Civil society-Government Dialogue on ACTA (June 28th, Lucerne)

Attending from Governments

20 government attendees, 5 women; EU (Luc Devigne and Representative from Spanish Government), Australia, New Zealand, Singapore, Mexico, Japan, Swiss (Mathias Schaeli - head of delegation & Juerg Herren, both IPI), US (Susan Wilson – DOC, Kira Alvarez – USTR, IP office Geneva), Canada, South Korea, Morocco.

Attending from civil society

Oxfam International (Rohit Malpani), MSF (Katy Athersuch), Third World Network (Sanya Reid Smith), Act Up-Paris (Pauline Londeix), La Quadrature du Net (Jérémie Zimmermann & Mathieu ?), American University Washington College of Law (Sean Flynn), Berne Declaration (Patrick Durisch).

Exchange of views

- Swiss:
    - Willing to hear concerns and provide answers to questions/inquiries. Will take them into account in the negotiations.
    - Already had national dialogues around ACTA; their first priority remains national dialogues with national stakeholders, but willing to take into account other stakeholders.
    - Provisional responses as negotiations ongoing; cannot share negotiating positions and will not enter into debates on specific points.
    - Had interaction in Wellington, good experience in contacts with civil society

- NGO Interventions
    - Berne Declaration introduction (see end of document).
    - MSF: WHO studies: 1/19 poor quality medicines was counterfeit, rest were genuine. 20% countries have fully operational DRAs. 30% countries have no/regulatory capacity.
    - Oxfam intervention (see end of document)
    - La Quadrature du Net intervention:
        - French Constitutional Council 2009: Freedom of speech implies freedom of access to internet
        - Obama pledged to protect net neutrality, ACTA will be bad for this
        - Infringement v free speech: criminalising inciting/aiding/abetting bad for fundamental freedoms

Answers to questions by ACTA negotiators (see questions at end of document)

- Remained silent/did not disagree with our request that the meeting should be ‘on the record and that it can’t be called a consultation’.

- Comprehensive set of concerns for us to take into account. Govs need to take into account all concerns brought to its attention
- Answering for ACTA delegns = agreed elements of response
- Will not cover elements currently under discussion
- Transparency:
    - Disagreed with our comments that these negotiations were not transparent and was displeased somewhat that allegations that the negotiations were not transparent had accompanied ACTA delegates.
    - They noted that ACTA delegations made commitment and are being true to it to provide considerable amt of info re ACTA. The Swiss delegate noted that in his personal capacity he can't remember other inter-governmental negotiations where this much information was provided.
    - Defended themselves further by noting that they published summary papers, fact sheets and released documents as well as the text at the end of the April negotiating round. They felt this was proof that ACTA delegations are willing to provide information.
    - Oxfam: WHO, WIPO, WTO were given as examples of negotiations that were far more transparent.
    - Negotiators response: Cannot compare as ACTA negotiations are plurilateral while others are multilateral negotiations with the latter having a dedicated Secretariat. They had published summary papers and fact sheets Stated that the April 2010 = latest text. Since then there has been no formal discussions between parties; only bilateral discussions between rounds with no new plurilateral text to provide. Finally, willingness of negotiators to meet face-to-face demonstrates that they are willing to provide information.

Responses to specific questions by the negotiating party (for list of questions – see further below):

1. Delegates will decide at end of rd whether or not to release the text; it will depend on what happened during the week. Transparency will be agreed by consensus by 11 ACTA parties. Re public comment: each ACTA party does info and consultation work at national level and will take into acct for their posn. ACTA group won't lead formal/official consultn process
2. ACTA parties are WTO members and will respect WTO obligations. If there are any problems another WTO Member can use the WTO DSU to sort out the problem/clarify an issue through a challenge at the WTO.
    a. Negotiators pointed out press releases after Wellington 8th Rd, namely that ACTA shall be consistent with TRIPS and respect Doha Declaration on Public Health.
    b. Evidence base: ACTA concerned re piracy according to all avail docs and statistics is evident and that new measures are needed to deal with piracy and counterfeiting. Although they point out there are many studies, they don't focus on any one study or figure to justify their initiative.
    c. Govs are supposed to effectively enforce their laws. More effective enforce standards are needed to address this phenomena. Piracy is a tendency that cannot be denied
3. ACTA negotiations are the same as other international intergovernmental negotiations, whether they are bilateral or multi-lateral. If ACTA has additional obligations for ACTA party cf current national laws, then it has to adjust in its domestic laws and must pass parliament.
4. The definition of a counterfeit is still being negotiated. The only definition currently proposed in April text is for counterfeit TM goods which reflects the TRIPS definition
5. Border measures: there's emerging consensus that patents not be included in scope of border measures (but remained silent on whether or not patents would be included elsewhere in the

Agreement). Think patents and TM different re border measures, see great justification for TM to be included in border measures as this is the most common occurrence in practice of infringement (imported, exported or transit).

   a. With respect to 'confusingly similar' trademarks, the negotiators believe there is little justification for generic med manufacturer to choose a generic medicine name that is similar to degree that cannot be distinguished [Sean: often used to define cfeit, 'confusingly similar' = civil violn] from original TM. [RM: Eg customs officials have to apply 9 part test]. Civil infringe of TM. Not all civil infringe is cfeit. All WTO Members have to have crim sanctions for certain TM cfeit

   b. US explanation of national laws: Civil (pats, TM), admin (most have something incldg border, some require court order), criminal (most have for TM and copyright),

   c. Confusingly sim to registered TM usually have civil and admin (border) in USA. Criminal = substantially indistinguishable from (and have border). Confusingly similar still up in the air in ACTA negns (as to whether it will be included in border measures).

   d. Swiss qn to MSF: Out of cfeit meds, how many substd? WHO hasn't done the studies

   e. Still negotiating over whether applying law of importing country or law of transit country

   f. ACTA will not prohibit countries from including patents in border measures but it will not mandatorily require countries to do this.

6. Not intending to intro new/expand existing substantive IPRs or protections but instead effective enforcement standards. Safeguards will continue to apply at national level of ACTA Parties and protection of consumers will occur through implementation of ACTA at the national level. They disagree that they do not provide anti-abuse provisions – provided two examples:

   a. Provide exceptions and limitations eg de minimis in border measures (although not yet certain it will be included in the text).

   b. When a rights holder requests customs auth assistance – adeq security and assurances need to be provided by rt holder before can ask for assistance.

7. Liability for IP infringe still under negn. National laws of ACTA parties: liability for IP infringe depends on knowl and fault and suppose these key princips of civil and crim law will apply similarly in this context.

8. ACTA parties negotiate in autonomous sovereign manner and decide whether want to become party at the end. Hope addnl countries will join at later stage for these enhanced enforce stds to be applied by current 11 parties negotiating. Certainly want to reach out to other countries to join ACTA once it's finalised. ACTA will not establish an international organization that would replace/supersede WTO and WIPO. Institutional issues still under discussion.

9. ACTA parties referred to this concern in press release post Wellington: aware of importance of safeguarding fund freedoms and ACTA shall not interfere with citizens' fund rights and liberties. ACTA parties bound by international human rights obligations and national constns which guarantee fund rights and liberties and ACTA will obvly have to respect these. They also stated that there must be consistency for each ACTA party with respect to WTO and TRIPS.

   a. [Zim: giving incentives to countries to prosecute – this is how you consider comply with free speech?]. EU laws will be fully respected in ACTA. ACTA will be in line with EU law. ACTA will not go beyond EU law.

10. For consultation, the responsibility of each ACTA country to hold consultations at the national level according to its own rules and practices. Understand this is underway and has been happening according to its own rules and practices doing outreach to its national stakeholders.

    Criminal provisions in ACTA are for judge not contract.

11. Other issues:
    a. MSF: destruction as a remedy without judicial oversight. Left to customs official who may make wrong call eg re confusingly similar.

Meeting with ACTA negotiators, Lucerne, 28.06.2010
Compiled questions from the civil society for the Q&A session

1. Will negotiators commit to continue releasing each new version of the text of the Agreement following completion of this week's negotiating round and subsequently [a reasonable time before each negotiation to permit public comment before the round] until the completion (or abandonment) of negotiations?

2. Are negotiators reviewing the text of the Agreement to ensure it is fully consistent with WTO Agreements? Will the WTO or other independent legal experts be asked to review the text of the Agreement to ensure it is legally consistent with WTO rules? Will you provide clear and objective information regarding the evidence base upon which ACTA is purportedly justified, as far as international law, access to medicines and Internet are concerned?

3. Criminal sanctions are being negotiated, which imply the usage of police & judiciary systems, as proven by the presence among the negotiators of the EU Presidency. How can you justify any legitimacy for criminal sanctions (which highly impact fundamental freedoms) being negotiated outside of any democratic frame, in the secrecy of what is much more than a "trade agreement"?

4. What is the prevailing definition of a 'counterfeit' amongst negotiators? With respect to pharmaceuticals, is it the official position of negotiators that medicines which are suspected of patent infringement are counterfeit? If not, will you commit to ensure that the entirety of ACTA excludes patents from the scope of the agreement as the inclusion of patents is unrelated to the issue of counterfeit, and poses significant risks for access to medicines in developing countries?

5. Should customs authorities be authorized to seize medicines in 'transit countries', even when the medicines do not infringe any laws in the producing or importing countries? Will you commit to ensure that any inclusion of *ex officio* action and/or in-transit seizures is optional and not mandatory for countries? If permitted, do negotiators maintain that customs officials in exporting, transit or importing countries are capable of determining whether medicines infringe patents or whether a pharmaceutical product is 'confusingly similar'? Should there be any anti-abuse provisions included?

6. Could negotiators list out the relevant anti-abuse provisions in ACTA to ensure that rights holders do not use the Agreement to expand intellectual property protection for products, including medicines? ACTA currently contains no pro-consumer provisions and minimal protections for an alleged infringer, alongside maximum privileges and incentives for a right-holder to allege infringement (including extraordinarily limited liability for abuse of recourse measures). The enforcement provisions are universally mandatory while the protections are optional. There are virtually no references to exceptions and limitations, or to TRIPS flexibilities and safeguards. Do negotiators feel that sufficient balance has been achieved under the Agreement?

7. Are negotiators aware that the Agreement could create third party liability for suppliers of active pharmaceutical ingredients whose materials may be used in mislabeled products without their knowledge? What are the reasons for holding suppliers of active pharmaceutical ingredients unknowingly liable for mislabeled products?

8. ACTA can become a very strict text should certain proposals be followed, not leaving much room to maneuver for its application. Are contracting parties foreseeing to include in the agreement exceptions to preserve the public interest or flexibilities allowing for adaptation to different national realities? Will you remove institutional measures in which ACTA Member countries attempt to export heightened TRIPS-plus IP protections to other countries, and in particular developing countries

9. How do you guarantee that policies required to benefit from liability safe harbour for Internet service/access providers won't have the effect to force them to restrict fundamental freedoms -- such as freedom of expression and communication, privacy, and the right to a fair trial -- turning them, via contractual policies, into private copyright police/justice?

10. There have been no open hearings or other engagements with civil society since the text was released. Will you commit for the establishment of consistent mechanisms for the ongoing engagement of civil society? More generally, how are you going to fix the process to encourage greater public deliberation on the record, with access to text, and in a meaningful setting? And how are you going to fix all of the specific concerns raised in the expert communiqué: http://www.wcl.american.edu/pijip/go/acta-communique?

Introductory Remarks – Berne Declaration

First of all, we would like to thank the Swiss Delegation for having made this meeting possible. We hope this will be an opportunity to enable us, civil society representatives, to engage with you to exchange views on critical issues that are under discussion during this negotiating round. We also hope that this meeting is a sign of a future commitment towards the establishment of consistent mechanisms for the ongoing engagement of civil society in such plurilateral negotiations.

All of the organizations and institutions present here are seriously concerned about ACTA, its lack of transparency and the damaging consequences such an Agreement would cause to fundamental rights and to developing countries.

We just want to be clear about the ground rules of this meeting. Our assumption is that this meeting is on record, as we are not representing our private but the public's interest. We have therefore an obligation to report back to the general public. We also do not consider this meeting to be a consultation – and should not be reported publicly as such – since we did not have access to the latest version of the text. We urge you to release the text before and after each negotiation.

I will give now the floor to the other representatives of the civil society present to introduce themselves and say some words about their views on ACTA in relation to their field of expertise.

Oxfam Intervention – 5 access to medicines barriers

1. The scope of IP covered is too broad in many areas of the Agreement. The inclusion of patents and confusingly similar trademark infringement, as well as clinical trial data and trade secrets, is inappropriate and irrelevant to anti-counterfeiting measures. The scope of IP needs to be scaled back to willful commercial scale trademark counterfeiting.

2. The agreement currently authorizes customs authorities to seize goods in transit under a legal fiction that labels in-transit goods as originating from in-transit countries. This had led to the seizures of at least 20 shipments of legal generic medicines within the European Union that were intended for developing countries. It is not enough to merely limit the types of IP that customs authorities can enforce – there should be no in-transit border measures since rights holders will always try to game the system.

3. The willingness of rights holders to game the system is a serious risk because at present the Agreement has no anti-abuse measures or safeguards. It is wildly imbalanced.

4. At present the Agreement places limits on key flexibilities, especially with respect to damages and injunctions, including in patent cases. Flexibility is needed for government use, court ordered royalties or other policies that would de-link cost of R+D from the price of products.

5. The Agreement potentially creates broad based intermediary liability. Provisions in ACTA can subject ‘so-called’ intermediaries to interlocutory and permanent injunctions. Thus, the use of injunctions could affect many key participants in global pharmaceutical value chains - including active pharmaceutical ingredient (API) manufacturers, international shippers and traders of generic medicines, and other participants. This would deter generic entry, robust generic competition, and legitimate international trade of generic medicines of assured quality.