NATIONAL LAWS: IP LAWS

- THE LAW ON PLANT VARIETY PROTECTION INCLUDING BREEDER RIGHT PROTECTION PROMULGATED ON MAY 13, 2008;
- THE LAW ON TRADITIONAL CULTURAL EXPRESSIONS 1996;
- LAW OF NATIONAL ASSEMBLY OF MAY 17, 2005 ON COMMERCIAL ENTERPRISE; AND
- THE PRAKAS No. 105 MOC/ SM2009, ON MAY 18, 2009 ON GEOGRAPHICAL INDICATION, WHICH RECEIVED STRONG SUPPORT FROM FRENCH AND AMERICAN EXPERTS.

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (5/9)

NATIONAL LAWS: NON-IP LEGISLATION

- CIVIL AND CIVIL PROCEDURE CODE;
- CRIMINAL AND CRIMINAL PROCEDURE CODE;
- LAW ON CUSTOMS OF THE KINGDOM OF CAMBODIA DATED 20 JULY 2007;
- LAW ON THE MANAGEMENT OF PHARMACEUTICAL PRODUCTS OF MAY 9, 1996;
- THE LAW ON THE MANAGEMENT OF QUALITY AND SAFETY OF PRODUCTS AND SERVICES (LMQSPS) (N0 0600/001) WAS APPROVED ON JUNE 21, 2000;
- THE FOOD SAFETY OF AGRICULTURAL PRODUCTS ACT, NUMBER 334, 7 AUGUST 2007;

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (6/9)

NATIONAL LAWS: **NON-IP LEGISLATION**

- THE PRAKAS No. 1045 OF MINISTRY OF INDUSTRY, MINES AND ENERGY ON CAMBODIAN STANDARD CS 001-2000 RELATED TO FOOD PRODUCT LABELS;
- STANDARD OF AGRICULTURE PRODUCTS (SAP); AND
- CERTIFICATION AND CAMBODIAN LAW ON ORGANIC AGRICULTURE (CCL).

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (7/9)

NATIONAL LAWS (ACRONYMS)

TML: Trade Mark Law

PL: Patent Law

CPL: Copyright Law

GID: Geographical Indication Decree

LMPP: Law on the Management of Pharmaceutical Products

LMQSPS: Law on The Management of Quality and Safety of Products and Services

CL: Customs Law

CCL: Certification and Cambodian Law on Organic Agriculture

SAP: Standard of Agriculture Products

FSPA: Food Safety of Agricultural Products Act

ISC: Industrial Standards of Cambodia

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (8/9)

TYPE OF PRODUCTS	HEALTH RISKS	APPLICABLE IP LAWS	APPLICABLE NON-IP LAWS
Counterfeit pharmaceuticals	Ineffective treatment, illness, drug resistance, death.	TML, PL, CL	LMPP
Counterfeit food and drink	Illness, intoxication due to dangerous substances (methylated spirits in counterfeit vodka anti-freeze in alcoholic sodas).	TM, CL, GID	LMQSPS, SAP, CCL, FSPA
Counterfeit auto parts	Spare parts made of substandard materials without safety testing can lead to mechanical failure (tyres, brakes etc.).	TM, PL, CL	
Counterfeit electrical goods	Lack of safety features and prematurely failing can cause injury.	TM, PL, CL	ISC

FINDINGS

- OVERVIEW OF LEGISLATIVE FRAMEWORK (9/9)

Counterfeit phones and batteries	Battery cells made with inadequate vent mechanisms are prone to violent explosions. High levels of mercury can result in overexposure , causing learning disabilities, impair kidney and immune functions and, and loss of sight and hearing.	TM, PL, CL	
Counterfeit toys	Small sharp breakable parts pose a choking hazard and banned toxic paints and dyes containing lead are often found. Children are especially vulnerable.	TM, PL, CL	
Personal care products	Allergies and toxic response from residual industrial solvents and carcinogens. Products of this category include those consumed orally and topically.	TM, PL, CL	LMQSPS
Counterfeit cigarettes	Poisoning from inhalation of paper bits saturated with chemicals or tobacco with banned preservatives or pesticides. The counterfeit production and distribution entirely generates enormous profits by bypassing regulatory and taxation systems.	TM, PL, CL	LMQSPS

FINDINGS

- OVERVIEW EXPOSITION OF RELEVANT LAWS AND ASSESSMENT OF AVAILABLE ACTIONS TO COMBAT HARMFUL COUNTERFEIT PRODUCTS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION: GENERAL COMMENTS

+DIP

+TRIPS COMPLIANT

+ WELL-KNOWN MARK PROTECTION

+3D-MARKS

+COLLECTIVE MARKS (BUT NOT CERTIFICATION MARKS)

FINDINGS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION: GENERAL COMMENTS

ADMINISTRATIVE ACTIONS

- INVALIDATION, REMOVAL AND CANCELLATION PROCEDURES
- RAID ACTION BY DIP (EX-OFFICIO IF CLEAR EVIDENCE AND COMPLAINT-BASED USUALLY USED TO SPUR NEGOTIATION)
- BORDER ACTIONS (EX-OFFICIO –RARE- AND COMPLAINT BASED FOR CLEAR CUT CASES OF IDENTICAL MARK-CASES ANYONE?)



Pictures courtesy of Mr. ~~Fabrice Mattei~~

FINDINGS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION: GENERAL COMMENTS

JUDICIAL ACTIONS

- CIVIL ACTIONS:

CIVIL COURT OF FIRST INSTANCE: POSSIBILITY OF PRELIMINARY INJUNCTIONS, MONETARY DAMAGES/FINAL INJUNCTIONS.

CHALLENGE 1: NO SPECIALIZED COURT (THAILAND, MALAYSIA, INDONESIA, PHILIPPINES) FUTURE COMMERCIAL COURT WILL GREATLY HELP.

CHALLENGE 2 : JUDGES' PERSUASIVE ATTEMPTS TO SETTLE CASES
ARTICLE 97 AND 104 OF CIVIL PROCEDURE CODE

CHALLENGE 3: TRADEMARK LAW DOES NOT SPECIFY HOW DAMAGES ARE CALCULATED

CHALLENGE 4: LENGTH OF PROCEDURE (18-24 MONTHS)

FINDINGS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION

- CRIMINAL ACTION:

FINES

IMITATION: 5,000,000 TO 10,000,000 RIELS (USD\$1,250 TO \$2,500), 1 MONTH TO 1 YEAR IMPRISONMENT, OR BOTH. TML, ARTICLE 65.

COUNTERFEITING: 1,000,000 TO 20,000,000 RIELS (USD\$250 TO \$5,000), 1 TO 5 YEARS' IMPRISONMENT, OR BOTH. TML, ARTICLE 64.

REPEAT OFFENDERS ARE SUBJECT TO UP TO DOUBLE THESE PENALTIES. TML, ARTICLE 67

FINDINGS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION

-CRIMINAL ACTION: CHALLENGES

-CHALLENGE 1: ARTICLE 66 OF TRADEMARK LAW: REQUIREMENT OF WILLFUL INFRINGEMENT: TM OWNER MUST FIRST NOTIFY THE ALLEGED INFRINGER AND ALLOW TIME FOR THE ALLEGED INFRINGER TO RESPOND. ONLY IF THE INFRINGER THEN CONTINUES TO COPY THE TRADEMARK CAN A WILFUL INFRINGEMENT CLAIM BE BROUGHT. FORTUNATELY, THIS LIMITATION DOES NOT APPLY TO ENFORCEMENT ACTIONS ENGAGED AGAINST MANUFACTURERS.

-CHALLENGE 2: LENIENCY
UNDERMINES DETERRENCE

- CHALLENGE 3: INSIGNIFICANT DEFENDANTS
SUBSTITUTIONS SHALL BE STRICTLY PROHIBITED

- CHALLENGE 4: RESISTANCE TO SEIZE GOODS EXPORTED FROM CAMBODIA

FINDINGS

TRADEMARK AND UNFAIR COMPETITION LEGISLATION

CRIMINAL ACTION: CHALLENGES

- CHALLENGE 5: NOMINAL SENTENCES AND LACK OF FINES AND DAMAGES

CALCULATION GUIDELINES

RESULT IN INCONSISTENCIES IN APPLICATIONS OF PENALTIES.

SOME OFFENDERS MAY THEN VIEW CRIMINAL SENTENCING AS IN NON-DETERRENT

- CHALLENGE 6: PRODUCT SPECIFICATION

FINDINGS

PATENT LEGISLATION

- ADMINISTERED BY MINE (NOT DIP)

- ADMINISTRATIVE ACTIONS:

NO CANCELLATION PROCEDURE ONLY INVALIDATION AFTER GRANT AND IN FRONT OF COURT= NEED FOR TRAINING OF JUDGES.

EX-OFFICIO SEIZURES/RAIDS NOT REPORTED. RIGHT HOLDERS USUALLY ACT ON BASIS OF CRIMINAL TRADEMARK INFRINGEMENT RATHER THAN PATENT INFRINGEMENT.

-CIVIL ACTIONS:

A CIVIL INFRINGEMENT SUIT MAY BE BROUGHT BY BOTH THE PATENT OWNER OR BY A LICENSEE. THE COURT HAS WIDE DISCRETION TO AWARD MONETARY DAMAGES AND ORDER INJUNCTIVE RELIEF. WE ARE NOT AWARE OF ANY CIVIL ACTION BROUGHT IN CAMBODIA ON THE GROUNDS OF PRODUCT PATENT INFRINGEMENT

FINDINGS

PATENT LEGISLATION

-CRIMINAL ACTIONS:

CHALLENGE 1: BURDEN OF PROOF REQUIRED IN CRIMINAL PROSECUTION OF PATENT INFRINGEMENT IS PROHIBITIVELY HIGH:

*Article 133 “any person who **knowingly** performs an act which constitutes an infringement as defined in Article 125 of this Law hereof shall be guilty of an offence punishable by a fine from five million (5,000,000) Riels to twenty million (20,000,000) Riels or by imprisonment from one (1) year to five (5) years, or by both. The maximum penalty for a repeated offence committed within five (5) years from the date of conviction for similar offence, shall be doubled in both of fine and imprisonment.*

IF YOU NEED TO NOTIFY YOUR RIGHTS PRIOR TO TAKE ACTION NO COPIES WILL EVER BE SEIZED.

CHALLENGE 2: DISCRETION

EVEN IF THE ALLEGED INFRINGER IS FOUND GUILTY, THERE IS NO GUARANTEE THAT GOODS INFRINGING A PROTECTED PATENT WILL BE SEIZED. ARTICLE 134 OF THE PATENT LAW GIVES THE COURT DISCRETION TO ORDER SEIZURE, STATING THAT THE COURT “MAY” ORDER THE SEIZURE OF THE COUNTERFEIT GOODS.

	TRADE MARK LAW	PATENT LAW
PRODUCTION OF COUNTERFEIT GOODS	Article 64, Whoever counterfeits a trademark, service mark, collective mark or trade name registered under Article 11.(b), in the Kingdom of Cambodia by another enterprise shall be liable to a fine of from one to twenty million Riels, or to imprisonment from one to five years, or both	Article 133, any person who knowingly performs an act which constitutes an infringement as defined in Article 125 of this Law hereof shall be guilty of an offence punishable by a fine from five million (5,000,000) Riels to twenty million (20,000,000) Riels or by imprisonment from one (1) year to five (5) years, or by both. The maximum penalty for a repeated offence committed with in five (5) years from the date of conviction for similar offence, shall be doubled in both of fine and imprisonment.
DISTRIBUTION OF COUNTERFEIT GOODS	Article 66, Whoever wilfully imports, sells, offers for sale or has for the purpose of sale goods bearing a counterfeit mark, under Article 64, shall be liable to the penalties provided in that Article. Whoever wilfully import, sells, offers for sale or has for the purpose of sale goods bearing an imitated mark under Article 65, shall be liable to the penalties provided in that Article.	Article 133, any person who knowingly performs an act which constitutes an infringement as defined in Article 125 of this Law hereof shall be guilty of an offence punishable by a fine from five million (5,000,000) Riels to twenty million (20,000,000) Riels or by imprisonment from one (1) year to five (5) years, or by both. The maximum penalty for a repeated offence committed with in five (5) years from the date of conviction for similar offence, shall be doubled in both of fine and imprisonment.

FINDINGS

PATENT LEGISLATION

-CRIMINAL ACTIONS:

CHALLENGE 2: COURT DISCRETION REGARDING SEIZURES

EVEN IF THE ALLEGED INFRINGER IS FOUND GUILTY, THERE IS NO GUARANTEE THAT GOODS INFRINGING A PROTECTED PATENT WILL BE SEIZED. ARTICLE 134 OF THE PATENT LAW GIVES THE COURT DISCRETION TO ORDER SEIZURE, STATING THAT THE COURT “MAY” ORDER THE SEIZURE OF THE COUNTERFEIT GOODS.

CHALLENGE 3: REPAIRED AND REFURBISHED PRODUCTS

ARTICLE 44(I) OF THE PATENT LAW PROVIDES:

“The rights under the patent shall not extend to **acts** in respect of **articles** which have been **put on the market** in the Kingdom of Cambodia or outside the Kingdom of Cambodia by the owner of the patent or with his consent.”

WHAT ARE THE “ACTS”? (USING, DISTRIBUTING, IMPORTING, OFFERING FOR SALE?)

WHAT ARE THE “ARTICLES”? (ORIGINAL PRODUCTS? MODIFIED PRODUCTS?)

FINDINGS

PATENT LEGISLATION

-CRIMINAL ACTIONS:

CHALLENGE 3: SAME FINES AS FOR TM INFRINGEMENT ALTHOUGH REGISTERING PATENTS INCUR HIGHER RESEARCH AND DEVELOPMENT COSTS.

FURTHERMORE, THE INFRINGEMENT OF A PATENT (I.E PHARMACEUTICAL PRODUCT, MACHINERY ETC) FREQUENTLY EXPOSES USERS TO HIGHER RISK THAT THE INFRINGEMENT OF A MARK.

FINDINGS

COPYRIGHT LEGISLATION

- REGISTRATION WITH MCFA-NOT COMPULSORY BUT RECOMMENDED:

CHALLENGE 1: NO LIABILITY FOR DISTRIBUTION OF ILLEGAL COPIES-ONLY PRODUCTION, REPRODUCTION, PERFORMANCE OR COMMUNICATION TO THE PUBLIC.

CHALLENGES 2: NO RULES FOR CALCULATION OF DAMAGES

CHALLENGE 3: DISCRETION REGARDING DESTRUCTION OF PRODUCTS

GEOGRAPHICAL INDICATIONS PRAKAS NO. 105 AND DRAFT GI LAW

PROTECTION AGAINST DIRECT OR INDIRECT COMMERCIAL USE OF REGISTERED GI
MISUSE, IMITATION, EVOCATION
FALSE INDICATION

FINDINGS

NON-IP SPECIFIC LEGISLATION

-THE LAW ON MANAGEMENT OF PHARMACEUTICAL PRODUCTS (PHARMACEUTICAL LAW)

ARTICLE 8 REGULATES THE OPERATION OF PHARMACIES AND THE PRODUCTION, IMPORTATION, EXPORTATION AND TRADE OF PHARMACEUTICAL PRODUCTS AS FOLLOWS:

*“1- Authorization from the Ministry of Health is required for: the opening, closing or changing of location of **pharmacies**, pharmaceutical import-export companies and pharmaceutical manufacturing establishments, the businesses of importing, exporting of pharmaceuticals, the importation, exportation and storage of pharmaceuticals and raw materials for the production of pharmaceuticals, the advertisement of pharmaceuticals.*

*2- The **production, import, export and trade** of pharmaceuticals for the veterinary, shall be determined by a joint prakas (joint proclamation) of the Ministry of Health and the Ministry of Agriculture, Fishery and Forestry.*

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FINDINGS

NON-IP SPECIFIC LEGISLATION

-THE LAW ON MANAGEMENT OF PHARMACEUTICAL PRODUCTS (PHARMACEUTICAL LAW)

CHAPTER X OF THE PHARMACEUTICAL LAW PROVIDES PENALTIES FOR VIOLATIONS OF THE PROCEDURE AND CONDITIONS FOR THE PRODUCTION, IMPORT, EXPORT AND TRADE OF PHARMACEUTICAL, PUNISHMENTS FOR THE ADVERTISING OF PHARMACEUTICALS WITHOUT AUTHORISATION, COUNTERFEIT PHARMACEUTICAL IN ITS ARTICLES 10 AND 12 AS FOLLOWS:

“[Violators] shall be subjected to penalty to a fine from 20,000,000 (twenty million) to 50,000,000 (fifty million) Riels or to punishment to imprisonment from five (5) years to ten (10) years or, to both of the punishments, for any person who deliberately engaged in producing, importing, exporting or trading of pharmaceutical containing addictive substances without authorization, counterfeit pharmaceutical, pharmaceutical of damaged quality or out of delay which affected to the health or lives of the consumers.”

FINDINGS

NON-IP SPECIFIC LEGISLATION

-LAW ON THE MANAGEMENT OF QUALITY AND SAFETY OF PRODUCTS (QUALITY AND SAFETY LAW)

THE QUALITY AND SAFETY LAW APPLIES TO ALL COMMERCIAL ENTERPRISES, ALL MANUFACTURING FOR COMMERCIAL PURPOSES, IMPORTERS, EXPORTERS AND MERCHANTS, SERVICE PROVIDERS, ADVERTISERS OF PRODUCTS, GOODS, SERVICES ESPECIALLY REGARDING THE INSPECTION PROCEDURES AND BORDER CONTROL FOR QUALITY AND SAFETY OF PRODUCTS, GOODS AND SERVICES.

THE QUALITY AND SAFETY LAW HAS BEEN ENHANCED WITH THE FOLLOWING REGULATIONS:

Prakas No. 335 (MOC) requires expiry dates to be fixed on food products;
Prakas No. 329 (MOC) bans consumer products without appropriate trademark or label; and
Prakas No. 963 (MIME) requires that products be registered with MIME with proper product labeling.

FINDINGS

NON-IP SPECIFIC LEGISLATION

-LAW ON THE MANAGEMENT OF QUALITY AND SAFETY OF PRODUCTS (QUALITY AND SAFETY LAW)

THE MANUFACTURING AND COMMERCIALIZATION OF PRODUCTS, GOODS, OR SERVICES COULD HARM THE HEALTH OR SAFETY OF CONSUMERS MUST RECEIVE PRIOR AUTHORIZATION FROM RELEVANT INSTITUTIONS AND AGENCIES FOR THE PARTICULAR TYPE OF PRODUCTS, GOODS, OR SERVICES. IF AUTHORIZED, THE PRODUCTS, GOODS, OR SERVICES ARE DULY INSPECTED AND AN INDICATION OF USAGE GUIDELINES IN KHMER LANGUAGE IS APPROVED.

ADDITIONALLY, THE QUALITY AND SAFETY LAW EXPLICITLY, STRICTLY PROHIBITS THE PRODUCTION OR PLACEMENT INTO THE STREAM OF COMMERCE OF PRODUCTS, GOODS, OR SERVICES WITHOUT PRIOR AUTHORIZATION FROM APPLICABLE, COMPETENT INSTITUTIONS AND AGENCIES.

FINDINGS

NON-IP SPECIFIC LEGISLATION

-LAW ON THE MANAGEMENT OF QUALITY AND SAFETY OF PRODUCTS (QUALITY AND SAFETY LAW)

KEY PROVISIONS OF THE QUALITY AND SAFETY LAW ENUMERATE **ON REQUIREMENTS FOR THE INSPECTION OF PRODUCTS SAMPLES, INSPECTION AND DETERMINATION OF THE IDENTITY OF THE GOODS**, THE INSPECTION OF SOURCE AND CHARACTERISTICS OF THE PRODUCTS, PRODUCT SEAL AND LABEL REQUIREMENTS, MEASURES OF PREVENTION FOR SUSPECTED BATCHES OF PRODUCTS AND GOODS, AND CRITERIA FOR INSPECTION OF GOODS AND PRODUCTS.;

ARTICLE 62, CHAPTER XX OF THE QUALITY AND SAFETY LAW PROVIDES A PENALTY OF 6 DAYS' TO ONE MONTHS' IMPRISONMENT AND/OR A FINE OF **1,000,000 TO 5,000,000 RIELS** FOR VIOLATING THE FOLLOWING PROVISIONS OF THE ACT:

ARTICLE 7: *"IT SHALL BE STRICTLY PROHIBITED TO PRODUCE OR PLACE INTO THE STREAM OF COMMERCE PRODUCTS, GOODS, OR SERVICES ABOVE MENTIONED IN ARTICLE 6 OF THIS LAW WHEN NO PRIOR DISCLOSURE HAS BEEN MADE OR NO PRIOR AUTHORIZATION HAS BEEN ISSUED BY THE COMPETENT INSTITUTIONS"*.

ARTICLE 6 STATES: *"WHEN THE PRODUCTS, GOODS, OR SERVICES COULD HARM THE HEALTH OR SAFETY OF CONSUMERS, THEIR MANUFACTURING AND COMMERCIALIZATION SHALL BE SUBJECT TO A PRIOR SUBMISSION OF A DECLARATION TO THE COMPETENT INSTITUTIONS AND HAVE A PRIOR AUTHORIZATION BY THE COMPETENT INSTITUTIONS FOLLOWING AN INSPECTION AND AN INDICATION OF USAGE GUIDELINES IN KHMER LANGUAGE"*.

FINDINGS

NON-IP SPECIFIC LEGISLATION

-LAW ON THE MANAGEMENT OF QUALITY AND SAFETY OF PRODUCTS (QUALITY AND SAFETY LAW)

-LACK OF ENFORCEMENT

THERE IS A REAL PROBLEM REGARDING THE ENFORCEMENT OF THE QUALITY AND SAFETY LAW AS WIDELY REPORTED IN THE CAMBODIAN PRESS

RECOMMENDATIONS

AMENDMENTS

EXISTING IP LAWS CAN BE FURTHER PERFECTED IN OUR OPINION BY ADDRESSING THE FOLLOWING ISSUES:

- **AMENDING ARTICLES OF THE TRADEMARK LAW AND PATENT LAW REQUIRING “WILLFUL” INFRINGEMENT** (ARTICLES 66 OF TRADEMARK LAW AND 133 OF PATENT LAW);
- **DIFFERENTIATE LEVEL OF FINES BETWEEN TRADEMARK AND PATENT INFRINGEMENT** BY INCREASING THE FINES FOR PATENT INFRINGEMENT IN ORDER TO TAKE INTO ACCOUNT THE SUBSTANTIAL INVESTMENTS MADE BY PATENT OWNERS;
- **INCLUDE DAMAGE CALCULATION PROVISIONS** IN THE EXISTING TRADEMARK AND PATENT LAWS IN ORDER TO PROVIDE JUDGES WITH BETTER CLARITY AND TO INCREASE LEGAL CERTAINTY;
- **FORBID SITUATIONS WHERE THERE IS A DISCRETIONARY POWER** FOR DECIDING WHETHER COUNTERFEIT GOODS SHALL BE DESTROYED OR NOT AS THIS UNDERMINES ENFORCEMENT EFFORTS;
- **ADOPT SPECIFIC ANTI-CORRUPTION PROVISIONS** TO ADDRESS THE SITUATION WHEN CORRUPTION INVOLVES OFFICIALS IN CHARGE OF THE INSPECTION AND SEIZURE OF POTENTIALLY DANGEROUS PRODUCTS TO THE CONSUMER.

RECOMMENDATIONS

CONTINUE TRAINING

WHILE ALL THE RELEVANT LAWS IN CAMBODIA PROVIDE THAT EACH INTELLECTUAL PROPERTY AGENCIES IS RESPONSIBLE AND ABLE TO TAKE ACTION (*EX OFFICIO*) ON INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, IT IS THE LACK OF KNOWLEDGE AND KNOW-HOW OF THE OFFICIALS THAT HAVE PROHIBITED AN EFFECTIVE ENFORCEMENT EFFORT. IN MOST CASES, THE INTELLECTUAL PROPERTY OFFICIALS CLAIM THAT THEY CANNOT DISTINGUISH THE INFRINGED PRODUCTS FROM THE AUTHENTIC ONES, EVEN IN MOST OBVIOUS COUNTERFEITING CASES.

SPECIALIZED JUDGES AND COURT

IMPROVE COORDINATION BETWEEN AGENCIES

THERE IS A COORDINATION PROBLEM WHEN THERE ARE A NUMBER OF AGENCIES ENFORCING THE INTELLECTUAL PROPERTY LAWS AND REGULATIONS. THIS MAKES THE ENFORCEMENT PROCESS LONGER THAN IT SHOULD BE. EVEN THOUGH, THE CAMBODIAN GOVERNMENT HAS ESTABLISHED A COORDINATING COMMITTEE, THE COMMITTEE ON SUPPRESSION OF INTELLECTUAL PROPERTY INFRINGEMENT, THE ACTUAL IMPLEMENTATION OF THE LAWS IS STILL WITHOUT A CLEAR DIRECTION AND COORDINATION.

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INTELLECTUAL PROPERTY

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