**IP Enforcement Trends**

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At the last meeting, my delegation, had pointed out how the plurilateral agreements like ACTA and TPP contained TRIPS plus provisions that can undermine the flexibilities and disturb the delicate balance provided by the TRIPS Agreement and adversely affect access to health in the developing countries. The issue of access to health is not only limited to the developing countries but has begun to affect even the developed world. The unprecedented economic and financial crisis in the developed world and the austerity measures that have been taken by many countries, have adversely affected their health budgets. In this situation of shrinking health budgets it is essential that access to affordable medicines in every country, whether developed or developing, does not get circumscribed by the agreements like ACTA and TPP, which are basically motivated by the interests of big pharma companies. In this respect I would like to draw the attention of the Members to reports on , “Fiscal Crisis taking toll on Health of Greeks”. They highlight how the extensive public health care system of Greece that took care of every need of its people, has been pushed hard for dramatic cost savings, to cut back on the deficits. These measures are taking a brutal toll on the system and on the country’s growing number of poor and unemployed, who can neither afford high health insurance premiums or high cost of drugs provided by big pharma companies. Similar austerity measures in other parts of Europe have begun to affect access to medicines to their citizens.

 Mr Chairman, the post TRIPS era that has seen reduction in the policy space required for designing the IP policy can be characterized by an enormous increase in cost of essential medicines and the countries that lack manufacturing capacity are in a further difficult situation. For the last few years we have seen barriers being created, even to import generic medicines, through their seizure, during their transshipment at the European ports. In addition attempts are being made through bilateral , regional and plurilateral agreements to stifle the manufacturers of generic medicines that are a life line for billions of poor in the developing countries. In fact, my delegation is of the opinion, that this august committee should deliberate on how the TRIPS agreement should promote access to health to the billions of needy people rather than discuss the IP agenda of a few countries.

We have heard the statements made by ACTA signatories and also their reassurance that ACTA will not affect access to medicines in developing countries. We are afraid that once ACTA comes into force, the ACTA Border measures which are currently limited to some parts of Europe could get extended to the territories of ACTA signatories; further stifling the supply of generic medicines to the needy countries. In fact on this issue we fail to understand the very need of ACTA when there are no reliable estimates of the extent of counterfeiting and piracy that exists or the exact impact of such activities on domestic industry. There are various industry estimates which have been seen to be based on downright incorrect data and at best dubious methodology to the extent that some estimates rely on failure to meet targeted sales as evidence of piracy and counterfeiting.

There are several provisions in ACTA despite the ostensible removal of ‘patents’ from the ambit of border measures which may be worrisome for the developing world.

1. The ACTA is not just against ‘counterfeiting’, as it is understood in the context of the TRIPS agreement as well as in the definition given in the text of the agreement. Even while admitting that the term ‘counterfeit’ applies to trademarks, the agreement in fact extends it to all forms of IPRs as covered under the TRIPS Agreement, including data, copyrights, patents, etc. It would be inappropriate to state that patents are not the subject matter of the Agreement. In fact, the parties are permitted (on option) to keep patents (and undisclosed information) outside the scope of Civil Enforcement. Thus, despite agreeing to keep patents (and undisclosed information) outside the scope of Border Measures the option on civil enforcement on patents remains in the agreement. This set of provision is still a marked increase over the TRIPS Agreement which limited itself to counterfeit trademark and pirated copyright goods only.
2. Article 23.2 of the ACTA clearly militates against parallel importation even though the relevant domestic law may not expressly forbid it. This it does by criminalising willful use of trade labels or packaging without the authority of the rightholder, which is exactly what parallel importers do.
3. **On Border Measures,** ACTA goes much beyond Article 51 of the TRIPS Agreement and includes all forms of Intellectual Property Rights. However thanks to the strong criticism of these provisions during the secret negotiations of ACTA and several incidents of generic drugs getting seized in transit at the European ports, the ACTA signatories finally decided to exempt patents and undisclosed test data from Border Measures. While we appreciate these exclusions, the imposition of Border Measures over other forms of IPRs can still affect the trade in goods that transit through the ports of ACTA Members.
4. Members may recall that during several TRIPS Council Meetings in the past, India and other countries highlighted their concerns over the seizure of generic medicines in transit at the European ports when there was in fact no IP violation. Some consignments were detained not for patent violation but were suspected of trade mark violation. ACTA’s expansion of border measures far beyond “counterfeit trademark or pirated copyright goods” can thus authorize seizures of suspected “confusingly similar” trademarks. Takking a decision on trademarks requires a comprehensive legal analysis, which is much less straightforward than determining whether goods are counterfeit. Such an assessment is typically performed by courts or trademark offices, which have the necessary legal expertise, case law, and experience to rely upon. Imposing this task on customs officers is likely to result in a considerable increase in seizures and temporary detentions based on right holder allegations that transiting products are confusingly similar.
5. ACTA Article 16, escalates the border seizure requirements while reducing safeguards. ACTA mandates ex officio seizures, extends the scope of requirements to include exports, and makes no mention of a prima facie evidence requirement or limited duration of the suspension pending a determination on the merits. This goes much beyond the TRIPS provision of Article 58 that imposes restrictions on the ability of border officials to take ex officio action to halt goods at the border without any complaint from a rights holder. Further rights holders could also use this customs authority to launch harassing actions against legitimate competitors.
6. The TRIPS Plus Border Measures under Article 22 of ACTA disturbs the delicate balance provided by Article 57 of the TRIPS Agreement that favour rights holders vis-a-vis the importer of goods. The disclosure of information provision could be used by right holders to discover details on distribution chains of generic companies on the basis of alleged infringement rather than proven infringement. These companies can then mount aggressive and expensive litigation against suppliers and intermediaries to deter generic entry into key markets.

Mr Chairman apart from these concerns we are afraid that ACTA would establish new benchmarks in international standards on IP enforcement. These standards are likely to become the bedrock of future negotiations between the developed and developing countries in the various RTA negotiations currently under way. As the lure of immediate market access is a potent one, many of the developing countries may end up accepting these standards as their own. This would severely inhibit South–South trade since it would impose obligations on the importing countries to follow the new standards of enforcement.

Mr Chairman, we also have concerns over the impact of ACTA on digital goods and Internet freedom. There is considerable interest about ACTA creating obligations on the enforcement of copyright, which are themselves problematic, including those involving digital rights management and technology protection measures, which are coupled with new norms for damages for infringement, such as the notion that injury can be the suggested
retail price of goods.  This is likely to have a severe impact on the efforts towards literacy and access to knowledge and information that has been at the core of the aspirations of the developing world to convert themselves into information societies and knowledge economies**.** In these areas, consumers in the US and the EU are rightfully concerned, because ACTA is fundamentally hostile to consumers, by systematically excluding consumer interests from having meaningful roles in the ACTA
negotiations, a tradition that is expected to continue in the ACTA
Committee, which is under no obligation to operate in a transparent,
open, and inclusive manner.

To conclude my delegation reiterates that the adverse effect of the TRIPS plus enforcement provisions contained in ACTA and other plurilateral agreements in the pipe line would not only affect the developing countries but could also have an impact on the developed countries. It is therefore essential that collective efforts must be made to protect the policy space needed not only to access affordable medicines but also to provide freedom to let the nascent digital industry prosper in the interest of the mankind.