**interventions of the united states**

**TRIPS COUNCIL MEETING**

***February 28-29, 2012***

**AGENDA**

* Under this agenda item, we propose to address intellectual property rights enforcement. Given that enforcement is the subject matter of Part III of the TRIPS Agreement, this item is perfectly consistent with the mandate of the TRIPS Council.
* The proponents of this item have met all of the procedural requirements required for filing an agenda item, and consensus was reached on the item’s title in October as well as including the item on the agenda of the October TRIPS Council meeting.
* If Members have questions regarding the subject matter of this item, we welcome that discussion. Indeed, as we indicated in October, Members have raised questions in the past. There were requests for additional information in October as well.
* Transparency lays at the foundation of this agenda item. Many Members, and not only the proponents of this item, explicitly supported the objective of promoting transparency on this issue at our last meeting. This is reflected in paragraphs 5-31 of the minutes of the October TRIPS Council meeting found in document IP/C/M/67.
* To call for transparency and yet to oppose this item is curious, not to mention internally inconsistent. To deny a response from the ACTA participants to Members who have asked questions and sought additional information is difficult to reconcile.
* Regarding the suggestion made by some Members that this item should be addressed under “Other Business”, we have previously explained that “Other Business” is inappropriate for this agenda item.
* This item is not limited to an announcement, as is the purpose of “Other Business”. We would refer Members to Rule 25 of the Rules of Procedures, which confirms this point.
* Instead, this item is substantive in nature and intended to promote a good exchange of views.
* With respect to the reference made to past ministerial statements, we recall paragraph 3 of the statement of Ministers from the December 2011 Ministerial found in document WT/MIN(11)/W/2, where:

“Ministers underline the importance of the work of regular WTO bodies including their role in the oversight of implementing existing Agreements; dispute avoidance; transparency through monitoring and reporting and as a forum for the consideration of trade-related issues raised by Members. “

* In our view, this agenda item is fully in line with the intent of Ministers in their December statement.
* In contrast, it is difficult to understand how opposing this item fulfills that intent.

1. **REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)**
2. **RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY**
3. **PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE**

* Thank you Mr. Chairman. With respect to your invitation earlier regarding consultations on CBD observership, we welcome your guidance and look forward to engaging constructively.
* Also, in the interest of treating issues consistently, I would note, in light of our previous discussions this morning, that this issue involves discussion of “TRIPS plus” proposals, to the extent there are proposals to amend the TRIPS agreement.
* As has been referred to by other delegations, earlier this month, WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held its twentieth Session.
* As evidence of our constructive engagement, at that Session, the United States, together with Canada, Japan, the Republic of Korea, and Norway made a proposal for a Joint Recommendation on Genetic Resources and Associated Traditional Knowledge.
* I would like to provide a few highlights of the Joint Recommendation, which incorporate TRIPS Council Members’ shared interest in addressing erroneously granted patents.
* The objectives and principles of the Recommendation are that:
* “Member States, in protecting genetic resources and traditional knowledge associated with genetic resources, should aim to:
* Prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources.
* Second, to protect indigenous peoples and local communities from the limitations of the traditional use of genetic resources and their traditional knowledge associated with genetic resources that might result from the erroneous patenting thereof.
* Third, to ensure that patent offices have the appropriate available information on genetic resources and traditional knowledge associated with genetic resources needed to make informed decisions in granting patents; and
* Finally, to maintain the incentives for innovation provided by the patent system.”
* During the time that the IGC has been reflecting upon how to protect genetic resources, traditional knowledge and folklore to benefit mankind, there have been a number of important developments, including the following:
* The development of improved search tools and classification systems for patent examiners who examine patent applications, including applications that claim genetic resources;
* The creation of a database of illustrative examples of mutually agreed terms concerning access and benefit sharing. This database serves as a capacity-building tool, and helps inform the policy debate; and
* The drafting of guidelines on the IP aspects of equitable benefit-sharing arrangements.
* In addition, mindful of the concerns being addressed at the IGC, the WIPO Patent Cooperation Treaty Working Group has established additional tools to improve the quality information available to patent examiners. These tools include:
* a supplemental international search mechanism; and
* a mechanism for third parties to submit prior art to be considered during the international search and preliminary examination.
* We note that the U.S. Patent and Trademark Office has a similar mechanism in place, and we are grateful to the esteemed delegate of India for supporting this mechanism in his intervention.
* Furthermore, the International Authorities under the Patent Cooperation Treaty decided to expand the list of periodicals that are part of the PCT Minimum Documentation by adding the Korean Journal of Traditional Knowledge, the Indian Journal of Traditional Knowledge, and other periodicals. The PCT Minimum Documentation are the patent publications and non-patent literature that a patent examiner should search in conducting a search or preliminary examination of a PCT application.
* National authorities have created additional tools, such as patent prosecution highways, and databases of information related to genetic resources and to traditional knowledge associated with genetic resources.
* Clearly, although the IGC has not yet finished its work, it has made significant contributions to addressing our shared concerns. We hope that that WIPO will adopt the Joint Recommendation and thereby demonstrate to the international community our commitment to prevent patents from being erroneously granted, including by creating and using relevant databases, and by encouraging compliance with relevant ABS and PIC laws and regulations.

1. **NON-VIOLATION AND SITUATION COMPLAINTS**

* We continue to be of the view that it is entirely appropriate for non-violation and situation complaints to be applicable to the TRIPS Agreement and further, that the moratorium should expire at the next Ministerial conference.
* The United States would support Nigeria’s proposal for further consultations on this issue.

**K. TECHNICAL COOPERATION AND CAPACITY BUILDING**

[U.S. First Intervention]

* The United States continues to hold internal consultations.

[U.S. Second Intervention]

* The United States would welcome the opportunity to engage in consultations on this issue should the Chair decide to hold such consultations.

1. **IP ENFORCEMENT TRENDS**

[U.S. First Intervention]

* We appreciate this opportunity to discuss enforcement of IP rights, and hopefully to dispel some misperceptions about IP enforcement in general and the ACTA in particular.
* Effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally.
* The proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public.
* The effective enforcement of intellectual property rights benefits from enhanced international cooperation and more effective international enforcement.
* Turning specifically to ACTA, the principles I just enumerated form part of the bedrock of that Agreement.
* To help promote a dialogue on these important principles, we wanted to address some of the questions that were raised at the October meeting of the TRIPS Council.
* At that meeting, the esteemed delegate from Zimbabwe asked which clear “lacunae” in the TRIPS agreement do the ACTA participants seek to address?
* **Let me provide a few examples:**
* **The ACTA provides a forum for the Agreement’s participants to work cooperatively together to protect and enforce intellectual property. The ACTA cooperation provisions are more extensive than those in the TRIPS Agreement, but as with the rest of ACTA, they are fully consistent with the TRIPS Agreement.**
* **The ACTA provides that Parties to the Agreement must authorize their border enforcement authorities to act on their own initiative against trademark counterfeit and copyright pirated goods. This addresses a gap in existing standards that has sometimes meant customs officials are powerless to take action against fake and pirated goods. Application of this stronger standard will help protect consumers.**
* The ACTA includes new commitments on the seizure and destruction of fake goods, on seizure of the equipment and materials used in their manufacture, and on seizure of the criminal proceeds from piracy and counterfeiting offenses. This ensures that police and prosecutors will be able to take away both ill-gotten gains and the tools of illicit trade.
* When the TRIPS Agreement was negotiated almost 20 years ago, the type of complex distribution webs that we see today did not exist. Much has changed since 1994.
* ACTA is intended to ensure that enforcement authorities have the legal tools to address the new sophisticated ways that illegal, and often deadly, products are distributed. The points I have just mentioned reflect an effort to provide appropriate tools. If governments do not modernize their approaches to adapt to evolving illegal activities, especially to keep up with the criminals, we are not doing our jobs.
* We also wanted to address interventions made in October suggesting that ACTA would target generic medicines.
* I want to be clear that ACTA does not target generics.
* For example, ACTA does not require border enforcement of patents.
* As to border enforcement of trademarks, this is an important element of protecting the public.
* For example, in the United States authorities recently uncovered a significant problem of fake cancer drugs in the U.S. supply chain. Among other things, fake drugs like these sometimes bear counterfeit trademarks. Empowering border authorities to act when they see such fake trademarks could have real health benefits.
* As Japan noted, at the same time, ACTA Article 13 provides similarly to the TRIPS Agreement that barriers to the legitimate trade should be avoided.
* And ACTA also protects against abuse: ACTA, like the TRIPS Agreement, stipulates that IP enforcement procedures “shall be applied in such a manner so as … to provide for safeguards against their abuse.”
* Finally, we wanted to address questions raised at the October meeting regarding transparency.
* ACTA is not secret: A draft was released in April 2010, while negotiations were still ongoing. We published a near-final text in October 2010, and then published the final text in December 2010, and then in May 2011 we published French and Spanish translations. The final English text has thus been public for more than a year.

[U.S. Second Intervention]

* We wanted to respond to a few specific points. For example, India raised questions with respect to confusingly similar trademarks.
* Providing for the availability of border enforcement against confusingly similar marks is a best practice reflected in laws of many WTO Members, including the United States.

* This type of enforcement would, for example, allow border authorities to take action when fake goods bear trademarks that are only slightly modified but still confusing.
* My delegation would respectfully submit that the determination that, for example, “Sialis” with an “S” is confusing with “Cialis” with a “C” is not a matter of such profound legal complexity as to be beyond the abilities of the same border enforcement officials we entrust with safeguarding our populations from all manner of potential threats.
* When there are hard cases, the laws of our country and others around the world provide appropriate legal means to resolve those issues.
* India also raised concerns regarding ACTA Article 22. I note that paragraph 9 of the Indian “Notification No. 47/2007 – Cus. (N.T.)” calls for provision of similar information by customs authorities to right holders upon request.
* Regarding “TRIPS plus” requirements, this point remains somewhat mystifying.
* Again, many WTO Members that are not ACTA participants have implemented ACTA provisions. For several examples, I would refer Members to paragraphs 534 and 535 of the minutes of the October TRIPS Council meeting contained in document IP/C/M/67.
* We look forward to responses from these countries as to why these provisions are acceptable in their domestic law, but not in ACTA. For example, there is a paradox between China’s analysis of the criminal provisions of ACTA and China’s own domestic law addressing criminal enforcement with respect to intellectual property rights.
* We would also like to explore one of the measures identified in October in greater detail.
* India’s “Notification No. 47/2007 – Customs (N.T.)” appears to implement numerous ACTA provisions, including ACTA Article 16(1)(a) on *ex officio* authority for customs officials, which is found in Article 7(1)(b) of the Notification.
* Likewise, ACTA Article 15 on the provision of information from rights holders to customs officials is found in Notification Article 7(5).
* We would add that the scope of IPR infringement covered by the Notification includes copyright, trademark, designs and patents.

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