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THE EUROPEAN UNION**

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Subject: 10th round of Anti-Counterfeiting Trade Agreement (ACTA)  
Negotiations, Washington, 16 - 20 August 2010  
- Customs issues

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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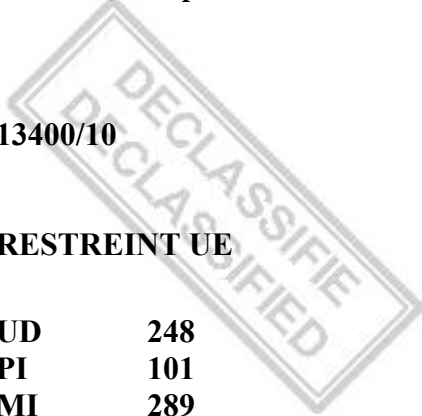
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## **NOTE**

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from: General Secretariat  
to: Working Party on Customs Union (Customs Legislation and Policy)  
on: 9 September 2010

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Subject : 10th round of Anti-Counterfeiting Trade Agreement (ACTA) Negotiations,  
Washington, 16 - 20 August 2010  
- Customs issues

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Delegations will find attached a report on the above meeting, transmitted by the Commission services.

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**Subject: Anti-Counterfeiting Trade Agreement Negotiations**  
**10<sup>th</sup> round, Washington, 16 - 20 August 2010 – customs issues**

## **Introduction**

The tenth round of ACTA (Anti-Counterfeiting Trade Agreement) negotiations took place in Washington, USA from 16-20 August 2010. In addition to the Commission and several Member States (including Belgium), all ACTA parties (the United States, Switzerland, Japan, Canada, Australia, Mexico, Singapore, Korea, Morocco, and New Zealand) were represented at the round.

Customs issues were raised in the context of the section of border measures, as well as in the chapter on enforcement practices in relation to the management of risk at the border.

## **Detail**

During the opening session, there was consensus to modify the order of certain sections. Border measures remained in Chapter 2, section 2, but the enforcement practices were moved to chapter 3, so the article concerning management of risk at border is currently Article 3.2.

### Article 2.X: Scope of the border measures

With regard to scope, no attempt was made to re-open the debate on the types of IPR to be covered, either in the context of the whole agreement, or by the section concerning border measures. However, with regard to the situations where customs should intervene to enforce IPR, the chair asked delegates to set out their respective positions. This request was presented in relation to the articles concerning applications for action and ex-officio, rather than this article. Yet again, the chair chose not to discuss the opening paragraph of this article, though the Commission delegate did get agreement to include in the draft text, a negotiator's note to the effect that the inclusion and placement of these provisions would be examined further. Despite some hesitation with the EU's proposal for an opening article establishing the scope of the border measures, there was

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acknowledgement of the merit for such an article (which included the need to place a provision excluding parallel trade from the border measures; currently proposed as a footnote to the article concerning applications for action).

With regard to the second paragraph and the reference to Geographical Indications, the following text was developed, for further examination at a later stage:

1. (...)
2. Parties may decide to exclude from the scope of this section, certain IPRs other than copyrights, Trademarks and Geographical Indications, whether protected through Trademarks, through registration or other specific/special legal means.

## Article 2.X: *De Minimis*; (to be re-named ‘Small consignments and personal luggage’)

An additional session was tabled to look at this issue and after lengthy discussion, text was agreed *ad referendum*, considered to be acceptable to countries hesitant about not having a specific exemption for small consignments. The proposed text provided for customs to control small consignments ‘of a commercial nature’, which was acceptable to the EU side. It was also agreed that the title for the article should be re-named. The new text should read as follows:

1. Parties shall include in the application of this section, goods of a commercial nature sent in small consignments.
2. Parties may exclude from the application of this section, small quantities of goods of a non-commercial nature contained in travellers’ personal luggage.

## Articles 2.6: Application by right holder and 2.7: Ex-Officio Action

The chair’s request concerning the respective positions of all delegations on whether customs should control at import, export and in transit, led to a complicated matrix of positions.

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Certain parties could accept mandatory provisions concerning import and export, for both applications for action and ex-officio. Others could only commit to controls at import for both applications and ex-officio. One party could not commit to mandatory controls at export, nor to ex-officio action.

With regard to transit, several parties could commit to controls based upon applications and a further party on the basis of ex-officio. No positions were taken on other situations where goods were under customs supervision.

Taking into account the limitations expressed by some parties (the lowest common denominator), the resulting level of enforcement would not go beyond the corresponding TRIPS provisions.

## Article 2.14: Liability of Competent Authorities

One delegation withdrew a request for the re-introduction of provisions concerning the liability of the competent authorities and there was no further discussion on this issue.

## Article 3.2 Management of risk at border (from chapter concerning enforcement practices)

After some discussion, text acceptable to the EU side was agreed, modifying the initial proposal as follows:

1. In order to enhance the effectiveness of border enforcement on IPR, the appropriate competent authorities of each Part may:
  - (a) consult with the relevant stakeholders and the appropriate competent authorities of other Parties responsible for enforcement of IPR to identify significant risks and promote actions to mitigate those risks;
  - (b) share information with the appropriate competent authorities of other Parties on border enforcement of IPR, including relevant information to better identify and target shipments for inspection.

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2. Where a Party seizes imported goods infringing IPR, the Party's competent authorities may provide the Party of export with information necessary for identification of the parties and goods involved in the exportation of the seized goods. The competent authorities of the Party of export may take action against these parties and future shipments in accordance with its laws.

## Conclusion

As indicated following the previous round, the text of the section concerning border measures is shaping up in an acceptable manner, as far as the compatibility with EU procedures are concerned. This continues to be the case. However, the divisions between the parties on the fundamental approach to the level of border enforcement, which is closely linked to the scope of the overall agreement, remain significant. Unless parties modify fundamental positions, certain parties will be unable to sign up to any text that goes beyond the current level of enforcement provided for by TRIPS.

The chair drew up a list of outstanding issues, both technical and those requiring a political decision to facilitate the work at the concluding round in Tokyo. As far as customs was concerned, it was agreed that 2 issues required a decision at a political level;

1. Form of trade covered by applications and by ex-officio action (import/export/transit);
2. Specificity and duration of application for actions.

Subject to agreement on the first point, further work would be required on the wording of the first article (proposed by the EU), as well as on the articles relating to applications and ex-officio. In addition, further technical work was identified on the footnote concerning parallel trade, extending customs control to other situations where goods were under their supervision (e.g. in a free zone) and the placement of certain definitions (transit, etc).

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All parties expressed a willingness to conclude the negotiations at the next round, scheduled to take place in Tokyo, from 27 September, though it is possible that additional technical discussions will start already from the previous Thursday, 23 September. The aim is to have senior officials (at Vice-Minister level or equivalent) to participate in the conclusion of the negotiations.

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