Intervention on Agenda Item K

At the outset I would like to thank the US delegation for making a submission on ‘Securing supply chains against counterfeit goods’ under the agenda item on ‘Exchange of information on securing supply chains against counterfeit goods’. Any discussion on Enforcement under Part III of the TRIPS Agreement is welcomed in the TRIPS Council and we would like to assure our constructive engagement.

The issues of IP enforcement are distinct from issues of quality and safety. The TRIPS Agreement itself makes no connection between “counterfeit” and issues of quality and safety. IP rights including trademark rights are not granted on the basis of quality and safety of a product. Thus, just because a product is trademarked does not guarantee that the product is safe and has the requisite quality. In fact many branded products have been known to be unsafe and a threat to public health. Further, IP enforcement is not an appropriate or an effective framework to deal with issues of quality and safety of products. In fact making a link between IP enforcement and quality and safety is wholly inappropriate because it marginalizes the role of other agencies that are actually mandated with the responsibility of ensuring standards, quality and safety.

Our comments on the US submission are preliminary in nature and it focuses on securing the supply chain to highlight the problem of counterfeiting from the safety of automobiles to the reliability of defence equipments, including its effect on the life of people through counterfeit medicines. The submission in the form of country experience in addressing the problem of counterfeiting through a multidimensional approach, including international co-operation, underscores the enormity of the issue and an urgent need to confront the issue. Further, it is necessary to note that the word counterfeiting has been used in a very loose fashion. While it makes a reference to the trade mark

counterfeiting at few places, it is mostly used to refer to the goods of compromised quality, safety and efficacy. Thus it makes a reference to the loss through unpaid taxes on the basis of media reports to underline the problem of counterfeiting in Indonesia and the East African Community of Burundi, Kenya, Rwanda, Uganda, and Tanzania. In this regard I have a couple of points to make.

1. In foot note 2 there is a reference to the news item in the Jakarta Post with headline, “Fake products cost Rp 43.2 trillion in lost taxes’ based on the report of an investigative institute of Indonesia’s School of Economics. But before we can make any judgement on the arrived figure of loss of Rp 43.2 trillion, it would be important to note that the study covered diverse items like leather products, software, automotive parts, clothing, lamps, cosmetics and pharmaceuticals. Therefore the percentage of these items that infringed IPRs like trademark or copyright could provide a correct picture. Further the statistics relating to the sales figures of the branded items for the same goods, percentage of goods sold in the country on which the taxes are paid, percentage of the Indonesian people who can afford branded items etc could throw light on the extent of the infringement of IPRs as defined under Articles 51 and 61.

2. In footnotes 3 and 4, there is a reference to the article sponsored by the Anti Counterfeiting and Product Protection programme of the Michigan State University of the US which refers to effect of the counterfeit drugs on health, economy, economic and technological development, foreign investment etc. in these African countries. In this article what the authors mean as counterfeit is a broad category of drugs that are substandard, spurious, falsified, falsely labelled and counterfeit products where there may or may not be an infringement of the IPRs. On account of the lack of a workable definition for the drugs of compromised, quality, safety and efficacy the World Health Organisation has set up a "Member State Mechanism". This mechanism will also address issues pertaining to the supply chain as well as address the

issue of poor quality, unsafe medical products from a public health perspective. We, therefore, have serious doubts about the accuracy of figures quoted about the drugs that infringe IPRs. We would therefore like to stress that the issues pertaining to the products of compromised, safety and efficacy do not fall within the purview of the TRIPS Agreement and therefore are beyond the mandate provided to the TRIPS Council. Enforcement measures cannot guarantee products of quality but excessive and unreasonable enforcement measures can surely undermine access to affordable medicines. This has been seen in recent years when several shipments of medical products were illegally seized by the authorities in an EU member state resulting in patients not receiving their treatments in time.

The paper also provides data on counterfeits provided by the US Customs and Border Protection and Immigration and Customs Department. The value of infringing goods for the period October 2010 to September 2011 is mentioned as USD 178.3 million. The relevant document again fails to provide the data for infringement against different IPRs to enable us to know the exact extent of trademark counterfeiting and copyright piracy**.**

As such we have several questions on the paper that has been circulated by the US Delegation. But let me conclude by saying that although the issue of enforcement is of critical importance to India, it is necessary to ensure the delicate balance provided in Part III of the TRIPS Agreement. A very careful balance of the interests of the right holders on the one hand, and those of wrongly accused infringers on the other, so as not to cause obstacles to legitimate trade is of utmost importance. For this delicate balance to be maintained, this Agreement has to be viewed in its entirety without focussing on just one aspect to the exclusion of others. Further, there is an important issue of limited resources to the developing country governments to enforce IPR laws relative to other laws which might have a higher priority. The text of Part III also recognizes that IPRs are private rights and action for their enforcement has ultimately to be taken by the right holders themselves.