PRESENTATION:

ASEAN AND W.T.O. COMPLIANCE

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I would like to concentrate on the enforcement aspect of compliance with the TRIPS Agreement. It does not matter what right we have if it is not enforced; the effective outcome would be that we have no right. It is like the saying in Thailand that "wherever you go, if your wife is not with you, then you are not married." It is the same thing with intellectual property rights. If it is not enforced then it does not exist.

Thailand does not have any problems with the *provisions* of the TRIPS Agreement, from Article 1 to Article 73, plus the preamble. However, we do have a problem with the *approach* to the TRIPS Agreement. More specifically, we have concerns that undue focus has been placed on certain provisions, namely, the provisions on standards and the provisions on enforcement, while neglecting the provisions on objectives and principles, Articles 7 and 8 and the preamble. I believe the TRIPS Agreement is like every other international agreement. It has to be implemented and complied with in line with the objectives and principles at the preamble.

There is nothing in the preamble that says that the intellectual property rights confer a monopoly on the holders. If you read the preamble very carefully, it suggests things like, "we have to enforce intellectual property rights but not in a way that would cause issues." There is a statement in there that acknowledges the fact that member economies are different. So, each member economy can take whatever appropriate measures to comply with the requirement of the TRIPS Agreement. Clearly, we can see in the TRIPS Agreement itself that, in order to comply with it, you have to make sure that the balance between the right holders and the public is maintained at all times. This is how Thailand and ASEAN countries have intend to comply with the TRIPS Agreement. Thus, I believe we should concentrate on enforcement.

If we look at Article 41, the general provisions deal with enforcement; you can see very clearly that emphasis is put on speed. Speed in giving remedies; speed in inventing rights, and then on the prevention of abuse of rights. I think it is implicit that the member economies have to file appropriate measures to prevent against abuse of their rights. It appears several

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times in the enforcement provisions, from Articles 41 to 61, if you read them very carefully.

So, what is the problem? The problem is in intervention. In the developing countries, we are expected to impose tougher penalties. Although in the TRIPS Agreement itself it says very clearly that only willful copyright piracy and willful counterfeit in the commercial scale should give rise to a criminal offense, that's the minimum standard in the TRIPS Agreement. We merely requested simple enforcement and now pressure has been put on us to impose tougher penalties, including a jail sentence. You know what happens in reality. When criminal sanctions are overly relied on, it gives rise to perversion of justice. If we impose penalties on each infringing good, it will appear that way in the report to the public prosecutor and to the court. In most cases there may only be one complaint. Since the numbers of complaints are so small we cannot do it.

Intellectual property offenses, like other offenses, depend very much on public morality. If the overall public morality does not consider the offense criminal or outrageous, how can you impose tougher penalties? It will also create patents that we are all guilty of infringing. If most people in the developing economies could easily rely on criminal sanctions against infringement, it would mean that the public could do the same. For example, wherever there's an infringement, people could just go to the police—when normally the police would not handle patent offenses. In the Thai Patent law we make patent infringement a criminal offense, as well. So, it is easy to go to the police, prove your ownership of the right, produce evidence of infringement and the police can take action. It is very easy. The right holder does not have to pay much, because most of the expense will be borne by the State (by the taxpayer's money).

However, we cannot do the same thing in developed economies, especially on patents. Could a Thai person say that his patent has been infringed here, then go to the FBI or get the police to arrest the infringer? The answer to that question is no. So, we are providing the wrong impression to our public. They are under the impression (due to our fault) that the ready-made remedy is the criminal sanction. It cannot function like that, for the rest of the world. Again, I believe the issues is excessive reliance on criminal penalties. It is too easy to file it under criminal penalties, which is a matter of serious concern.

Moving on, we have other issues concerning compliance. We need to look further into compliance, to focus on harmonization. More specifically, we should look at the quality and the standard of search examinations on patents. If you look at the major patent offices around the world, you need to ask whether they have the same standards. What is it exactly that is considered as the world patent information system? Is it only something in the English language? Or is it something in French, German, or perhaps Japanese? If I ask my colleagues in the USPTO, what kind of patent information will they look at when they make the search examination? Somehow

in our field, we have overlooked an important issue. Our examiners only look at the patent information of the USPTO, the EPO, and the JPO and then consider that as the world patent information—while neglecting to look at our own database, because we don't have it in easily accessible form. So, we have a lot of problems with the new patent applications, especially in the area of pharmaceutical products. For example new information happens to be somehow similar to the old formula, which is already in the traditional medicine. Since we do not have electronic databases for that kind of information, we tend to make many mistakes.

In addition to difficulties concerning enforcement, there are difficulties in harmonization of procedures. Why do I mention this? Before we can have enforcement we have to have the rights. It seems that the speed and manner of applying the rights seem to be different in different countries. The time spent and expenses are different. In my country, we are aware that intellectual property rights are acquired domestically. For example, patents and trademarks are acquired domestically based on the situation in the individual countries. Which gives rise to a severe headache in my country.

We have been encouraging our local businesses to register their trademarks and patents overseas. We are aiding them, by lending each local business about 100,000 *Bahts* (about U.S. $2,500) to do the applications throughout the whole world. For some reason this process does not seem to be working. The attorney fees alone are very expensive. Also, there is no consistency among the attorney fees; the fees are different from one country to another.

The role of the patent attorneys and trademark attorneys has a lot to do with the international protection of trademarks and patents in a uniform way. In ASEAN countries, we are trying to go for regional registration of trademarks and patents. We would like one common office to produce the ASEAN trademarks and patents. However, this idea has proved too difficult, so we have modified it to regional filing. Each IP office in the member countries acts like a receiving office, in that they send their applications to their designated office. It is very much like the PCT system.

In the very near future we would like to have on-line applications; the necessary technology is here. Since most of us have data in electronic form anyway, it would be very convenient to use an on-line application. For example, in Thailand we have done electronic searches for a few years, for both trademarks and patents. We have had no real problems. So, we are thinking of going on-line. However, if we decide to do on-line applications (and since we are talking about international harmonization) could we have patent and trademark application that anyone in the world could use without consulting local attorneys? Is this task possible by using information technology mediums? The answer is no, because we need to make sure that there is a pool of expertise in trademarks and patents in our country to uphold our regulations. The trademark and patent attorneys are very useful in giving advice in solving problems that may arise amongst the parties

involved. So if we decide to use the information technology there will be patents and trademarks that will undermine their usefulness to the economy.

When talking about complying with the TRIPS Agreement, it is not just a matter of looking at the words that comprise the TRIPS Agreement. I've read it so many times. I am not worried about copying the provisions of the TRIPS Agreement. I am worried more about the actual implementation and how to achieve genuine international cooperation in acquiring the rights, and in the process of protecting those rights. I believe these issues are crucial.

Finally, my last point is that while we are implementing the TRIPS agreement, we cannot turn our eyes to all the new global issues, such as biodiversity. On the other hand, we must focus on issues such as folklore, traditional knowledge, and genetic resources. Even though I believe that they are not a part of the international agenda, they are also not a part of any international agreement concerning intellectual property. Similarly, patents and copyrights were not a part of the international intellectual property scheme before 1883 and 1886. The same thing could be said for the new global issues. I think the key problem is in achieving an international consensus. How do we get to an international regime that is acceptable to all countries, the holders/possessors of those new rights and the users of those new rights? All has been not harmonious.

The same thing goes for the WIPO copyright treaty and the WIPO performance treaty. I am glad to say that the developing countries in the ASEAN group are insisting that 30 ratifications should be required for entry into force of those two treaties. If it is called an international agreement, why should only five ratifications suffice? If anything is international, it ought to have international acceptance. Whatever we do, especially on intellectual property, we cannot afford to make it seem as something imposed from the outside.

In the ASEAN countries we are concentrating hard on public education, to show to the people that intellectual property is valuable to everyone. Which means people in developed and developing economies alike. Even though there are a lot of foreseeable obstacles, we foresee that we can solve them.

Concerning the compliance issues, the respect of intellectual property, and the enforcement of intellectual property rights—none are the monopoly of developed economies. Developing economies can make use of them as well, especially with the availability of patent information on the Internet. I think that TRIPS is a godsend; the mutual agreements are good. We do not have anything to be afraid of as long as they are all implemented according to not only the letter of the TRIPS agreement, but to its spirit. I have advised my developing economy fellows to look at the provisions of the TRIPS Agreement very clearly, and implement the TRIPS Agreement according to those provisions in the preamble and according to the objectives and principles.

Thank you very much, ladies and gentlemen.

Audience member: We have been discussing patent harmonization and enforcement issues. I'm sorry if I'm mistaken, but I believe that in stressing the procedural aspects we've missed out on the substance. I feel that, as Professor Weeraworawit pointed out, in the eastern and the western parts of South Asia we need to do harmonization from the substance because we have different perceptions concerning the substance of the law, and also concerning matters of procedures of the law. For instance, I think something was mentioned on Article 27, about the order of public values and morality. In different regions of the world, the interpretation of morality is different. So how can we harmonize those different interpretations?

Mr. Weeraworawit: I think we can facilitate the harmonization by educating our public as to the real meaning of patents. It is supposed to generate further innovations. But at the same time we have to give respect to the so-called "common-rights." We have to find some international legal protection for the so-called "traditional knowledge," folklore and biodiversity and genetics resources. In fact, they have been enforced in all the forums apart from WTO and WIPO. If you follow the work of the FAO, you will know that they have been working on these international undertakings on the exploitation of biodiversity resources. So, the efforts are real, even though you may think that in the WIPO we are just talking. No. They have become an established agenda, I think, with a two-prong approach.

On our part, in the developing economies, we make our people aware of the benefits of patents. We have shown them how to make use of a patent. I have been telling the Thai people that if they are not patented in Thailand, that they should be. Since it is a burden for the owners or the right holders to file for protection in our country, they don't want to take the steps needed to file for the patent. So, in our country we can make use of the product if it is patented. Furthermore, if they file for protection, then we can make use of it by making further innovation.

Whatever happens, we have got to handle things in the same way and in the same style. That applies not only to patents but also to creating a favorable environment in terms of education, venture capital, transparency, and good governance. So, I think this two-prong approach would help in the harmonization of patents, because the developed economies will have to give way on the new global issues, as well.

Joseph Straus: I will be very brief. I believe nobody can answer such a question. We are not able to harmonize the definition of morality in Europe, in the European Union, or the rest of the world. I don't see the possibility of this harmonization for the foreseeable the future. However, I must say, you may exclude those inventions or you may not allow the commercialization. That is also against your morality. Therefore, I believe that is not the problem of the so-called compliance of TRIPS.

If I may, I am not a Karl Marx and I am not Friedman, but I think one point should be mentioned. Why do we have TRIPS? If countries all over the world are claiming the right to export tangible goods under the same conditions, how can you, in a globalized economy, claim the right to decide in your own territory to treat intellectual property so differently? So, bananas from one country, when they pass through border are still the property of the same subject. If an invention or a copyrightable work is passing the border, then should it not be in the ownership of the same person, but rather according to the law of that country be treated differently? I believe this has to be taken into account whenever you are talking about borders.

The China example is a very good example. If you have a surplus of $50 billion with this country, how can they say, "Well we are sovereign in deciding to take your software, and we don't care since we are sovereign and the issues fall under the principle of territoriality. But of course, if you are buying our footwear, you may not involve the custom duties and everything." So that is the problem.

Audience member: It is great that you try to recognize intellectual property from the world's perspective. There is a little weakness of some of this, in that granting these rights, particularly with respect to patents, some of the practices in the examination process are highly questionable. So if you want the dignity you feel is required for intellectual property rights, particularly in Thailand, it seems to me you have to examine why it was granted in the first place.

I must admit, I saw a recent patent from the U.S. that dealt with refreshening bread by putting a little water on stale bread and then putting it in a toaster. Would you think that the patent should be accorded the dignity that you're ascribing to intellectual property rights? There has to be some perspective on what you are granting. If you want real appreciation from intellectual property appraisers, I believe you have to spend a lot more time aggressively making sure that the intellectual property right is really justified. Since in many of these instances, particularly in the U.S. now, we have had a problem with the patenting of business methods. What is a business method? It's really frustrating because it cannot be examined. For example, what you do on your computer is personal. You don't publish it to the world. However, it is obvious to do, you've been doing it for years, but someone else gets a patent on it. This is very disturbing. That is all I can say. In terms of what you're trying to do, if you want the dignity of a patent, you really have to do something in the patent granting process.