



ONG Derechos Digitales es una organización no gubernamental cuya misión es promover la defensa y protección de los derechos fundamentales en el entorno tecnológico.

February 4th, 2010

Stanford K. McCoy
Assistant U.S. Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th St NW, Washington, DC 20006

Re: Special 301 Review
Docket no. USTR-2010-0037

Dear Mr. McCoy:

I am writing on behalf of the NGO Derechos Digitales, a Chilean nonprofit organization based in Santiago of Chile, with comments for the 2011 Special 301 Report.

NGO Derechos Digitales believes that Chile should not be included in the Priority Watch List any longer. Unfortunately, as it is explained in the attached memorandum, in previous years, Chile has been unfairly enrolled in that list, in spite of its notorious and progressive improvements and efforts by ratifying international instruments on intellectual property, by implementing them into domestic law, by updating its legal regime, and by enforcing the mentioned rights in both civil and criminal courts.

We expect that this year, unlike the previous one, the unfair qualification of Chile in the Priority Watch List will be remedy, by excluding Chile from that list and recognizing properly the enormous efforts already made by your commercial partner.

Sincerely,

Claudio Ruiz Gallardo
President
NGO Derechos Digitales

**Memorandum about the Inclusion of Chile
in the Priority Watch List by the 2010 Special Report 301**

Washington DC, February 3rd, 2011.

In 2010, and for the fourth consecutive year, the Special Report 301 included Chile in the Priority Watch List. In spite of being aware of Chile's efforts for increasing protection of intellectual property, the United States persists in including Chile in the Priority Watch List, which diminishes the image of the country, fails in recognizing its progress, and raises concern about the unfair treatment the U.S. gives to its commercial partner. In that context, this memorandum refutes the concerns raised by the 2010 Special Report 301 about Chile and, therefore, argues that this country should not be included in the Priority Watch List this year.

In recent years, Chile has taken positive steps to protect intellectual property systematically. In 2003, Chile signed the U.S.-Chile Free Trade Agreement (FTA) and the EU-Chile Association Agreement, both of which include provisions on intellectual property. In 2004, law that implemented international commitments on copyright entered into force. In 2005 and 2007, Chile adopted implementing law on patents. In 2008, Chile created a specific unit in the police to enforce intellectual property law. In 2009, Chile joined the Patent Cooperation Treaty, and both a modern national service –the Instituto Nacional de Propiedad Industrial– and a special court on industrial property began operating. In 2010, after three years of legislative debate, Chile modified its copyright law to facilitate enforcement by increasing punishment, providing judicial remedies, and setting forth a system of liability for Internet service providers in cases of online copyright infringement. In sum, Chile has worked hard to protect intellectual property by reinforcing its institutions, assuming international commitments, and modifying domestic law.

In spite of these efforts, Chile was included in the Priority Watch List by the 2010 Special Report 301. This Report sets forth four reasons to justify the inclusion of Chile in the mentioned list, which relate to: the implementation into domestic law of international commitments; the enforcement of intellectual property rights; the adherence to international instruments on the matter; and the protection of pharmaceutical products. It is necessary to explain with some detail each of these reasons, as discussed below.

Chile has properly implemented into domestic law its international commitments on intellectual property. The 2010 Special Report 301 reproached Chilean legislation for falling short of fully addressing its multilateral and bilateral commitments, and emphasized the supposed absence of protections against the circumvention of technological protection measures (TPMs). However, Chilean implementation of the international commitments into domestic law has fulfilled all its commitments. In fact, the very example given by the Report is inappropriate, because it ignores how our legal regime works and the actual commitment assumed by Chile in the FTA. First, although Chile does not have special provisions on TPMs, criminal and civil law provisions apply, including the Civil Code for compensating damages, the Law 19.223 and the Criminal Code for punishing illegal accesses and damages; therefore Chile does provide general protection for TPMs. Second, neither the WIPO Internet Treaties nor the U.S.-Chile FTA (article 17.7.5), unlike other FTAs signed by the U.S., requires specific legal measures or criminal punishment; therefore, even if unsatisfactory, particularly for consumers, Chile already provides protection for TPMs. Chile therefore has not fell short in implementing into its domestic law its international commitments.

Chile has strong criminal enforcement for intellectual property infringement. The second reproach of the 2010 Special Report 301 about Chile is precisely related to the actual enforcement of the intellectual property rights; the U.S. expresses concern with the relatively low rate of prosecutions and penalties applied for counterfeiting and piracy in Chile. This concern is groundless and, in fact, is totally rejected by the statistics of enforcement in the country. As a result of the recent reform to the criminal justice system and the creation of a specialized unit in the police dealing with

intellectual property infringement, enforcement has improved impressively. For example, according to data from the National Institute of Statistics, in 2006 there were only 20 judgments on intellectual property crimes, in 2007 those increased to 1652, and in 2008 there were 2487. Unlike previous years, there is also a close relation between the number of prosecutions and judgments. In addition, recent legal amendments have introduced mechanisms to make procedures even more effective, particularly in relation to online infringement, and adopted criminal sanctions even for nonprofit infringements. Therefore, concerns about enforcement are incorrect and show a lack of any analysis of reliable available data; in fact, the current problem is that Chile is becoming an extremely punitive environment when enforcing intellectual property rights.

Chile has made notable progress ratifying international instruments on intellectual property. The third reproach of the 2010 Special Report 301 for Chile is the lack of ratification of some international instruments on intellectual property. In 2009, Chile agreed to the Patent Cooperation Treaty; therefore, current complaints are limited to ratifying the Protection of New Varieties of Plants (UPOV Convention) (1991) and the Trademark Law Treaty (TLT). With respect to the UPOV Convention, Chile participates in it, but a previous incarnation, not the latest one; however, Chile has implemented several of the provisions of the latest version and the adherence to the mentioned treaty was submitted to the Congress and approved by the House of Representatives in 2009, remaining only its ratification by the Senate. With respect to the TLT, before being ratified by Chile, the treaty still needs to undergo the whole legislative procedure. However, according to data from the WIPO system, among its 184 country members, only 49 countries have ratified the TLT and less than 50 the 1991 UPOV Convention; therefore, the mere lack of ratification of these instruments is neither a real nor a sufficient argument to categorize Chile in the next Priority Watch List.

Chile provides protection to pharmaceutical products in full compliance with international, regional, and bilateral commitments on intellectual property. The fourth concern of the 2010 Special Report 301 about Chile is related to an ongoing concern of the U.S. pharmaceutical industry: the linkage between issuing a patent and

a market authorization for pharmaceutical products. First, we should recall that the mentioned report does not argue FTA infringement, because the U.S.-Chile FTA, unlike other FTAs signed by the U.S., does not set forth the linkage; consequently, requiring its adoption may constitute unilateral measures by the U.S. Regardless, this complaint lacks any actual evidence of damage and is supported only by some PhRMA's associates, while being rejected by other pharmaceutical industries. Therefore, the reproach of the 2010 Special Report 301 on linkage lacks reliable, empirical, and impartial research, and it also lacks legal bases. The absence of linkage in the Chilean law should not justify a new inclusion of the country in the 2010 Special Report 301.

In sum, the reasons set out in the 2010 Special Report 301 for including Chile in the Priority Watch List do not now hold water –if they ever did–, because:

- a) Chile has implemented its international commitments into its domestic law; and arguing the case of the technological protection measures constitutes an unilateral imposition rather than a negligence in implementation;
- b) Chile has made notable progress in the criminal enforcement of intellectual property rights, becoming –unfortunately– a real leader in the criminalization of intellectual property infringement;
- c) Chile has made –and will continue making– serious progress in ratifying international instruments on intellectual property; the fact that some instruments have not been ratified yet is not a real or sufficient argument to enroll Chile in the Priority List Watch; and,
- d) Chile has not infringed any commitment by refusing to adopt a system of linkage for pharmaceutical products and, plus, there is no reliable, empirical, and impartial data showing it is necessary.

In sum, Chile has an strong system of criminal enforcement for intellectual property rights; has made notable progress in the ratification of international instruments on

the matter; has implemented its commitment into domestic law appropriately; and, there is not legal or factual base to require additional protective measures for pharmaceutical products in the country. As a result, there is no serious argument to keep Chile on the Priority Watch List in 2011, because of its clear efforts in assuming international commitments on intellectual property, and updating and enforcing its domestic law.

A handwritten signature in black ink, appearing to read 'A. Cerda Silva', with a long, sweeping underline.

Alberto J. Cerda Silva
Professor on Cyber Law
University of Chile Law School