

Addressing Intellectual Property Rights Reforms in Kazakhstan

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**Commercial Diplomacy
Master's Project**

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MONTEREY INSTITUTE OF INTERNATIONAL STUDIES

April, 1999

This paper was researched and written to fulfill the M.A. project requirement for the Monterey Institute of International Studies' Master of Arts in Commercial Diplomacy. For more information about the Commercial Diplomacy program and the M.A. project requirement, please visit www.commercialdiplomacy.org.

Table of Contents

[Scenario](#)
[Executive Summary](#)
[Background: The WTO Protection in Kazakhstan](#)
[Background: The WTO TRIPs Agreement](#)
[Background: Commercial Issues](#)
[Analysis of the Substantive Policy Issues](#)
[Comprehensive Strategy Paper](#)
[Appendices](#)

Scenario

This project was completed to fulfill the requirements of the Monterey Institute of International Studies' Master of Arts in Commercial Diplomacy degree.

For the purpose of this project, I have assumed the role of an independent trade consultant to Kazakhstan's Ministry of Energy, Industry and Trade. In this fictitious capacity, I propose a strategy for bringing Kazakhstan's Intellectual Property Rights Regime into compliance with the minimum international standards incorporated in the Trade Related Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO).

Joining the TRIPS Agreement is a key requirement for Kazakhstan's accession to the WTO. Acceding to the TRIPS Agreement will also contribute significantly to the establishment of a stable business and investment environment in Kazakhstan.

The following strategies support the Kazakhstani President's vision to develop Kazakhstan as the first "Asian Snow Leopard," and to bring economic, political and social advances to the country.

Executive Summary

Issue

Inadequate intellectual property rights protection in Kazakhstan is a key obstacle to attracting foreign direct investment to the country; it is also a major impediment to Kazakhstan's accession to the WTO. The country's lack of IPR protection results in enormous business losses. Losses to domestic industries from counterfeiting and piracy alone are estimated at \$295 million per year, or 1.3 percent of Kazakhstan's GDP. Kazakhstan's weak IPR protection has undermined foreign direct investment from the United States, which currently invests \$1.5 billion in Kazakhstan per year, accounting for 28 percent of total investment in Kazakhstan.

Objective

Kazakhstan's IPR regime must be brought into compliance with international standards, the most important of which is the WTO TRIPS Agreement. Strengthening IPR protection will speed Kazakhstan's accession to the WTO and considerably increase foreign investment inflows.

Background

Creation of a new set of laws, including appropriate enforcement mechanisms, to protect intellectual property rights has been a major challenge for Kazakhstan. Prior to 1991 when the country gained independence, private property did not exist. The country's centrally planned, soviet system protected state property laws, however even these laws were geared more toward controlling the economy than protecting property.

As a result, the population of present-day Kazakhstan does not understand the concept of intellectual property rights. Within the government and general population, there is a general perception that developed countries gain immediate benefits from IPR protection while Kazakhstan, as a country in transition with an unstable economy, gains very little. The following are some common perceptions:

- Because developed nations have comparative advantages in supplying technology, capital and services, IPR protection will initially help them more than Kazakhstan.
- Piracy brings commercial benefits to Kazakhstan because consumers can buy goods at lower prices. This stimulates domestic production and enhances employment.

- Monetary values cannot be placed on intangible items. People should not pay for expressions of ideas.

IPR Legislation

Kazakhstan has already made great strides toward establishing an IPR regime that meets international standards. In anticipation of the 1992 *U.S. – Kazakhstan Bilateral Trade Agreement*, Kazakhstan joined a number of international treaties and conventions, including the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, and the Berne Convention. In 1996, the country also passed the *Law on Copyright and Neighboring Rights*, which covers a wide number of intellectual property areas such as computer programs, sound recordings, exclusive rights of reproduction for copyright owners, and penalties for infringement. Additionally, the *Criminal Code* was revised in 1997 to strengthen the Kazakhstani government's means of enforcing these laws. The new Code includes substantial fines and imprisonment for infringers.

Nonetheless, Kazakhstan's IPR laws still lack certain provisions crucial to compliance with the TRIPS Agreement. As committed to in the Bilateral Trade Agreement with the United States, Kazakhstan must begin adhering to the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms in order to provide protection to sound recordings. Kazakhstan has signed but not ratified the 1997 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Laws on the protection of undisclosed information and integrated circuits need to be enacted. Moreover, many of Kazakhstan's IPR laws still do not include adequate enforcement provisions.

Enforcement

Where enforcement provisions are included in Kazakhstan's IPR laws, they are often rendered useless by unnecessarily complicated and costly procedures required for invoking these provisions. The enforcement process is extremely slow with many unwarranted delays.

The National Patent Office and the Agency for Copyright at the Ministry of Energy, Industry and Trade are the administrative agencies that oversee IPR protection. Their staffs are small and poorly equipped. Staff incompetence on IPR issues creates difficulties in registering trademarks, obtaining patents and addressing copyright infringements. Kazakhstan's courts do not have a sufficient number of judges familiar with IPR cases, and court decisions are often biased and lack written reasoning to back them up. All of these factors contribute to the problem of corruption, as well as the inadequate functioning of the judiciary institutions. The Customs Administration does not participate in preventing IPR violations because there are currently no legislative acts that regulate Customs' involvement in IPR enforcement.

These conditions make the coordination of enforcement activities difficult to manage. To make matters worse, IPR enforcement requires that financial resources be effectively distributed, but corruption often impedes such distribution. The lack of transparency of governmental actions in Kazakhstan, as well as the general non-existence of the rule of law, is also a problem.

To strengthen Kazakhstan's IPR regime and bring it into compliance with the international standards incorporated in the WTO TRIPS Agreement, I recommend the Ministry of Energy, Industry and Trade take the following actions:

Ø Necessary Reforms:

1. Legislative:

- a) Enact the Law on the Protection of Independently Created Industrial Designs
- b) Enact the Law on the Protection of Layout-designs (topographies) of Integrated Circuits
- c) Adopt the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms
- d) Issue a Decree Establishing the National Agency for the Protection of Intellectual Property Rights

2. Procedural:

- a) Reform IPR related administration procedures, including patent and trademark registration procedures
- b) Reform judiciary processes and structures for enforcing IPR laws, including increasing the number of judges knowledgeable about IPR
- c) Revise the Customs Service's authority for stopping pirated goods at the border, and institute procedures to facilitate the exercise of this authority

Ø To build broad support for IPR, the Ministry of Energy, Industry and Trade needs the assistance of the private sector. A **Coalition for Intellectual Property Rights Protection (CIPRP)** should be formed to implement a domestic strategy for passing necessary legislation and strengthening enforcement mechanisms. A Coalition could also help with the development of an international negotiating strategy to help speed Kazakhstan's accession to the WTO. The Coalition should be comprised of businessmen and scientists who have access to the political elite and can influence the country's top policymakers. Representatives of domestic and international trade associations should also be included.

Ø Building consensus among government officials and gaining support of the President is crucial to successful IPR reform in Kazakhstan. All ministries need to understand the long-term economic benefits of a sound IPR regime. The Ministry of Energy, Industry and Trade needs to pursue an executive strategy to target the Prime Minister and the ministers who are close to the President in order to obtain his full support for IPR reform.

Ø A legislative strategy should be developed to convince the Parliament to adopt the proposed legislation. This strategy should be designed to overcome Parliament's lack of specific knowledge of IPR, its unwillingness to give priority to this issue until after "more important" issues are solved, and pressures from domestic protectionist

groups. The Ministry, with the support of the Coalition, should inform legislators about the benefits of IPR protection. Political parties should be targeted to assure their commitments to the IPR reforms.

- Ø The Coalition for Intellectual Property Rights protection will play an important role in implementing the domestic media strategy. To build public support, the coalition will need to overcome the public's general lack of awareness of IPR issues. Members of the Coalition who are well-known public figures can change public opinion through educational campaigns. National writers and singers can inform the general population about the negative impact of IPR violations on their professional activities and job stability. TV advertising campaigns and press conferences in the most popular national newspapers such as "Panorama," "Caravan," and "Delovaya Nedelya" will be effective tools for obtaining public support.
- Ø The Government of Kazakhstan, with the assistance of the Coalition, should pursue an international strategy that includes media and negotiation strategies. The objective of the media strategy is to communicate the image of Kazakhstan as a country that is both moving progressively towards a market-oriented economy and implementing the reforms necessary for building a stable business environment. The international media strategy should attract the attention of international organizations and help the country gain technical assistance in conducting IPR reforms.
- Ø The Government of Kazakhstan will need a strategy for its WTO accession negotiations. Kazakhstan should convince WTO members that the IPR reforms Kazakhstan has already implemented are as good as they can be at this stage of the country's development. Because the domestic political institutions that regulate protection of intellectual property rights and other new areas of trade policy are still relatively weak, Kazakhstan cannot fully comply with the IPR requirements of the WTO Agreement at the present time. Implementing legislation needed for comprehensive IPR protection and enforcement will require considerable time, especially because Kazakhstan is only now beginning the process of organizing its governmental institutions.

Background: IPR Protection in Kazakhstan

Prior to gaining independence, Kazakhstan's economy was centrally planned for 70 years. During that time, laws and enforcement mechanisms for the protection of state intellectual property were developed, but protection of private property, intellectual or otherwise, was almost non-existent. Wealth and property, whether private or industrial, belonged to the state. Creative ideas and expressions were state property and could be used for the good of the country without authorization from the inventor. Indeed, implementation of private copyright and other private intellectual property rights would have contravened the fundamental communist belief in communal property.^{1[1]}

Thus, while the soviet regime did include a system for registering patents, trademarks and copyrights, these rights were held by the state and served the purpose of helping the state regulate the economy rather than that of protecting individuals' inventions.^{2[2]}

The system provided no protection for infringements involving producers of sound recordings, performers, or broadcasters. Moreover, criminal code sanctions for copyright infringements were deficient. They lacked jail terms and imposed only small fines or obligatory labor.

The breakdown of the socialist economic system left Kazakhstan with no IPR protection whatsoever. However, since gaining independence in 1991, Kazakhstan has made considerable changes in its IPR regime, putting into place the statutory framework for bringing the country's IPR protection up to modern standards. Specifically, the government of Kazakhstan has adopted the following legislative acts:

1. In May 1992, Kazakhstan signed a *Bilateral Trade Agreement* with the United States, which entered into force on February 18, 1993. The Agreement required Kazakhstan to provide high standards of protection for intellectual property and included wide-ranging commitments for Kazakhstan to enact and enforce modern laws protecting intellectual property rights before December 31, 1993. In return, Kazakhstan became eligible for "most favored nation" status and became a beneficiary country under the Generalized System of Preferences (GSP), a program through which the United States grants preferential duty-free status on specified imports. The GSP program requires that countries provide "adequate and effective" copyright protection and enforcement to U.S. copyright owners. The United States also acknowledged in the Agreement Kazakhstan's adherence to the Universal Copyright Convention (U.C.C.), which the Soviet Union joined on May 27, 1973. In anticipation of the Bilateral Trade Agreement, Kazakhstan acceded to the Paris convention for the Protection of Industrial Property, the Patent Cooperation Treaty, the Madrid Agreement Concerning the International Registration of Marks, and WIPO. Kazakhstan recently became a member of the Berne Convention for the Protection of Literary and Artistic Works.^{3[3]}
 2. In February 1996, Kazakhstan passed a new *Law on Copyright and Neighboring Rights*, which came into force on June 10, 1996. That law was closely modeled on the Russian Federation's 1993 copyright law and WIPO's model law. Among its many features, the law for the first time protects computer programs and sound recordings; it provides copyright owners with exclusive rights of reproduction and distribution (including importation, rental and public lending); and it protects public display and public performance, broadcasting, and the right of translation and adaptation. It provides a Berne-compatible term of life plus fifty years and includes sanctions for infringement. The penalties for copyright or neighboring rights violations include statutory penalties of up to 50,000 times Kazakhstan's minimum wage.^{4[4]}
 3. In July 1997, the President of Kazakhstan issued a resolution on the adoption of a new *Criminal Code of the Republic of Kazakhstan*, which entered into force on January 1, 1998. This code covers copyright and other intellectual property rights violations not previously covered in the 1959 Criminal Code. It includes substantial fines of up to 500 times the monthly wage and imprisonment of up to five years for repeat offenders.
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Copyrights

Copyrights are registered at the Agency for Copyright at the Ministry of Energy, Industry and Trade. To begin a civil action against a copyright violator, the copyright holder must file a complaint with the appropriate civil court. The copyright holder must provide a detailed description of the nature of the injury and determine the amount of damages caused by the infringement. In practice, no civil suits are brought because the proceedings are slow and document intensive, and no injunctions or seizures are available. Therefore, most people prefer to pursue criminal actions against copyright violators. Evidence of the crime and the name of the person who allegedly infringes the copyright must be provided. Further, copyright holders must provide a complete statement of the law to the attorney general since copyright violations and copyright law are not well understood. The action can take one year or more. Establishing good personal relations with prosecutors usually helps the right holders win the case.

Industrial Property Rights

Since 1992, the National Patent Office, located in Almaty, the former capital of Kazakhstan, has administered the system of industrial property rights including patents and trademarks. In Kazakhstan, existing Soviet patents were converted to Kazakhstani patents. National legislation on the protection of patents will be enacted in 1999. As noted above Kazakhstan already has joined various international agreements that apply to industrial property rights. Further regulations on integrated circuits and a law on commercial secrets are expected to be enacted in 1999.

Novelty, inventive activity, and industrial application are considered in determining whether or not an invention is eligible for protection. An invention is considered novel when it is not state-of-the-art. Inventive activity is the creative process providing results that cannot be obtained from state-of-the-art methods by a person skilled in the art. The patent legislation excludes certain products such as layout designs and plant variety.

Kazakhstan's patent registration system works not on the first-to-invent but rather the first-to-file principle. Thus, unlike in the United States, the person or company who first files a patent application is considered the inventor and will be the owner of the future patent. Complete registration can take about two years.

As for trade and service marks, they may be registered with the National Patent Office for a period of 10 years and may be renewed every 10 years. Only visible signs may be registered. If a trademark is similar enough to another that it could cause confusion, the trademark may not be registered. It usually takes one and a half years to complete a trademark registration. Licensing agreements regarding trademarks must also be registered.

The Criminal Code enacted in 1998 covers violations of industrial property rights. Damages can be recovered through a civil trial. However both criminal and civil cases are almost non-existent because they are time-consuming, expensive and almost always unproductive. The Civil Code includes substantial fines for violation of industrial property rights. However, these remedies too are more theoretical than practical.

In addition to the Criminal and Civil Codes, administrative procedures are in place for declaring a patent null or canceling a patent or trademark under certain circumstances.

To make a complaint, the complainant must file an application at the National Patent Office in Almaty. The application must be in writing and signed by the interested party, and it must contain the applicant's and the opposing party's name and address, as well as the purpose of the application and facts and provisions of the law.

Piracy in Kazakhstan

Kazakhstan has undertaken significant steps toward improving its IPR regime. However, the process of establishing respect for intellectual property rights is very slow. It is still common to watch Western movies on Kazakhstani television long before they are released for the U.S. audiences. Many television stations broadcast U.S. and Western programs via satellite. Illegal distribution of pirated videocassettes comes mostly from Russian intermediaries, who are also the main source of bootleg software.^{5[5]}

On May 1, 1998 the USTR included Kazakhstan on its Special 301 Watch List because Kazakhstan had not met its bilateral intellectual property rights obligations. In announcing this determination, the USTR declared that:

“Kazakhstan has several remaining steps to take to fulfill the IPR commitments under our bilateral trade agreement. It needs to adhere to the Berne Convention for the protection of Literary and Artistic Works and the Geneva Phonograms Convention, provide full-term retroactive protection for US copyrights, specify protection for sound recordings under the copyright law, license television, broadcasting stations, and increase copyright enforcement. Piracy of all copyrighted products is reportedly widespread and there have been no known enforcement measures to date. We look to Kazakhstan to begin significant enforcement measures to reduce piracy rates, to complete its bilateral IPR obligations, and to move toward making its IPR regime consistent with the TRIPS Agreement before it accedes to the WTO”.

Footnotes

6^[1] Keneth Ho, *Problem of Piracy in Hong-Kong and China*, <http://www.houston.com.hk/>

7^[2] Idem, *Patent protection and the Free Market Economy*, IIC, Vol.23 (1992), pp159 *et seq.*

8^[3] USTR Report on Foreign Trade Barriers, 1998

9^[4] Kazakhstan's minimum wage is about \$75 per month

10^[5] Trade directory, Tradeport, 1998

Background: The WTO TRIPS Agreement

Countries that wish to become WTO members must adhere to the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which came into effect on January 1, 1995

The TRIPS Agreement covers the following areas of intellectual property:

- a) Copyright and Related Rights
- b) Trademarks
- c) Geographical Indications
- d) Industrial Designs
- e) Patents
- f) Layout Designs (Topographies) of Integrated Circuits
- g) Protection of Undisclosed Information
- h) Control of Anticompetitive Practices in Contractual Licenses

The cornerstones of the agreement are the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

The TRIPS Agreement is the most comprehensive agreement on intellectual property. Besides establishing minimum standards of IPR protection, it obliges governments to take positive action in this direction. The World Intellectual Property Organization (WIPO)—which provides a forum for the negotiation of substantive obligations with respect to intellectual property—has existed for over a century.¹¹^[1] However, membership to WIPO is not universal and the organization lacks adequate enforcement/dispute settlement mechanisms. In contrast, the TRIPS agreement, via its incorporation in the WTO, includes a binding enforcement mechanism.¹²^[2]

The general provisions and basic principles are established in the first part of the TRIPS agreement. National treatment and most favored nation principles apply with regard to the protection of all categories of intellectual property. “These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of IPR specifically addressed in the Agreement.”¹³^[3]

Enforcement and dispute settlement procedures are provided in detail in the Agreement. Specific provisions related to domestic procedures and remedies for the enforcement of IPR are the following:

- a) Civil and administrative procedures and remedies
- b) Provisional measures
- c) Special requirements related to border measures
- d) Criminal procedures

Members are required to include effective enforcement procedures in their national IPR laws. Procedures should not be unnecessarily complicated or entail unreasonable time limits or delays, however there are no specific obligations for members’ judicial systems. In case of disputes between WTO members regarding the TRIPS obligations, WTO dispute settlement procedures are applied.

Substantive Standards of Protection

Copyright

In general terms, a “copyright” is:

“...an intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a specific period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.”¹⁴^[4]

Section 1 of the TRIPS Agreement addresses protection of copyright and related rights. It incorporates Articles 1 to 21 of the Berne Convention, with the exception of the Berne Convention’s obligations regarding protection of moral rights. The TRIPS Agreement specifies protection of computer programs as “literary works,” and databases as “intellectual creations.” The minimum term for copyright protection is 50 years from the initial date of authorized publication.

Related rights include protection of performers, producers of phonograms (sound recordings) and broadcasting organizations. Performers should have the means to prevent the unauthorized fixation of their performance on a phonogram and the reproduction of such fixation. Producers of phonograms are granted an exclusive reproduction and rental right. Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcast by wireless means, as well as the communication to the public of their television broadcasts.

Trademarks

The first paragraph of Article 15 of TRIPS Agreement defines trademark as:

“...any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as a trademark.”¹⁵^[5]

The Agreement also covers the protection of service marks. Article 16.1 grants the owner of a registered trademark an exclusive right that prevents other parties from using identical signs for goods or services that would result in “a likelihood of confusion.” Certain provisions oblige members to refuse or to cancel the registration and to prohibit the use of a mark conflicting with a mark that is well known. The term of protection should be no less than seven years. Certain exemptions apply to “fair use of descriptive terms.” Parties are allowed to use a trademark without permission from a trademark’s owner provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Patents

The TRIPS Agreement protects both products and process patents. Patents should be available for “any inventions in all fields of technology without discrimination ... as to the place of invention and whether products are imported or locally produced.”¹⁶^[6] Exceptions are allowed only when commercial exploitation of a patent would be detrimental to public order or morality, or when a patent would somehow endanger human, animal or plant life or health.

The Agreement acknowledges developing countries’ concern with legitimate social and economic interests in the determination of patent rights.¹⁷^[7] For example, exceptions are provided for the patentability of “plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.”¹⁸^[8] The compromise that was reached on this issue is reflected in the decision that the relevant provision of the TRIPS Agreement will be reviewed four years after the entry into force of the WTO.

Under certain conditions, the TRIPS Agreement permits both compulsory licensing and governmental use of patents without the authorization of a patent holder. The conditions for such use are contained mainly in Article 31. These include the obligation that the proposed user of the patent make “efforts to obtain authorization from the right holder on reasonable commercial terms and conditions” within a reasonable period of time; the obligation to pay adequate remuneration “taking into account the economic value of the authorization”; and the obligation to allow for judicial or other independent review by a distinct higher authority.

Other Forms of Intellectual Property Protection

Besides copyrights, trademarks and patents, the Agreement also covers protection of industrial designs, geographical indications, integrated circuits and trade secrets.

Members are obliged to provide at least 10 years of protection for independently created industrial designs “that are new or original.” “Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.”¹⁹^[9] This provision reflects a significant lobbying effort by U.S. insurance companies, consumer groups and replacement parts manufacturers, all of whom sought language on industrial designs that would prevent automobile manufacturers from protecting the design of car parts, thereby threatening the manufacture of “generic” replacement parts and potentially raising the cost of replacement parts.²⁰^[10]

Geographical indications are:

“...Indications which identify a good as originating in the territory of a member... where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”²¹^[11]

The Agreement provides a means for preventing the use of indications that mislead consumers as to the geographical origin of a good or that constitute an act of unfair competition. The Agreement specifies the protection for geographical indications for wines and spirits.

TRIPS provisions on the protection of layout-designs of integrated circuits are based on the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) negotiated under the auspices of WIPO in 1989.

An 'integrated circuit' is:

“...a product, in its final form or intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.”

A 'layout design (topography)' is:

“...the three-dimensional disposition...of elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.”

Protection of undisclosed information relates to:

“...information...that has commercial value because it is secret and has been subject to reasonable steps under the circumstances...to keep it secret.”

The Agreement requires that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in cases such as breach of contract and breach of confidence.

Background: Commercial Issues

Kazakhstan's lack of an adequate system for protecting intellectual property rights deters investment and is a key obstacle to Kazakhstan's accession to the WTO. Comprehensive intellectual property rights legislation and corresponding enforcement mechanisms are crucial to preventing enormous losses—losses to both domestic and international foreign businesses in Kazakhstan estimated to total some \$153 million per year.²²^[12]

Adherence to the international standards of IPR protection (as set forth in the TRIPS Agreement) will not only improve Kazakhstan's ability to attract foreign investment but also will help accelerate its economic recovery and WTO accession. Failure to accede to the WTO is costing Kazakhstan about \$753 million per year, or about 3.3 percent of GDP.²³^[13] This loss takes the form of substantial reductions of foreign direct investment and other capital inflows, limited access to foreign markets for Kazakhstani exports, and other losses related to considerable reduction in revenues from international trade.

Kazakhstani companies continue to lose millions of dollars each year due to domestic IPR violations. In 1997, 46 Kazakhstani companies, including chemical firms, pharmaceutical companies, producers of alcoholic beverages, and the music industry, lost about \$4.5 million due to piracy, counterfeiting and trademark infringement. As a result of these losses, employment in these companies dropped by two percent, affecting more than 2,460 people who depended on their jobs for income.²⁴^[14] Copyright violations and piracy have had a particularly large effect on the Kazakhstani music industry. Kazakhstani musicians cannot earn money from sales of their records and must perform more concerts than their counterparts abroad in order to earn a living. Because Kazakhstan is not in compliance with international treaties and conventions, Kazakhstani companies are also vulnerable to IPR violations abroad.

The macroeconomic effect of piracy in Kazakhstan is an issue that needs proper consideration. The scale of economic losses resulting from counterfeiting and piracy is estimated at around \$295million a year, which represents 1.3 percent of GDP. Additionally, the rate of copyright piracy and trademark counterfeiting is increasing. The National Patent Agency of Kazakhstan has reported that counterfeiting and piracy has increased by 115 percent over the past few years.

American and other foreign companies are losing billions of dollars each year to IPR violations in Kazakhstan, including counterfeit products, trademark infringement, patent theft and copyright infringements. From 1992 to 1997, U.S. trade losses due to audiovisual piracy in Kazakhstan were estimated at \$50 million; losses due to software piracy were about \$32 million. In May 1998, the USTR placed Kazakhstan on the Special 301 "Watch List" as mandated by the Trade Act of 1974. Being on the Watch List could undermine Kazakhstan's participation in the U.S. Generalized System of Preferences (GSP) program because participant countries are required to provide "adequate and effective" IPR protection and enforcement. As a beneficiary country under the GSP program, Kazakhstan receives preferential duty-free treatment of certain imports, estimated at \$27 million per year.

The weakness of Kazakhstan's system of intellectual property rights protection has undermined foreign direct investment (FDI) decisions. A significant amount of foreign capital is not being invested in Kazakhstan because of continued Kazakhstani non-compliance with international IPR standards. The United States is the largest investor in the country, accounting for \$1.5 billion worth of investments or 28 percent of the total investment, and the United States is particularly concerned with IPR protection.

Many segments of the Kazakhstani economy remain underdeveloped and some even continue to decline because they lack a means of securing capital investment money and transfers of modern technologies. Kazakhstan will require significant inflows of foreign capital in order to generate sustained growth; diversify its economic activities and employment base; and reduce the risks associated with excessive reliance on a narrow base of natural resources exports. The country cannot rely only on investments in its oil and metals sectors if it is to build an economy large enough and stable enough to provide employment for the entire country.

There is almost zero investment in the medical, machine building, metalworking, and light industries. Likewise, there is little to no investment in research and development activities despite Kazakhstan's well-trained work force. Businessmen are simply

unwilling to make long-term investment commitments in countries that lack adequate IPR provisions for safeguarding their investments.

Product piracy also has significant effects in Kazakhstan. Cheap counterfeit goods from other CIS countries and China, estimated at \$176 million in 1997, gives local consumers only a short run gain from increased access to cheaper products. Potential costs in the form of low quality, health or related damages resulting from the use of inferior copies of legitimate products are very high, especially in the area of pharmaceuticals. Widespread distribution of counterfeited medicines and alcoholic beverages have resulted in serious health problems, affecting 6,700 people in 1997.

The large size of losses to firms and to the national economy underscores the need for an effective system of industrial property protection and enforcement. The TRIPs agreement is intended to provide the minimum framework needed for the protection and enforcement of intellectual property rights. The agreement sets out, for the first time, minimum standards for all aspects of intellectual property and domestic enforcement procedures.

Analysis of Substantive Policy Issues

Bringing Kazakhstan's IPR regime into conformity with the WTO TRIPs Agreement will require two main policy actions, each of which is essential to building a well-functioning IPR regime in Kazakhstan. First is the adoption IPR legislation that provides adequate IPR protection, including enforcement mechanisms. The second and more difficult challenge is to address the public mentality towards IPR protection. Both actions will be made all the more difficult because regulatory resources are already being stretched thin by the numerous reforms the government is undertaking in all aspects of society.

Adopting Adequate IPR Legislation

Kazakhstan's IPR legislation still lacks certain provisions crucial for compliance with the TRIPS Agreement. These shortcomings and gaps are listed below.

Lack of provisions on Substantive Standards of Protection

1) In the 1992 U.S.-Kazakhstan Bilateral Trade Agreement, Kazakhstan committed to adopt the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms by 1993. Kazakhstan has not enacted laws and regulations necessary for adherence to this Convention. The Convention requires:

- protection of sound recordings not only for Kazakh nationals or those first published in Kazakhstan, but also for foreigners;
- protection of pre-existing sound recordings (adopted in the TRIPS Agreement, Article 14.6);
- retroactive protection for pre-existing sound recordings and works predating May 27, 1973.

2) Kazakhstan has signed but not ratified the 1997 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

3) Kazakhstan's Law on Copyright and Neighboring Rights is generally in conformity with the TRIPS Agreement and offers protection to literary, scientific, technical, and legal works, as well as works of art including musical and sculptural works. However, certain issues have yet to be addressed in this law:

- The law has a separate category for the protection of computer programs, but the scope of this protection is not clearly defined. Although the literal elements of computer programs are protected, a great amount of uncertainty exists regarding the protection of non-literal elements such as flow-charts and the "structure, sequence and organization" of a program.
- According to the law, an infringer is subject to criminal sanctions if he makes direct profits from exploitation of an author's work. However, no criminal sanctions apply if someone makes multiple unauthorized copies not for sale, but

for the use within a company, i.e. indirect commercial intent. It is very difficult to demonstrate the internal duplication of computer software by large companies for use within the company, especially when users download the software on their hard drives without authorization by a right holder. Thus, such requirement of showing direct commercial intent of the infringer presents an obstacle for right holders to protect their rights.

- The law also lacks certain provisions related to the violation of the national treatment principle. There are marked disparities in fees charged to domestic patent and trademark applicants, as compared to foreign applicants.
- 4) In general, Kazakhstan's civil code is in conformity with the requirements of the WTO TRIPS Agreement. However, it has not established criminal sanctions for the violation of this law.
 - 5) Patent Legislation and a Law on the Protection of Undisclosed Information (commercial secrets) was recently approved by the Parliament and will be enacted in 1999. The new laws are necessary for the protection of independently created industrial designs and layout-designs (topographies) of integrated circuits

Lack of enforcement provisions in IPR legislation:

- 1) Inefficient administrative procedures:
 - courts lack the authority to order injunctions and to order an infringer to pay the right holder's expenses
 - there is no effective deterrent to infringement
- 2) Inadequate provisional measures:
 - remedies are not expeditious
 - no regulatory agency has authority to take prompt action against infringement
 - enforcement procedures are frequently abused for individuals' gain
- 3) Inefficient border measures:
 - Customs officials' authority is unclear
 - inspection procedures are inefficient
 - Customs officials lack *Ex Officio* authority to act upon their own initiative
 - criminal remedies are inadequate

To remedy these shortcomings, criminal procedures must be amended.

- police must be given authority to act on an *Ex Officio* basis and to seize and hold confiscated products and equipment for use at trial.

- criminal penalties must be adequate to deter piracy
- penalties for copyright infringement must be severe enough to act as a deterrent.

Establishing an Adequate Enforcement Infrastructure

Kazakhstan's most substantial IPR problem is that it does not enforce existing IPR laws. Although Kazakhstan has passed laws that meet most modern standards, enforcement is virtually non-existent. The main reasons for the failure to implement an appropriate enforcement regime are the following:

- 1) The lack of efficient procedural measures including:
 - a) Administrative procedures
 - b) Judiciary procedures
 - c) Customs procedures
- 2) The lack of financial resources and the material base for conducting necessary protection acts
- 3) Corruption
- 4) The Rule of Law and Transparency Problems
- 5) The prevalence of the old Soviet attitude towards IPR, characterized by the lack of basic knowledge of intellectual property standards, and total ignorance of the problem of its protection.

Lack of Procedural Measures

Unnecessarily complicated and costly procedures in the enforcement process significantly lower effectiveness of existing IPR legislation. Kazakhstan's slow enforcement process is replete with unwarranted delays; it can take a very long time before a right is actually protected. Inadequate measures can be observed in administrative, judiciary and customs procedures.

a) Administrative Procedures

The IPR enforcement agencies, the National Patent Office and the Agency of Copyright at the Ministry of Energy, Industry and Trade, have adopted inadequate procedures to deter IPR infringement. The staffs in their offices are small and not sufficiently equipped. Officials have only limited access to computers and international databases, and they are not able to process all application forms for obtaining a patent or registering a trademark. A backlog of unprocessed applications is already growing, and the number of applications is expected to rise. Because staff members have not received adequate training on IPR issues, many applicants experience difficulties in registering trademarks, obtaining patents and addressing copyright infringement.

Another problem is the location of patent and copyright offices. Foreign businesses prefer to be close to patent and copyright institutions, and only the central IPR offices in Almaty process applications and disseminate information about patents, trademarks and other types of IPR. As a result, there are low flows of capital investment to areas other than those the central region near Almaty.

b) Judiciary Procedures

Kazakhstan's legal system, like those of all CIS countries, differs significantly from Western legal systems, particularly with respect to the importance of judgements and the role of international treaties.

Kazakhstan operates under a civil law system, whereas the United States operates under a common law system. The common law or case-based legal system relies on prior judicial decisions as the primary source of law. Under common law, the judicial branch has considerable discretion to interpret and create law over time. In contrast, the civil law or code-based system relies primarily on codified statutes. In this system, the law changes through the actions of the legislative branch, and judges typically do not have the discretion to interpret the law or develop theories that may differ from the laws as they are written.

In Kazakhstan, international treaties are self-executing and therefore do not need to be implemented by law. As a result, law makers and government officials often argue that Kazakhstan's law does not require amendments to comply with certain international treaties since the treaty itself is a Kazakhstani law. In reality, however, judges do not consider a treaty as Kazakhstani law in rendering their decisions.

Kazakhstani judges do not have adequate experience in the area of IPR enforcement. Biased court decisions and a lack of written reasons for decisions both contribute to the problems of corruption and inadequate functioning of the judiciary institutions. Companies can register complaints with either the Kazakhstani Chamber of Appeals or to the Court. However, decisions are often the subject of complaints by domestic and foreign firms that spend substantial time and effort to protect their trademarks and copyrights. For example, under a Chamber decision, Xerox lost its trademark protections. This decision has since been nullified, but it created, for a time, the possibility of anyone starting his or her copying business under the Xerox name.

Usually, courts do not have the authority and resources to take effective action against infringements. For example, even if a good is found to be counterfeit, the infringing good can still continue to enter into the distribution network until the right holder takes further actions. With respect to copyrights, the length and unpredictability of the procedures for enforcement can prove costly. No civil remedies are available to enable the holder of a copyright to stop an infringing activity. The owner of the software copyright must convince the Attorney General to arrest the infringer in order to stop the infringing activity. Considering that the Attorney's office deals with murders and other major crimes, it is difficult to convince it to become involved in cases of illegal software duplication. Consequently, the infringer can sometimes continue his illegal activity to the detriment of the copyright owner.

The State Antimonopoly Committee is engaged in the study of issues of illegal competition and is responsible for forming committees of experts to make a decision in case of conflicts. The Antimonopoly Committee will only consider a case if a trademark

is already registered. The Committee discussed about 150 cases in 1996 and 188 cases in 1997.^{25[15]} Other cases are sent to Arbitration Court or a general jurisdiction court. The Higher Arbitration Court keeps no official arbitration statistics regarding trademarks and patents, but according to some estimates, there were over 30 cases related to IPR in the first half of 1998.

No judicial body has final authority in all IPR cases, such as an IPR Court.

c) Customs Procedures

In Kazakhstan, the Customs Administration does not participate in preventing IPR violations, such as preventing the importation of counterfeit goods at the border. There are no legislative acts that regulate Customs' involvement in IPR cases. In most cases, responsibility for enforcement of intellectual property infringements falls on a right holder. To start enforcement action against imported goods the industrial property owner cannot address the Customs Service directly. The industrial property owner must first notify the National Patent Office about the infringement. Then the National Patent Office may contact the Customs Service to start a search for infringing goods. The process is lengthy and inefficient and consumes inordinate personnel resources.

Obstacles to Adopting an Adequate IPR Regime

Scarce financial resources

A significant obstacle to strengthening Kazakhstan's IPR regime is the government's general lack of resources. Establishment of enforcement mechanisms, including administrative, judiciary and customs reforms, is a costly enterprise that needs a detailed budget analysis. Moreover, financial resources need to be redirected in many instances. Some agencies have excess personnel that should be retrained and distributed to other agencies.

Financial costs of building a sound IPR regime include:

- a one-time cost of drafting legislation;
- annual costs of judicial work, equipment and enforcement measures;
- costs of training judges and government officials.

These costs suggest a pressing need of foreign assistance for Kazakhstan.

Corruption

The problem of corruption remains serious in all of Kazakhstan's economic sectors, as well as within the government. A lack of control by the government over private corruption constitutes a significant obstacle to building a well functioning IPR regime. The State Committee for Investigations (the GSK – the Kazakhstani version of the FBI) has been given the responsibility for combating corruption, and the Kazakhstani Criminal Code (originally issued in 1986, amended in 1994 and revised in 1997) contains special articles regarding penalties for giving and receiving bribes. Despite legal and institutional

reforms, however, corruption continues to impede the functioning of Kazakhstan's fledgling IPR regime. Over the past few years, a small number of low level government officials have been removed from office for corruption, but prosecution of officials has been extremely rare.²⁶^[16]

The Rule of Law and Transparency Problems

Without an adequate legal system in which the rule of law can prevail over corrupt influences, Kazakhstan will not be able to meet the requirements for joining the WTO. It is extremely important to strengthen the court system, so court rulings in commercial disputes are reached in a judicious manner and promptly enforced. Non-transparent policymaking is a significant obstacle. Changes in the law are frequent and remain unpublished and unknown for long periods of time.

The Public's Attitude Towards IPR

Kazakhstan's most difficult challenge with respect to IPR will be to transform the general attitude towards intellectual property from the old Soviet way of thinking to a market-oriented, modern view of IPR. Because intellectual property was always state controlled and managed in the past, its protection has never been a central or priority issue for the population. The population generally lacks an understanding of the importance of IPR protection, as well as respect for the legal system. Officials in the enforcement agencies usually do not consider IPR infringement a serious crime. Currently, the Kazakh government is only in the process of learning that protection of intellectual property is vital for economic growth. The fact that intellectual property can be profitable for the Kazakh government is a new concept for the authorities. Changing the Kazakhstani attitude towards IPR is a serious task for IPR reformers. It will take much longer to change this attitude than to enact laws and enforcement mechanisms.

Footnotes:

27^[1] The Paris Convention for the Protection of Industrial Property dates back to 1883; the Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886.

28^[2] Bernard M. Hoekman, 1995, the World Bank, Washington, D.C., p.51

29^[3] <http://www.wto.org/wto/intellec/intell2.htm>

30^[4] Black's Law Dictionary 336 (7th ed.1993)

31^[5] TRIPS Agreement of the WTO, Article 15

32^[6] Ibid., Article 27.1

33^[7] Trebilcock, Howse, 1995

34^[8] TRIPS Agreement of the WTO, Article 27.3.(b)

- 35^[9] TRIPS Agreement, Article 25.1
36^[10] Stewart, *The GATT Uruguay Round: A Negotiating History, op.cit., pp 2299-30*
37^[11] TRIPS Agreement, Article 22.1
38^[12] Economic Research Institute, report, 1997
39^[13] Kazakhstan's GDP for 1997 was \$22.5 billion. (World Bank Country Report, 1998)
40^[14] Interview with K. Idrissov, Agency for Strategic Planning and Reforms in the Republic of Kazakhstan, 1998
41^[15] Antimonopoly State Committee, 1998
42^[16] Commercial Overview of Kazakhstan
[17] Economic Research Institute, report, 1997
[18] Kazakhstan's GDP for 1997 was \$22.5 billion. (World Bank Country Report, 1998)
[19] Interview with K. Idrissov, Agency for Strategic Planning and Reforms in the Republic of Kazakhstan, 1998
[20] Antimonopoly State Committee, 1998
[21] Commercial Overview of Kazakhstan

Comprehensive Strategy Paper

Kazakhstan needs to strengthen its IPR regime and bring it into compliance with the international standards of the WTO TRIPS Agreement. This is crucial for Kazakhstan's accession to the WTO and its establishment of a favorable business and investment environment. To satisfy these requirements, Kazakhstan needs to create IPR laws and initiate procedural reforms as outlined below:

1. Legislative:
 - a. Create a Law on the Protection of Independently Created Industrial Designs;
 - b. Create a Law on the Protection of Layout-designs (topographies) of Integrated Circuits;
 - c. Adopt the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms;
 - d. Issue a Decree Establishing the National Agency for the Protection of Intellectual Property Rights
 1. Procedural Reforms:
 - a. administrative reforms
 - b. judiciary reforms
 - c. customs reforms
-

These IPR reforms require action on the part of the Government of Kazakhstan, including the President, the Cabinet of Ministers (Ministry of Finance, Ministry of Justice, State Committee for Investments, Ministry Energy Industry and Trade), and the Parliament. Reform will also require participation of the private sector and academics.

A very important part of a strategy to modernize the IPR regime is awareness building for the general population, which involves educating the Kazakhstani public about the basic elements of IPR protection. Thus, the Ministry of Energy, Industry and Trade can help build broad support for IPR by involving members of the public in this effort. Specifically, a Coalition for Intellectual Property Rights Protection (CIPRP) can be formed to implement a domestic and an international strategy for reforming Kazakhstan's IPR regime. The Coalition should be comprised of representatives of large, private domestic corporations who have access to the political elite and can influence the country's top policymakers. International trade associations should also be included.

First, the Ministry of Energy, Industry and Trade should build consensus inside the Government and gain support of the President. It is crucial to convey the importance of IPR reforms. Government officials of other Ministries need to understand the benefits of a sound IPR regime for the country's economic future. The Ministry of Energy, Industry and Trade needs to pursue an executive strategy to target the Prime Minister and the ministers who are close to the President in order to obtain his full support for IPR reform.

Second, a legislative strategy should be developed to convince Parliament to adopt the proposed legislation. The Ministry of Energy, Industry and Trade should use the parliamentary elections in September 1999 as a chance to push IPR reforms. For the purposes of eliciting legislative support, it should seek the CIPRP's assistance in lobbying activities.

To build public support for IPR protection, the Coalition will develop a media strategy to educate the public about the benefits of such protection. The more prominent and well-known members of the coalition will be key to this educational campaign. Nationally known writers and singers can inform the general population about the negative impact of IPR violations on their professional activities and job stability. Education through newspaper articles, TV advertising campaigns and press conferences in the most popular national newspapers, such as "Panorama," "Caravan," and "Delovaya Nedelya" is also recommended.

In addition to the rest of the government, the Ministry of Energy, Industry and Trade should pursue an international strategy that includes media and negotiation strategies. The objective of the international media strategy is to communicate the image of Kazakhstan as a country that is moving progressively towards a market-oriented economy and implementing the reforms necessary for building a stable business environment and favorable investment climate. The negotiation strategy will be necessary for the Government of Kazakhstan in the WTO accession negotiations. Kazakhstan must convince WTO members that the IPR reforms it has already implemented are the most it can hope to achieve at this stage of its economic development. Foreign governments should take into consideration the transitional period the country will require to fully assimilate these reforms.

Recommended Actions for the Government of Kazakhstan

In order to build an effective IPR regime, the Government of Kazakhstan must enact IPR legislation and institute effective enforcement mechanisms. The following actions will ensure compliance of Kazakhstan's IPR regime with the minimum international standards presented in the TRIPS Agreement of the WTO:

IPR legislation

The Parliament of Kazakhstan can take the following actions to implement IPR reforms:

- a. Enact the *Law on the Protection of Independently Created Industrial Designs*.
- b) Enact the *Law on the Protection of Layout-designs (topographies) of Integrated Circuits*.
- c. Adopt the *Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms*.
- d. Issue a decree: *Establishing the National Agency for the Protection of Intellectual Property Rights*.

National Agency for the Protection of IPR

The Government should establish a National Agency for the Protection of IPR to replace the two administrative agencies that currently administer the country's IPR system—the National Patent Office and the Agency for Copyright at the Ministry of Energy, Industry and Trade. The establishment of an independent institution will be crucial for coordinating, implementing and enforcing legislation on IPR protection. The Agency's mandate should be to coordinate all relevant governmental bodies and to ensure that all policies adhere to international agreements signed by Kazakhstan. The agency can have a special enforcement unit that pools together experience needed to effectively fight counterfeiting and piracy. Such a watchdog entity should have broad power and authority to strengthen anti-piracy practices. The establishment of such an agency will not require substantial financial resources because the personnel of the agency can be pulled from existing administrative agencies.

Procedural Reforms

To strengthen Kazakhstan's IPR enforcement mechanism, procedural reforms need to be implemented by the Government of Kazakhstan. The procedural reforms involve three main elements that need to be implemented by the appropriate government agencies:

- a. *Administrative reforms* requiring the actions by the President, the Ministry of Finance, the Ministry of Energy, Industry and Trade
- b. *Judiciary reforms* which should be implemented by the Ministry of Justice
- c. *Customs Reforms* that should be implemented by the State Customs Committee

Administrative Reforms

Administrative reforms should concentrate on the creation of the National Agency for IPR Protection that will implement necessary actions for strengthening IPR enforcement mechanisms. The administrative functions of the existing two enforcement agencies, the National Patent Office and the Agency for Copyright, should be given over to the new institution. The actions to be taken by the National Agency for the Protection of Intellectual Property Rights are the following:

- Establish closer connections between administrative, judiciary and customs agencies to create cooperation and collaborative work against IPR infringement.
- Establish computerized information networks to facilitate the work of enforcement authorities.
- Establish working groups with regard to the TRIPS agreement comprised of experts from public and private sectors that will study the various aspects of the agreement and its implementation processes.
- Obtain technical assistance from WIPO, UNDP and the WTO.
- Publicize the enforcement sanctions and criminal penalties for all types of IPR violations, and make public display of these penalties.
- Publish all laws, regulations and administrative rulings relating to IPR enforcement in order to make the system more transparent.
- Organize an anti-piracy campaign to monitor and implement anti-piracy programs and work closely with regional governments to deter the growth and spread of illegally produced computer software, audiovisual technology and other types of IPR. The campaign should be directed toward the prosecution of intellectual property pirates and help companies to win cases in arbitration court.
- Develop an awareness-building campaign for consumers regarding legal products. With the assistance of the private sector, the agency should educate consumers on how to identify legal products and their benefits. They should also inform the public how to identify stolen software and computers with pirated software installed.
- Modernize the administration of IPR protection by developing human resources training, computerizing records, and making infrastructure improvements.

Judiciary Reforms

Judiciary reforms are crucial to enforcing IPR legislation. The following actions should be taken:

- The Ministry of Justice should write a memorandum to arbitration and local courts addressing the issues of intellectual property rights violations.
- The Ministry of Justice should create an intellectual property court in order to ensure the availability of necessary expertise.
- Court procedure should be revised so that previous decisions will be considered in making new decisions on similar cases.

- The judiciary system should adopt civil and criminal procedures.
- Judges and legal officials should be trained in the intricacies of intellectual property protection so they are able to address complicated technical questions regarding fair use of copyrighted or patented materials.

Customs Reforms

The State Customs Committee has the authority to reform customs procedures to improve IPR enforcement. It is within its capability to prevent importation of counterfeit goods at the border. It is much easier to stop counterfeit goods at the border rather than in the distribution network. Price difference is a strong indicator of counterfeit products.

Customs should enforce border measures consistent with the TRIPS Agreement by:

- Establishing a comprehensive monitoring system for imported and exported goods.
- Providing authority to Customs officials to take action against counterfeit goods or parts that are imported for the purpose of assembling or producing a finished product to be sold domestically or exported to a third market.
- Enabling Customs authorities to undertake discovery activities without prior notification of higher-level government agencies.
- Enabling industrial property owner to start an enforcement action against infringing goods by requesting that Customs search and seize a shipments thought to be counterfeit. This allows time for the industrial property owner to commence action against infringers, which may include seeking an injunction to prevent the release of the goods until the courts have heard a civil case to decide whether an infringement has occurred.
- Establishing close cooperation between Customs and specific industries. Customs is faced with the task of sifting through the enormous amounts of product documentation that uses generic descriptions and gives little or no indication of whether trademark or copyright law might apply. In this situation, industry assistance would be invaluable. It is industry that has specific commercial knowledge and market intelligence to assist enforcement agencies in making the best use of scarce resources. For example, industry may provide information that can be used to identify target areas to streamline search activities and allow resources to be redirected to those areas. Conversely, both administrative and enforcement agencies need to increase industry awareness of the commercial importance of IPR.

Coalition Building Strategy

To mobilize support and build consensus in the public, business and governmental sectors, a Coalition for Intellectual Property Rights Protection (CIPRP) needs to be established. This effort should involve government, business, industry associations, non-governmental organizations, the legal community, and academics.

The Objective of the CIPRP

The objective of the CIPRP is to strengthen Kazakhstan's intellectual property regime and bring it into conformity with the international standards of the WTO TRIPS Agreement. This can be achieved by lobbying the government of Kazakhstan to adopt necessary legislation and to establish sound mechanisms for enforcement.

CIPRP Membership

The Coalition's success will depend in large part on the ability of its members to influence government and public opinion. Accordingly, CIPRP should recruit high-level officers from large private enterprises, influential associations, and government agencies.

- Private Sector:
 - ACCEPT Corporation
 - ALSI Software Corporation
 - Coca-Cola International
 - Pepsi International Bottles-Almaty
 - Kazakhtelecom
 - Adil Inc.
 - BM Corporation
 - "Karaganda Sweets" Enterprise
 - Kabisko and R. J. Reynolds Tobacco Kazakhstan
 - Kazakhstan Pharmaceuticals Inc.
- Associations:
 - Chamber of Commerce and Industry of the Republic of Kazakhstan
 - The Businessman's Congress of Kazakhstan
 - The Almaty Helsinki Committee Artists' Union
 - The Congress of Entrepreneurs of Kazakhstan
 - Kazakhsani Writers' Union
 - International Music Festival "Voice of Asia"
- Agencies:
 - The National Patent Office of Kazakhstan
 - The Agency on Copyright of the Ministry of Energy, Industry and Trade

- The National Agency for Press and Mass Information
- Foreign Organizations:
 - American Chamber of Commerce
 - American Business Centre
 - United State Agency for International Development (USAID)
- Media:
 - Caravan-the most popular independent national newspaper
 - Komsomolskaya Pravda-Russia's newspaper, very popular in Kazakhstan
 - Delovaya Nedelya
 - Panorama
 - Radio Max
 - Radiocity
 - TV-M
- Research and Science:
 - Academy of Science of Kazakhstan
 - Independent Research Laboratories
 - National State University of Kazakhstan
 - Regional institutes and universities

Core Members of CIPRP

Core members of the CIPRP will play a vital role in lobbying the Executive Branch of the Government, especially the President. Therefore, core members should be representatives of the most influential business enterprises and large foreign and domestic private companies, (ACCEPT Corporation, ALSI Corporation), famous publishers and writers (Olzhas Suleimenov and Muhtar Shahanov), the President of the Academy of Science of Kazakhstan (Vladimir Shkolnik). These are people who personally know the President and can use their influence to promote IPR issues.

Actions to be Pursued by the CIPRP

To build support for IPR reforms in Kazakhstan, a considerable part of the CIPRP's efforts will aimed at:

- Gaining support from the executive branch, especially the President.
- Proposing policy changes to the government.
- Building consensus in the Parliament.

- Implementing a grassroots strategy to gain support from civil society to denounce piracy. This effort will include owners of small and medium size businesses, academics, and members of civil society.
- Developing an international media strategy to improve the image of Kazakhstan as a country with a sound investment and business climate.

Building Consensus in the Executive Branch

The Ministry of Energy, Industry and Trade can implement this consensus building strategy in order to gain executive branch support for adopting required IPR legislation and adequate enforcement mechanisms. The Ministry of Energy, Industry and Trade will have two main objectives:

1. Build consensus among governmental ministries and other agencies.
2. Gain support from the President.

In Kazakhstan, governmental power is increasingly concentrated in the executive branch. Only the highest officials in the government—the President, the Prime Minister and the Cabinet—have the ability to implement reforms in a relatively short period. The main focus of this strategy will be convincing the President to support IPR reforms by emphasizing the importance such reforms for achieving two of the President’s most important objectives, namely WTO accession and foreign investment in Kazakhstan. To achieve this, the Ministry of Energy, Industry and Trade should first concentrate on building consensus among the other ministries of Kazakhstan.

The following actions need to be implemented by the Ministry of Energy, Industry and Trade to gain the President’s support for IPR reforms:

Gaining Support of the Prime Minister and the Cabinet.

The Prime Minister and the Cabinet exert considerable influence on the President and his views on any given issue. Therefore, it will be important to develop an awareness-building strategy to raise the importance of IPR issues among the government officials who are close to the President and who are reliable sources of information for him. Gaining support from the Prime Minister and the Cabinet will be an intermediate action for obtaining the President’s support.

To implement this part of the executive strategy, the Coalition should use its most influential members—those who have access to higher level officials of the government. Potential Coalition representatives who could lobby the Prime Minister and the Cabinet are:

- The President of the ACCEPT Corporation. He knows the Prime Minister personally and spends a lot of time helping him guide government policies.
- The President of ALSI Corporation. ALSI is a thriving company with a large share of the domestic market and significant experience in influencing policy decisions of the government. ALSI was founded in 1992 as a Kazakhstan-Singapore joint

venture company. The annual revenue of the company increased from \$2 million in 1991 to \$30 million in 1997.

- The President of the Chamber of Commerce of Kazakhstan. He represents an important number of domestic private enterprises in Kazakhstan, as well as CIS-based companies.
- The U.S. Embassy Commercial Officer.
- The Minister of Science and President of the Academy of Science. He has easy access to other ministers.

Lobbying targets:

- The Prime Minister should be lobbied in order to gain his support for reforms. He is the main adviser to the President.
- The First Deputy Prime Minister-Chairman of the State Committee of the Republic of Kazakhstan for Investments. He is responsible for developing policies for investment attraction. In order to gain his support, he should be informed and educated about the direct correlation between sound IPR rules and inflows of capital to the country. The fact that long-term benefits will outweigh short-term gains should be the main emphasis of the lobbying effort.
- The Minister of Finance. He plays a vital role in any legislative reforms implemented in the government due to his power to regulate the financial aspect of any changes. The Coalition should propose methods to bring the costs of IPR reforms to a minimum.
- The Minister of Education, Culture and Health. He is responsible for regulating the activities of universities, cultural entities, and health care organizations. He should be convinced of the effects of piracy on cultural preservation, especially the effects on national music and books.
- The Minister of Justice. He regulates the activities of the local arbitration courts.

Lobbying activities will include the following:

- Separate meetings with each member of the Cabinet and the Prime Minister. It is important that these meetings be attended by Coalition members who have good relationships and similar interests with the members they lobby. It is important to state clearly the objectives and benefits of supporting the establishment of a sound IPR regime.
- Follow up meetings, letters and phone calls. A phone call to the right person has always helped in solving certain political issues in the government.

Lobbying the President

The main objective is to gain the support of the President for bringing Kazakhstan's IPR regime into conformity with WTO standards. He is an essential political figure in the policymaking process in Kazakhstan and remains an explicit as well as implicit player in all large-scale reforms. He has the power to change the attitude of government officials and the public toward IPR.

The President should introduce IPR reforms to the Legislative Branch and make this issue a political priority. The message to the President should be that IPR reforms will expedite Kazakhstan's WTO accession process. To gain the President's support, the Coalition should:

- Use the President's vision for Kazakhstan as a major instrument to gain his support. IPR reforms should be presented as part of implementing the President's strategy "Kazakhstan-2030."
- Propose IPR reforms to the President as a way to save his image in the public as a democratic reformer. The Presidential elections in January 1999 substantially undermined his reputation.
- Write a letter to the President emphasizing the importance of IPR protection and the need for it to be placed at the top of the government's agenda.
- Core members of the CIPRP should arrange a meeting with the President to explain the importance of IPR protection for the economic development of the country. It is important to emphasize the decrease in foreign investment that results when foreign investors lack confidence in a country's business environment.

Legislative Strategy

A key task for the Coalition will be to persuade Parliament to adopt adequate IPR laws. The Parliamentary elections in September 1999 provide a good opportunity to place IPR issues on the political agenda. Specific legal knowledge is not crucial for such lobbying efforts because most legislators are not lawyers and expect only a general discussion of the issue.

The Coalition needs to be prepared to deal with the following obstacles to the passage of IPR legislation:

- Legislators' lack of specific knowledge of IPR.
- Legislators' unwillingness to tackle IPR issues before other outstanding problems are solved.
- Pressures from the domestic protectionist groups.

An effective legislative strategy involves the following steps:

- Provide information on the benefits of addressing IPR issues. Such educational materials should demonstrate the relevance of IPR protection at the current moment. This information should include the following papers:
- White Paper (see Appendix)
- Report of the Economic Research Institute on the macroeconomic benefits of a stronger IPR regime

- Information on Kazakhstan's membership to relevant international treaties on IPR (see background) and a list of legislation that needs to be adopted (see Analysis of Substantive Policy Issues).
- Lobby Parliament, focusing on the largest parties in the Parliament—the People's Unity of Kazakhstan and the Democratic Party. The Democratic Party mostly favors IPR reforms, but it is important to assure its commitment. The People's Unity of Kazakhstan favors some nationalistic views and considers that Kazakhstan is not yet ready for compliance with international standards.
- Arrange meetings with the members of Parliament. It is important to anticipate the busy schedules of politicians and request meetings only when the Coalition's message can be heard with the attention it deserves. It is also crucial to tailor our approach to each legislator based on his own concerns, interests and overall objectives.
- Send letters and place phone calls.

Media Strategy

The media strategy is designed to enable the Coalition to build public support for IPR reforms. The objectives of the Coalition's media strategy are to:

1. Educate the public about the basic concepts of IPR protection and its importance for the long-term prosperity of the country, as well as inform the public about the health risks associated with counterfeited products and low IPR standards.
2. Educate the public and politicians about the direct correlation between the protection of intellectual property rights and foreign direct investment.
3. Establish a positive public attitude toward the government's desire to adopt a well functioning IPR regime. People need to understand that the improvement of Kazakhstan's IPR regime is not an imposition of an obligation but rather an undertaking that is in the interest of the nation as a whole.

Target Audience

The Coalition will target the Kazakhstani mass media, including top national newspapers, magazines, and radio and TV stations in order to influence the general attitude toward IPR. The main focus should be on the benefits of establishing a stable business and investment environment.

Key Coalition members to participate in the media strategy:

- Murat Irgaliev, the President of the Music festival "Voice of Asia." The "Voice of Asia" is an international music festival held annually in Almaty. Mr. Irgaliev is popular among the young generation and enjoys the respect of a wide segment of the population.
- Olzhas Suleimenov, Kazakhstan's well-known writer. He is very popular among the older generation.

Actions for the domestic media strategy:

- Influential members of the coalition should write op-ed pieces in the most popular newspapers in Kazakhstan including "Caravan," "Panorama," and "Delovaya Nedelya," as well as in private newspapers, and magazines. The main reasons for strong IPR protection and its benefits should be highlighted.
- Organize press conferences announcing the formation of the Coalition. Highlight the importance of IPR protection for joining the WTO and attracting investment. The coalition should emphasize that WTO accession was a government decision and IPR protection is part of this undertaking.
- Develop a TV campaign that includes the following:
 - A message from the President of Kazakhstan to the public addressing IPR issues and the great importance of IPR protection for the future of the country. The President should assure the public that these measures are not an imposition of extra duties from the industrialized countries, but a necessary stage in the process of building a stable economy and attracting investment to Kazakhstan. This message should be published in leading national newspapers and broadcast on TV and radio stations.
 - Use national celebrities, singers, highly visible people, and cultural leaders to help inform and educate the public on IPR issue. Kazakhs are culturally sensitive people and have great respect for national poets and singers. These artists can give a more tangible sense of the importance of IPR protection by speaking out on how piracy has affected their careers. The issue of national pride should be raised in this campaign to influence the attitude of Kazakhs toward IPR. Poets and composers will not be able to create and enrich Kazakh culture until their works are protected. A strong message should be sent to people that there is a danger of losing cultural identity.
 - Leading government officials should be interviewed and broadcast on TV and radio discussing the benefits from IPR protection and international trends in this sphere.
 - In coordination with the proposed National Agency for Protection of IPR, develop a public relations campaign through which the Government can inform the public about new IPR laws and their implications. The CIPRP should publish small brochures, bulletins, and educational videos on basic standards of intellectual property rights and their protection.
- Use paid advertising.

International Media Strategy

The international media strategy will require a coordinated effort from the Government of Kazakhstan and the Coalition for Intellectual Property Rights Protection. The goal of this strategy is to demonstrate to the international community the progress Kazakhstan has made toward building a stable business environment and favorable investment climate. Specifically, the objectives of this strategy are to:

- Attract foreign investors, especially the largest ones, including U.S., Japanese, British, and South Korean investors.
- Demonstrate to WTO members Kazakhstan's substantial movement towards compliance with the WTO requirements.
- Promote transfer of technology to Kazakhstan.
- Improve Kazakhstan's image, which was significantly damaged when the international community deemed the presidential elections in January 1999 to be non-democratic.
- Change the stereotype of former Soviet Republics as countries that have made little progress and continue to be ignorant of the rule of law.
- Obtain technical assistance from international organizations.

Target Audience:

The international media strategy should target foreign investors and Kazakhstan's major trading partners that are also WTO members (Great Britain, New Zealand, Japan). Also this strategy should attract the attention of journalists interested in CIS countries and who would be willing to discuss the issues internationally.

Recommended Actions:

- The Government should use paid media to publicize IPR reforms implemented in Kazakhstan. The *Financial Times* should be targeted as the best way to reach potential investors in other countries, particularly U.S. and British investors. The government has a fair amount of experience in using this highly popular economic newspaper as an instrument for acknowledging progress made by Kazakhstan.
- International members of the Coalition, such as the American Chamber of Commerce, the United States Agency for International Development (USAID), and the American Business Center should contribute by placing the reports about Kazakhstan's current reforms on their Web sites.
- Coordinated efforts should be made to attract free media coverage of IPR reforms in Kazakhstan. The message should be sent to the world that Kazakhstan is the first the former Soviet Union country to establish a sound intellectual property rights regime.

Negotiation Strategy

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The WTO Market Access Negotiations

Kazakhstan's WTO accession is now in the bilateral negotiation stage; it is negotiating market access concessions and commitments with individual WTO members. Kazakhstan made an initial concessions offer, but WTO members were not satisfied. Negotiations are lengthy and complicated because they involve a large number of

parties, all of which seek to protect their own unique interests. These negotiations also involve discussion of Kazakhstan's commitments on IPR protection. Certain WTO members are not satisfied with Kazakhstan's performance on this issue because Kazakhstan has not implemented reforms required for joining the WTO TRIPS Agreement.

The Government of Kazakhstan should use the following negotiation strategy as it enters into WTO accession negotiations with the United States and others. The United States is the WTO member most concerned about IPR issues in Kazakhstan; it has strong interests in addressing IPR issues. Kazakhstan should first implement those IPR reforms indicated in previous sections (see Recommended Actions for Kazakhstani Government), and then pursue the following negotiating strategy.

Background on Kazakhstan's Accession Negotiations

According to the Uruguay Round Agreement that established the WTO, countries in transition to a market economy cannot accede to the WTO unless their statutory and enforcement regimes fulfill the TRIPS obligations.

The United States is particularly concerned with ensuring that all WTO members and prospective members live up to their TRIPS obligations. The following U.S. interest groups have all submitted comments to the USTR concerning Kazakhstan's IPR regime and its accession to the WTO:

- The International Intellectual Property Alliance is a coalition of associations that represents U.S. copyright-based industries in bilateral and multilateral efforts to open up foreign markets closed by piracy and other market access barriers. The Alliance has urged U.S. negotiators not to permit Kazakhstan's accession to the WTO without full TRIPS compliance, including the dispute settlement provisions.
- The Distilled Spirits Council of the United States has argued that Kazakhstan must show that, upon accession, it can and will protect trademarks of distinctive American distilled spirits, such as Bourbon and Tennessee Whiskey.
- The Wine Institute is a California industry organization that represents over 85 percent of U.S. wine production. It has declared that, to be in compliance with the TRIPS Agreement, Kazakhstan must "protect the continued use of semi-generic wine names by U.S. producers." It also insists that "equal protection be provided to trademarks as is given to appellations of origin," and that "U.S. geographic indications and viticultural areas... be protected".

Preferred Outcome

The Government of Kazakhstan should obtain the United States' approval that Kazakhstan is in a full compliance with the TRIPS Agreement of the WTO and has undertaken significant steps toward compliance with international standards.

Interested Parties

United States

- The United States will seek assurances of IPR protection for U.S. companies doing business in Kazakhstan. Specifically, the United States will seek

Kazakhstani compliance with the TRIPS Agreement before it will bless Kazakhstan's accession to the WTO. The United States has stated that it will not agree to a special phase-in period for Kazakhstan to implement IPR reforms, despite the fact that such a phase-in is allowed for the developing countries that participated in the Uruguay Round.

Kazakhstan:

Kazakhstan has the following interests:

- Ease U.S. demands by demonstrating that Kazakhstan has fulfilled the requirements for joining the WTO TRIPS Agreement and has undertaken significant steps to come into compliance with international standards.
- Protect agriculture, the most sensitive sector of the economy.

Recommendations

During its bilateral market access negotiations with the United States, the Government of Kazakhstan should pursue the following actions related to the TRIPS Agreement:

- In advance of the negotiations, the newly created National Agency for IPR Protection should provide to WTO members a detailed report on Kazakhstan's IPR reforms, indicating specific changes that have already been made such as:
- Legislative reforms.
- Reforms in administrative, judiciary and customs procedures, including the creation of the new independent institution that coordinates the activities of all IPR enforcement bodies.
- Provide data on counterfeiting and piracy rates after reforms.
- Specify the functions and authority of local police for injunctions.
- List further actions for full compliance with the WTO TRIPS Agreement.
- At least two members of Kazakhstan's negotiating team should be thoroughly prepared to answer very specific IPR questions of the WTO members; they should be experts on not only Kazakhstan's reforms, but also international standards.
- Kazakhstan should agree to accede to the WTO TRIPS Agreement at the time it enters the WTO (i.e., without the four-year grace period that some developing countries have obtained). In exchange, Kazakhstan needs to request that it be able to maintain higher tariffs on certain products that are highly sensitive and need additional protection (e.g., agriculture products).

Exhibits

1. The WTO Accession Process and Kazakhstan

2. **Kazakhstan's Economic Climate**
3. **Policymaking in Kazakhstan**
4. **White Paper: Intellectual Property Rights Reforms in Kazakhstan**
5. **Questions & Answers**

Appendix 1

The WTO Accession Process and Kazakhstan^{43[1]}

In January 1995, the WTO was established as a successor organization to the GATT. The original GATT charter provided the rules, guidelines and disciplines for international trade in goods only, whereas the WTO regulates a wider range of issues. It provides a framework for implementing and administering a full range of multilateral trade agreements including the GATT 1994 Agreements, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and the Trade Policy Review Mechanism.

The core philosophy of the WTO system is equal treatment of members as set forth in the most favored nation and national treatment provisions of Article I and III of the GATT. Prohibitions on the use of quantitative restrictions (Art. XI) and bound tariffs (Art. II) are intended to allow trade to develop progressively based on individual countries' comparative advantages. The goal is to enhance the welfare of all members, without unreasonable and discriminatory disruption.

Under the GATT, countries could become Contracting Parties using two Articles: XXXIII and XXVI(5)(c). Article XXXIII of the GATT allowed a government, non-member of this Agreement, or government acting on behalf of a separate customs territory to:

“...accede to this Agreement...on terms to be agreed between such government and the Contracting Parties. Decisions of the Contracting Parties under this paragraph shall be taken by a two-thirds majority.”^{44[2]}

Article XXVI(5)(c) of the GATT allowed the customs territories that possessed full autonomy to accede to the GATT under the sponsorship of a government that was already a member of the Agreement.

Currently, a country can accede to the WTO in accordance with Article XII of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement):

“a State or separate Customs territory possessing full autonomy in the conduct of its external commercial relations and of the matters provided for in the WTO Agreement and the Multilateral Trade Agreements (MTAs) annexed thereto may

[1]

accede to the WTO on terms to be agreed between such State or separate customs territory and the Members of the WTO".45^[3]

The WTO accession process involves a number of steps as described below:

1. *Indication of Intention to Accede.*

The acceding country sends a letter to the Director-General of the WTO indicating its desire to accede to the WTO under Article XII. The application is considered by the General Council, which consists of representatives of all members and meets frequently during the course of the year. Kazakhstan formally applied for WTO membership in January 1996.

2. *Establishment of a Working Party*

The next step of the accession process is the establishment of a working party by the General Council of the WTO. The terms of reference for working parties are "to examine the application for accession to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession." Membership of any working party is open to all members of the WTO. The General Council established Kazakhstan's working party in February 1996. The General Council appointed Bjorn Eckblum, Permanent Representative of Finland to the WTO, as the chairman of the working party for Kazakhstan. In Kazakhstan, an inter-agency commission was created in the country's Ministry of Economy and Trade to coordinate Kazakhstan's accession bid. Kazakhstan's Agency for Strategic Planning and Reforms approved the Plan of Action for WTO accession (in accordance with the Government's Decree No.211 dated 19 February 1996).

3. *Preparation of a Memorandum on the Applicant's Foreign Trade Regime*

Upon the establishment of a working party, the WTO Secretariat requires that the applicant submit a Foreign Trade Regime Memorandum detailing its foreign trade regime and providing relevant statistical data. The memo is circulated to all WTO members and covers the country's existing policies and institutions. It goes well beyond a discussion of trade in goods and services to include descriptions of various aspects of macroeconomic policy (especially related to foreign exchange management and controls), investment and competition policy, and enterprise privatization, as well as protection of intellectual and other property rights. The acceding country is responsible for preparing a complete memorandum in a timely fashion. Incomplete memos usually result in longer question and answer periods. Kazakhstan submitted its Memorandum in June 1996.

4. *Question and Answer Period*

Once the memorandum has been circulated to working party members, the accession process enters the most time consuming process. This consists of members asking questions about the applicant's policies and institutions, either based on the

memorandum or on independent evidence gathered by working party members.

5. *Working Party Review Sessions*

Working party meetings are held to discuss issues raised in Foreign Trade Regime Memoranda. Relevant documentation should be circulated four to six weeks prior to the meeting to enable both working party members and representatives of the applicant country to prepare for the meeting.

The working party for Kazakhstan's accession first met on March 19, 1997 in Geneva. The WTO members present were Australia, Canada, Cuba, the European Union, Finland, the United States, Japan, India, Netherlands, Spain, Switzerland, Turkey, Great Britain, Poland, Czech Republic, Greece, Germany, France. Countries with WTO observer status that attended the meeting were Algeria, Byelorussia, Estonia, Georgia, Russian Federation, Saudi Arabia, and Ukraine. International organizations, such as the IMF, World Bank, OECD, and UNCTAD were also present. The Kazakhstani delegation was lead by Zhanat Ertlesova, Deputy Minister of Energy, Industry and Trade. The entire delegation consisted of nine members, including Bulat Uteumuratov, Kazakhstani Ambassador to the United States.

Kazakhstan's government submitted a plan for future legislative reforms that will bring the country into compliance with WTO requirements. Kazakhstan acknowledged its intention to submit an initial offer on tariff concessions in goods by May 1997 and in services by July 1997. The United States asked Kazakhstan to submit a list of commodities that need to be brought into compliance with the WTO Agreement on Sanitary and Phitosanitary Measures within a certain time period. The United States also emphasized that Kazakhstan may not use Article 29 of the WTO Agreement on Subsidies and Countervailing Duties. Article 29 allows Members that are "in the process of transformation from a centrally-planned into a market, free-enterprise economy" to phase out subsidies falling within the scope of Article 3 of this Agreement within a period of seven years from the date of enforcement of the WTO Agreement. Instead, the United States requested that Kazakhstan submit a list of subsidies that are not in compliance with the WTO Agreement and the time schedule for their gradual elimination.

During the first working party meeting, WTO members identified the following changes that Kazakhstan must make to meet WTO standards.

a) Adoption of new legislative acts:

- Antidumping Law
- Law on Subsidies and Countervailing Measures
- Law on Safeguards
- Law on Government Procurement
- Legislative Act on Intellectual Property Rights
- Stricter Civil Codes for the protection of Intellectual Property Rights

- b) Amendments in existing legislation:
- Amendments to the existing Customs Code need to be made to assure its compliance with Article VII of the GATT (Valuation for Customs Purposes) and Agreement on Rules of Origin. Rules regulating the application of seasonal duties must be more explicit.
 - Amendments to the Law on Petroleum Products and the Law on Natural Resources and Its Users need to be made to conform with the WTO Agreement on Trade-Related Investment Measures
- c) Certain changes should be made in Kazakhstan's current trade policy for it to comply with the national treatment principle.
- Value-added excise taxes should be the same for CIS and non-CIS countries (based on the departure point, not on the point of origin) to meet the requirements of GATT Article XXIV. The adoption of specific excise taxes and their equal application to imported and domestic products should be guaranteed by the Government of Kazakhstan in order for Kazakhstan to be in compliance with Article III of the GATT (National Treatment on Internal Taxation and Regulation).
 - Fees and taxes applied by the National Patent Agency of Kazakhstan should be the same for residents and non-residents, however residents still receive preferential rates on: 1) application fees, 2) trademark registration fees, 3) fees for presenting a case to the appellation body, 4) guarantee fees for patents and trademarks, and 5) other payments. These differences should be explained by Kazakhstani officials in detail and further eliminated. A time schedule for eliminating differences was not specified in the first Working Party meeting.
- d) According to GATT Article VII (Valuation for Customs Purposes), all duties and charges related to trade transactions (e.g. fees for customs services, payments for import or export licenses, charges for the certificate of origin) should be based on the actual value of the services.
- e) The Government of Kazakhstan should guarantee transparency in further legislative actions:
- The official national newspaper of Kazakhstan should publish all current and future changes in regulations for importing and exporting goods.
 - Kazakhstan should report annually to the WTO on the status of privatization measures.

- f) Kazakhstan should adopt the Harmonized Tariff System for assessing duties. This should be accomplished in a short time period in order to facilitate upcoming bilateral and multilateral negotiations on market access in goods.

6. *Bilateral Negotiation of Two Schedules of Concessions*

When the examination of a foreign trade regime is sufficiently advanced, members of the working party may initiate bilateral market access negotiations on goods and services. The fact-finding work on a foreign trade regime and the negotiating phase may proceed in parallel, as is the case with Kazakhstan. The applicant must prepare two schedules of concessions that will be attached to the Protocol of Accession: one for agricultural and industrial goods and the other for services. The initial schedule of “offers” in goods and services consists of:

- The detailed schedule of tariffs and the level at which the tariffs will be bound (i.e., the tariff level beyond which a prospective member cannot increase tariffs except in well-defined circumstances).
- The country’s commitments to maintain free access to its market for services.
- The country’s commitments regarding the level of support it grants to agriculture relative to a base reference period.

Kazakhstan has tabled its draft schedule of concessions and commitments to provide the basis for negotiations, which are often referred to as “market access negotiations” and are conducted bilaterally between Kazakhstan and other contracting members who wish to negotiate. These bilateral negotiations involve tariff reductions, the elimination of non-tariff barriers, and commitments in services. Market access negotiations are conducted to strike a balance between the rights and obligations of existing WTO members who have reduced their tariffs through successive negotiations in the past and new members who have not done so. The results of these bilateral negotiations are applied to all members under the most favored nation principle.

Following the conclusion of bilateral negotiations between interested members and an applicant, the applicant’s Schedule of Concessions and Commitments to GATT 1994 and its Schedule of Specific Commitments to the GATS are prepared, reviewed by all interested WTO members, and annexed to the draft Protocol of Accession as an integral part of it.

The second meeting of the working party for Kazakhstan’s accession to the WTO was conducted on October 7, 1997 in Geneva, Switzerland. This meeting was held in parallel with bilateral negotiations on tariff concessions. It focused on further discussion of Kazakhstan’s Foreign Trade Regime Memorandum, changes in domestic legislation, and Kazakhstan’s initial offer of tariff concessions on goods and services. Results of the second meeting of the working party and bilateral negotiations are outlined below:

- The European Union and the United States pointed out that the high tariffs offered by Kazakhstan could threaten the process of further bilateral negotiations. The United States proposed that the average tariff should be bound at 15 percent and that tariffs for certain commodity groups should be significantly less. Zero tariffs were proposed to Kazakhstan on the following goods: information technology, chemical products, alcoholic beverages and textile. The European Union and the United

States also requested the elimination of limitations for foreign suppliers in a wider range of services (telecommunications, air and railroad transportation and others).

- Slovakia, Czech Republic, Pakistan, Cuba, Canada and Australia offered their own binding levels for Kazakhstan's import tariffs: 150 percent for sensitive agricultural goods (alcoholic beverages and tobacco products); 70 percent for other agricultural goods; six to 100 percent for sensitive industrial goods; and 15 to 50 percent for other industrial goods.

7. Approve the Accession

At this stage, a working party submits a Report to the General Council/Ministerial Conference together with a draft Decision and Protocol of Accession. Following the General Council/Ministerial Conference's adoption of the Report of the working party and the approval of the draft decision by a two-thirds majority of the WTO members (Article XII(2)), the Protocol of Accession enters into force thirty days after acceptance by the applicant.

8. Prepare the Protocol of Accession

The last stage in the process of accession is the negotiation of the Protocol of Accession, which contains general terms and conditions of membership for the acceding country, as well as terms specific to a certain country and its ability to comply with the WTO rules.

Appendix 2

Kazakhstan's Economic Climate

Since gaining independence, Kazakhstan has made significant progress toward establishing a market-oriented economy. By 1997, it had largely achieved macroeconomic stabilization, liberalized large portions of its domestic market, and opened most of its economy to foreign competition. Involvement by the state in the economy has been considerably reduced. However, the effects of seventy years of central planning have not yet been fully erased.

Four key problems persist:

- Total or almost total nationalization of the economy left a very limited role for private savings and serious restrictions on private economic activity.
- Huge structural distortions evolved from monopolization, economic autarky, price controls, and centralized investment decisions.
- Social spending levels remain high relative to the country's level of economic development.

- Domestic and external macroeconomic disequilibriums became particularly problematic during the final years of the communist regime when the government lost its capacity to control economic and social life.

Kazakhstan has a population of 17 million. It ranks second only to the Russian Federation in size covering 2.7 million square kilometers stretching from the Caspian Sea to China. Kazakhstan is land-locked and depends on its neighbors for access to international markets. The country is endowed with rich natural resources, including oil, gas and non-ferrous metals.

The transition costs of moving from a centrally planned to a market economy, have been high. With the breakup of the Soviet Union, Kazakhstan experienced a drop in output in almost all sectors of the economy; an increasing volume of non-payments between enterprises; decreasing investments; and decreasing levels of the population's income.

The economy in the early nineties was characterized by sharp declines in production, the destruction of economic ties between enterprises, a breakdown of the monetary and credit system, the loss of stability of the ruble, a universal transfer to barter trade, empty counters in shops, and distribution of goods by coupons. Radical restructuring of the economy began in 1992 when inflation reached an unprecedented pace. In 1992 and 1993, prices inflated 3,060 and 2,265 percent respectively. A new national currency, Tenge, and new macroeconomic policies were introduced in November 1993.

Although Kazakhstan's market-oriented economy is growing, its rate of growth has slowed in the past year. Prices for Kazakhstan's leading exports—oil, metals and grain—have all dropped markedly since the summer of 1997, resulting in a significant decline in government revenues. The Asian and Russian financial crises have dampened the enthusiasm of international investors. Moreover, paying for the opening of the new capital in Astana has increased pressure on the budget.

Joining the internationally regulated trading system became essential for Kazakhstan when, after gaining independence, it became more involved in the world economy. In 1997, Kazakhstan's external trade shifted away from former Soviet Union (FSU) countries. Kazakhstan now exports more to the rest of the world than it does to FSU countries. These countries are only marginally more important than the rest of the world as a source of Kazakh imports. FSU countries were the destination of 59 percent of Kazakh exports in 1996 but only 46 percent in 1997. Kazakh exports have diverted away from Russia towards Western Europe, notably the United Kingdom and Germany. The FSU countries' share of Kazakh imports dropped from 71 percent in 1996 to 55 percent in 1997 as imports from Russia were substituted by imports from Germany, the United States and the United Kingdom. The dollar value of exports grew by 7.6 percent to US\$ 6.8 billion, mainly as a result of increased exports of oil and gas condensate (14.8 percent) as well as other mineral products (notably coal, copper, iron, rolled ferrous metal, and zinc).

Although the challenge of reform is enormous, the country has significant economic resources including:

- significant oil and other natural resources that have already attracted foreign investment. There are significant reserves of minerals, copper, lead, and gold. Kazakhstan is practically self-sufficient in food. In per capita terms, this resource

endowment is even larger, since this is one of the most under-populated countries in the world.

- comparatively low debt ratios.
- a reasonably well educated workforce. Adult literacy is comparable with that in economies with per capita GDP above US\$6,000.⁴⁶

Industry is dominated by mining and processing activities and geared largely toward exploiting the country's rich natural resource base. There are processing plants for both ferrous and nonferrous metals, especially in the northern and eastern parts of the country that are close to mineral deposits. Local industries produce heavy machinery and tools. Refineries and petrochemical plants also take advantage of existing hydrocarbon resources. Kazakhstan also has a variety of agro-processing industries, including meat and fish canneries, wineries, and footwear and textile manufacture.

The agricultural sector remains a highly significant part of the Kazakhstan's economy. Prior to 1991, agriculture officially accounted for about 35 percent of GDP and 25 percent of total employment. Kazakhstan has a total area of about 2.7 million square kilometers of which 221 million hectares or 75 percent are designated as agricultural land. Some 190 million hectares of agricultural land are steppe or semi-arid pastures or fallow meadowlands, leaving the rest, 33 million hectares, for cultivation. The country is a significant producer and exporter of agricultural products. Livestock husbandry is the traditional industry of the indigenous population. The most important agricultural products include wheat, maize for fodder, livestock products, cotton and wool.

Appendix 3

Policymaking in Kazakhstan

Unlike many other former communist countries in Eastern Europe, Kazakhstan was not previously an independent state, and until now, it has never experienced democracy. Since independence, the country has had to build from nothing the basic institutions of an independent state. It is not surprising that certain individuals are sometimes more powerful than governmental institutions in the policymaking process.

In 1995, after a first, failed attempt to establish stable political institutions, Kazakhstan adopted the constitution that now defines the country as a unitary state with a presidential form of government and an elected parliament. The constitution concentrates power in the presidency, permitting the president to dominate the parliament, judiciary and local governments. Kazakhstan's parliament is a legislative body, which consists of two Chambers: the Majilis, which is elected directly, and the Senate, which is elected indirectly by secret ballot.

The administrative structures of Kazakhstan's present government have remained similar to those in place under the Soviet system. They are characterized by a high degree of centralization of policymaking and strong presidential power. The president, the prime minister, the deputy prime ministers, and their staffs assume leadership in the formulation of all government policies and in the control of policy implementation. Under

them, all state bodies, from the ministries downward, are ordered in a hierarchical system.

The president is increasingly the country's central political figure. Initially elected in 1991 to a five-year term, President Nursultan Nazarbayev's powers have been strengthened two times: first through a 1995 referendum and then through a 1996 decree. This latter decree gives the president the power to determine the basic course of domestic and foreign policy and to serve as a guarantor of national unity, state power, the constitution and citizens' rights. The decree also gives the president power to order parliamentary elections, annul existing laws, and demand the government's resignation. Nazarbayev extended his presidency for seven more years when he won the January 1999 presidential election.

Regional administrative heads (akims) implement the decisions of the national government at the local level. Under the new constitution, the akims are nominated by the prime minister and appointed and removed by the president without the scrutiny of either the legislative or judicial branches. Regional legislative bodies enjoy minimal authority.

Lobbying. Citizen participation. Interest groups involvement.

No interest groups are actively involved in the political or policy process. According to the constitution, citizens' groups have no stated right to initiate legislation. In practice, they also have no access to those who initiate legislation. Since 1993, both the Kazakhstan International Bureau for Human Rights and Rule of Law and the Kazakhstan Branch of "Interlegal" have drafted legislation and lobbied parliamentary deputies, but they have had little success.

The largest trade union in Kazakhstan remains a governmental organ that succeeded the Soviet-era General Council of Trade Unions. Most workers remain members of the state-sponsored trade unions established during the Soviet period. While the law gives workers the right to join or form unions of their own choosing and to stop automatic deductions of dues for the state unions, enterprises continue to ignore workers' requests and withhold dues for the state-sponsored trade unions.

Although the constitution guarantees freedom of speech, there is no explicit reference to freedom of the press. The stated purpose of the newly created National Agency for Press and Mass Information of the Republic of Kazakhstan is to strengthen press freedom and provide state support for the publication of newspapers, magazines and books. However, it is vested with very broad powers such as the right to prepare "proposals on improving legislation in the area of the press and mass media" that, according to many journalists, increase the government's control not only over state-owned, but also private media.

Corruption among government officials remains a major issue in Kazakhstan, although the Kazakhstani Criminal Code contains special articles on penalties for accepting and giving bribes. The State Committee for Investigations (the GSK) and a special Subdivision of the Committee for National Security (the KNB) are responsible for combating corruption. The Kazakhstani government has undertaken a number of initiatives to combat corruption, however, there have been no major prosecutions.

Corruption is a significant obstacle to investment.

The Legislative Process^{47[5]}

Each year, the legislative agenda is set forth by a government draft schedule that lists what legislation the government will submit to the Majilis (lower house of parliament) and deadlines for presenting the legislation to: 1) the Ministry of Justice for legal review; 2) the Prime Minister's office for further review, and 3) Parliament. Either the government or members of the lower house present legislation depending on who initiated it. A Majilis Committee (one of several that examine new legislation) has one month to accept or reject the provisions of the legislation after which it is sent to a plenary session of the Majilis for approval or return to the Committee. Approved legislation is sent to the upper house, the Senate, for a similar review. After changes made in the Senate are reconciled with the Majilis, legislation is sent to the president who has 10 days to approve or veto it. If the president does not accept the law, he may issue a decree that has the force of law. Kazakhstan is often handicapped by poorly drafted legislation that permits overly broad interpretations and abuse.

Appendix 4

WHITE PAPER

Intellectual Property Rights reforms in Kazakhstan

Issue

Lack of Intellectual Property Rights protection is a significant handicap to Kazakhstan's economic development. Domestic and international businesses in Kazakhstan lose about \$295 million (1.3 percent of GDP) due to IPR violations every year. Moreover, the lack of protection impedes the country's ability to attract FDI—especially from the United States, which accounts for 28 percent of total foreign investment. It also is slowing, if not blocking, Kazakhstan's accession to the WTO. The Ministry of Energy, Industry and Trade of the Republic of Kazakhstan has proposed a strategy to strengthen the IPR regime in Kazakhstan and bring it into compliance with the minimum international standards incorporated in the Agreement on Trade Related Intellectual Property Rights (TRIPS) of the WTO. The implementation of the proposed IPR reforms will enhance investment inflows to Kazakhstan and significantly speed up the process of Kazakhstan's accession to the WTO.

Background

IPR regime in Kazakhstan

Two administrative bodies regulate IPR protection in Kazakhstan. They are the National Patent Office and the Agency for Copyright at the Ministry of Energy, Industry and Trade.

Since gaining independence in 1991, Kazakhstan has put into place a statutory framework for bringing the country up to modern standards in the area of IPR protection. The following major laws regulate the present system of IPR protection in Kazakhstan:

- The U.S. – Kazakhstan Bilateral Trade Agreement of 1992
- The Law on Copyright and Neighboring Rights of 1996
- The Criminal Code of the Republic of Kazakhstan of 1997 (as amended)

Enforcement of these laws, however, is very weak and inadequate to deter IPR infringement. Registration procedures are expensive and, because not enough human and computer resources have been dedicated to the IPR system, these procedures are very time-consuming. Kazakhstani courts have neither sufficient experience in IPR cases, nor a sufficient number of judges familiar with IPR cases. Criminal penalties are never publicized and therefore are unknown to the general population. And the Customs Administration does not participate in combating piracy and counterfeiting

International Trends in IPR protection

Technological development and the globalization of trade have increased the need for a country to be able to protect new inventions and commercially valuable assets. Developed countries, as well as most of the developing world, recognize that the existence of strong intellectual property rights is key to their economic and social well being.

Benefits of a sound IPR regime to Kazakhstan

- Substantial increases in investment
- Transfers of advanced technology
- Safety of Kazakhstani consumers
- Incentive for local innovation and greater technological self-reliance

Proposed Action

In order to accede to the WTO and establish a more favorable investment and business environment in Kazakhstan, it is crucial that the country pass IPR legislation and ensure its enforcement. Implementation of IPR reforms should be an essential element of the strategy “Kazakhstan-2030,” the President’s vision for Kazakhstan. All segments of society, including the private sector, NGOs, academics, legislators, judiciary, and the executive branch, should work collaboratively in order to achieve this national goal, including IPR reforms. The major IPR reforms require strong support from the President, the Ministry of Finance, the Ministry of Justice, and the State Customs Committee in order to pass IPR legislation and create enforcement mechanism.

To bring the Kazakhstan’s IPR regime into compliance with international standards, the government should:

- Ø Adopt new laws on the protection of industrial designs and layout-designs (topographies) of integrated circuits and adhere to the Geneva Convention for the

Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms.

- Ø Create a National Agency for Intellectual Property Protection that will 1) incorporate functions of the National Patent Office and the Agency for Copyright at the Ministry of Energy, Industry and Trade and 2) will coordinate the implementation of national legislation on IPR protection and its enforcement.
- Ø Reform the court system to ensure the availability of necessary expertise to deal with the specifics of IPR protection.
- Ø Establish a comprehensive Customs system for monitoring imported and exported goods. This will require close cooperation between the Customs Service and other IPR enforcement agencies, as well as an expansion of Customs officials' authority.

To advance IPR reforms and ensure compliance with international standards this effort needs the support of members of civil society, the government, the private sector, and international business organizations. If Kazakhstan is to advance this issue and become a member of the WTO, a coordinated approach is crucial.

Appendix 5

Possible Questions & Answers

1. Why should Kazakhstan enforce intellectual property laws if piracy is a profitable business that employs a large number of people?

If Kazakhstan wants to encourage the development of arts and sciences in the country, then it is crucial to have strong IPR protection. Benefits from piracy are only short-term. In the long-term, piracy undermines investment decisions and has other negative macroeconomic implications. In the late 1800s, Mark Twain expressed the need for strong IPR protection noting that, "A country without a patent office and good patent laws is just like a crab that can't travel any way but sideways and backways."^{48[6]}
 2. How does Kazakhstan's further development depend on IPR protection?

Kazakhstan needs technology transfers for economic development. The only way to promote such transfers is to ensure inventors that their inventions will receive the same kind of IPR protection they receive in the developed countries. Otherwise, foreign companies will keep their latest inventions out of Kazakhstan's market and offer only older, off-patent technology for which IPR protection is no longer available.
 3. Is it possible to force everybody to follow the rules? You will always find a retailer around the corner selling goods with violated trademarks.
-

Some piracy and counterfeiting will always exist. The important thing is to pass laws that prohibit this kind of behavior and establish an effective judicial process to enforce those laws. It is impossible to police every instance of piracy, but the mechanism for policing must be there. Intellectual property rights holders must have a means of stopping and gaining fair compensation from those who use their inventions without authorization.

Footnotes:

49^[1] Structured after the model of M. Hart on Russia's accession to the WTO

50^[2] GATT, Article XXXIII.

51^[3] Agreement Establishing the World Trade Organization, Article XII

52^[4] World Bank country Report, 1995

53^[5] Commercial Overview of Kazakhstan

54^[6] Interview with USTR officials on IPR.
