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Committee on Trade and Environment

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CLUSTER ON MARKET ACCESS

Statement by India

The delegation of India has made the following statement at the 19-20 March 1998 meeting of the Committee on Trade and Environment (CTE) under Item 8, and has requested that it be circulated to Members of the Committee.

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I. INTRODUCTION

1. India had made a contribution to the discussion in the Committee on Trade and Environment on the issue of transfer of environmentally sound technology and products (EST&Ps) as a part of the issues related to the Market Access Cluster. The relevance of this issue has been reinforced by the comments made by several Members in the discussions on market access in the Committee, pointing out the significant impact transfer of such technologies can have for enhancing market access, especially for exports from developing countries including from small and medium enterprises.

2. India would like to refer to the detailed comments made by the United States on the paper submitted by India (WT/CTE/W/66) at the November 1997 meeting of the Committee, and provide clarifications. In our view, WT/CTE/W/66 arises from the mandate of the CTE to examine the relationship between TRIPS and Environment. This discussion is subsumed in the larger question of reconciling an open, non-discriminatory and equitable multilateral trading system on the one hand with the objective of the protection of the environment and the promotion of sustainable development, on the other hand. In its report to the Singapore Ministerial Conference (SMC), the Committee had concluded, inter alia, that further work is required to help to develop a common appreciation of the relationship of the relevant provisions of the TRIPS Agreement to the protection of the environment and the promotion of sustainable development, and whether and how, in comparison to other factors, these provisions relate to among other things, facilitating the access to and transfer and dissemination of EST&Ps. India's paper falls squarely within the mandate of the CTE and in particular, within the scope of the further work required in this Committee. Several questions have been raised by the United States on the Indian submission which are dealt with below.

II. HOW IS THE INDIAN SUBMISSION RELATED TO THE MARKET ACCESS?

3. The TRIPS Agreement is a market access agreement, not only because it is a part of the Marrakesh Agreement but also because this Agreement relates to "trade-related" aspects of intellectual property rights (IPRs) and their use, and not to IPRs in general. Technology transfer, in the context of technologies covered by IPRs, is definitely trade-related, and therefore closely related to market access. Thus, India is not simply adding the words "market access" without any reason.

III. PATENTS AND COMPETITION

4. While it is clear that patents reward inventions and thus lead to the generation of new technologies, including environmentally sound technologies, it is equally clear that they legally restrict competition. Other things being equal, such restrictions generally lead to restrictions on output and to higher prices. While India agrees that patents need to be granted to generate new technologies, in its submission to the CTE, India is calling for certain minimalistic measures required in three specific situations, namely: (i) MEAs; (ii) mandatory national environmental standards; and (iii) voluntary international environmental standards. Such reconciliation of technical standards with IPRs is being attempted in several fora, including in courts in the United States.

IV. THAT A SERIOUS PROBLEM EXISTS OR WILL ARISE ON PROPRIETARY EST&Ps NOT BASED IN FACT

5. India has brought to the notice of this Committee in 1996 that a serious problem exists on its industry's access to certain patented technologies of Ozone Depleting Substances (ODS) substitutes required for implementation of the Montreal Protocol. This was also confirmed by the intervention made by the Republic of Korea in the CTE. In an UNCTAD Meeting on positive measures held in November 1997, the People's Republic of China also confirmed that it was facing similar problems on accessing these patented technologies. At this meeting, representatives of UNEP and the Multilateral Fund confirmed that such problems had been brought to their notice and that so far no guidance has been finalized for funding projects on the production of ODS substitutes in these countries. Even funding of indigenous research and development efforts on the production of ODS substitutes have not been financed by the Multilateral Fund. That other countries with strong patent protection have revealed no problem with the discrimination of patented technologies or patented products is not relevant, since these countries may not have had the domestic technologies to produce ODS in the first place. Moreover, there are many more MEAs which could develop in the future with time bound targets for eliminating environmentally harmful substances. A notable example is the framework Convention on Climate Change. Research on new substitute technologies is being funded by governments in developed countries. Such technologies would in future be covered by IPRs. Once there are time bound targets, this gives private companies holding such IPRs a double advantage, in having guaranteed markets with legally restricted competition. It should be the responsibility of the international community to make available such technologies at reasonable prices to all participants of the MEA or the international environmental standard. Therefore, it cannot be said that India's arguments on these issues are not based on fact. Moreover, it may be noted that the discussions on other issues in this Committee are also based on apprehensions of a possible future conflict between the multilateral trading system and the MEAs.

V. THAT PATENT PROTECTION IS ONLY ONE FACTOR INFLUENCING TRANSFER OF EST&Ps

6. It is true that patent protection is only one of the many factors that influence transborder transfers of patented technologies and trade in patented goods. However, the UNEP case studies of India and Korea's implementation of the Montreal Protocol clearly reveal problems in accessing patented ODS substitute technologies. The People's Republic of China has also confirmed similar difficulties. Given the different foreign investment and other regulatory and market regimes of these three countries it is unlikely that any of these other factors could have uniformly contributed towards the non-availability of these technologies in all these countries. This is the reason why India has not made any specific mention of these factors in its latest paper.

VI. THAT IT IS HIGHLY UNLIKELY THAT A PARTICULAR EST&Ps IS REQUIRED IN AN MEA OR BY NATIONAL LAW

7. It is true that there may be many substitutes, whether patented or not, which can be used for the implementation of the targets of an MEA or to meet national or international environmental standards. However, in practice, for technical and commercial reasons, the market tends to favour particular EST&Ps and this tends to become the virtual standard for implementing a certain aspect of an MEA or a certain national or international standard. Further, in future there may be a situation where one particular EST&P is the only available substitute to implement an MEA or an environmental standard. In such circumstances it is important that the international community finds a solution to effectively reconcile IPRs with transfer of technology and access to such EST&Ps.

VII. THAT INDIA SEEKS TO ELIMINATE HONEST COMMERCIAL PRACTICES IN ARTICLE 31 OF THE TRIPS AGREEMENT

8. India has suggested that some conditions in Article 31 are cumbersome and could delay the grant of compulsory licenses. There are already circumstances such as public non-commercial use and adjudicated cases under competition law where exceptions to some of the conditions are already available under Article 31. India has suggested that in the limited three cases set out in its paper similar flexibility should be allowed. This cannot be construed to advocacy of the elimination of honest commercial practices.

VIII. THAT REDUCTION IN PATENT TERM FOR SOME LIMITED EST & Ps IS A LOSE-LOSE SITUATION

9. India's proposal on the reduction of patent term is limited to the three specific situations listed in its paper and not to all EST&Ps. With the certainty of markets ensured by MEAs or national/ international standards, India feels that there could be a reduction in patent term without a consequent reduction in rewards for invention. The patent term decided under the TRIPS Agreement did not consider the optimal patent length for rewarding innovation and certainly did not consider the specific three cases mentioned in India's submission. In the case of an MEA which has time-bound targets, the issue of the patent term becomes especially relevant.

IX. THAT THE TRIPS AGREEMENT CONTAINS NO PROVISIONS ON REVOCATION EXCEPT IN ACCORDANCE WITH ARTICLE 5(A) OF THE PARIS CONVENTION

10. In the TRIPS Agreement, Article 32 entitled "Revocation" lays down that revocation of patents must be subject to judicial review . In addition, Article 2 requires WTO Members to comply with Articles 1 through 12 and Article 19 of the Paris Convention. Article 5(A) of the Paris Convention lays down that parties must first seek to correct abuses of the exclusive rights of patents, such as, for example, failure to work, by the grant of compulsory licenses and that only after two years from the grant of the first such compulsory license can proceedings for the revocation of patents be instituted. However, as far back as 1968, Bodenhausen, the Director of BIRPI (now WIPO), in a commentary on the Paris Convention based on documents of meetings concerning these amendments, interpreted this article to mean that these provisions apply only to cases where measures are taken to counter the abuse of exclusive patent rights and not in other circumstances, such as in public interest. At the time of the TRIPS negotiations at least one country, India, had clearly stated in its written submissions that it intended to retain the provision of revocation in public interest. Such a provision would now be subject to judicial review. Therefore it cannot be said that such a limited use of revocation to safeguard the environment would create chaos in the market place. This interpretation of the Paris Convention is not simply wrong on its face and would not nullify all the obligations under Section 5 of Part II of the TRIPS Agreement.

X. ON INDIA'S INTERPRETATION OF FAIR AND MOST FAVOURABLE TERMS

11. India has made a practical suggestion that where the cooperation of the right holder is necessary in the transfer of EST&Ps, there should be an obligation on right holders to transfer such technologies at fair and most favourable terms and conditions, upon demand, to any interested party which has an obligation to adopt these under national law of another country (as for instance in the case of mandatory national environmental standards) or under international law (as for instance in MEAs). This proposal does not state that fair and most favourable terms and conditions should be unfavourable to the right owner. In most proprietary products and technologies there is no "market" as it is the IPR holder who sets the price, based on the legal right to exclude all competition for his product or technology for a limited period of time. Certainly the negotiation of such terms and conditions can be done by the home country where the IPR owner is based.

12. In conclusion, India's proposal has addressed the need for the CTE to examine and recommend certain measures reconciling the TRIPS Agreement with the demands made to implement time bound MEAs, mandatory national standards and voluntary international standards, where such implementation involves the use of EST&Ps covered by IPRs. We look forward to further consideration of this issue under the Market Access Cluster by the CTE.

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