Memorandum to: ACTA Negotiators

Subject: Business Perspectives on Recently Released “Summary of Key Elements Under Discussion”

From: Concerned business groups operating in ACTA nations

Date: July 1, 2009

Since ACTA negotiations were initiated in June 2008, the business community has widely and openly welcomed the initiative and has sought to contribute support and expertise to the process. Through an ACTA Business Response Group comprised of some 30 business organizations working across sectors and within many of the ACTA countries, we have provided governments of negotiating parties with input on various provisions upon which ACTA is being created. We have also sought to partake and provide views to the various public hearings sponsored by governments and to respond to official calls for comment from the public.

Within this context, we have welcomed the public availability of the document entitled, Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion, released by many of the ACTA negotiating governments in early April. With this memorandum, we respectfully submit views in response to the negotiating topics delineated in the “Summary” document.

Our views are organized into a table format for ease of reference. In the left column, we list ACTA provisions as they appear in the Summary document. In the middle column, we provide relevant recommendations we have put forward in our previous memorandums to you. In the right column, we provide additional views, for example, where we have not commented in the past or where we wish to provide further information or clarification.

Generally, we support the Objectives stated in the Summary and the statement made in the Structure and Content section, which stated that ACTA “aims to build on existing international rules in the area of intellectual property, in particular on the TRIPS Agreement...” It is our hope that ACTA will create higher standards and stronger cooperation on combating counterfeiting and piracy.

As always, we stand ready to provide further assistance to the ACTA negotiators where needed and relevant.
**Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion**

(released by many of the ACTA negotiating governments in April 2009)

**CHAPTER TWO**

**LEGAL FRAMEWORK FOR ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS**

**Section 1: Civil Enforcement**

The following table compares provisions delineated in *Summary of Key Elements under Discussion* with recommendations set forth in the ACTA Business Response Group (BRG) memorandum to ACTA negotiators dated 28 July 2008, entitled “Business Perspectives on Border Measures and Civil Enforcement.”

<table>
<thead>
<tr>
<th>Provisions delineated in <em>Summary of Key Elements under Discussion</em></th>
<th>BRG views previously submitted to ACTA negotiators</th>
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<tr>
<td>- scope of the section – which intellectual property rights would be covered by the provisions of this section;</td>
<td>No prior recommendation on this issue.</td>
<td>We support the original intention of the Anti-Counterfeiting Trade Agreement (ACTA) to encompass trademark counterfeit and copyright pirated goods.</td>
</tr>
<tr>
<td>- the definition of adequate damages and the question of how to determine the amount of damages, particularly when a right holder encounters difficulties in calculating the exact amount of damage it has incurred;</td>
<td>Encourage governments to develop calculation methods that lead to fines against counterfeiters and pirates commensurate to the harms caused in order to increase the deterrent impact of fines, and impose sanctions, such as contempt of court, for failure of violators to pay such fines. Calculation methods can be based on information provided by right holders. Right holders should be allowed to elect award of either actual damages suffered or pre-established</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<td>damages.</td>
<td>No prior recommendation on this issue.</td>
<td>We support this approach and element in ACTA.</td>
</tr>
<tr>
<td>- the authority of the judicial authorities to order injunctions which require that a party desist from an infringement;</td>
<td>Counterfeit and pirated goods should be destroyed and definitively removed from the channels of commerce, or disposed of with the rights holders' consent where there is no health or safety risk. Destruction of the seized goods and materials and implements used to manufacture them should be conducted in a manner that minimizes risks of further infringements.</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
</tr>
<tr>
<td>- remedies, including the destruction of goods that have been found to be infringing an intellectual property right and under what conditions and to what extent materials and implements that have been used in the manufacture or creation should be destroyed or disposed of outside the channels of commerce;</td>
<td>Grant officials authority to order and/or execute seizure of the infringing goods, and materials and implements used to manufacture and/or package the infringing goods, as well as other physical and financial assets of violators….</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
</tr>
<tr>
<td>- provisional measures, such as the authority for judicial authorities or other competent authorities to order, in some circumstances, the seizure of goods, materials or documentary evidence without necessarily hearing both parties; and</td>
<td>Allow right holders to recover costs incurred in the detection, investigation and prosecution of acts of counterfeiting and piracy. Costs that can be recovered by the right holder can include court costs or fees, reasonable attorneys’ fees, and storage and destruction fees.</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<tr>
<td>- the reimbursement of reasonable legal fees and costs.</td>
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</table>
## Provisions delineated in *Summary of Key Elements under Discussion* vs. BRG views previously submitted to ACTA negotiators

<table>
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<tr>
<td>Not addressed</td>
<td>Provide rights holders who are victims of counterfeiting and piracy the right to obtain information regarding the infringer, including their identities, means of production or distribution, and relevant third parties.</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
</tbody>
</table>

## Section 2: Border Measures

The following table compares provisions delineated in *Summary of Key Elements under Discussion* with recommendations set forth in the ACTA Business Response Group (BRG) memorandum to ACTA negotiators entitled “Business Perspectives on Border Measures and Civil Enforcement.”

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<tr>
<td>- scope of the section – which intellectual property rights will be covered, and whether border measures should only apply to importations or should equally apply to the export and the transit of goods;</td>
<td>Extend greater authority and effective powers to local customs and enforcement authorities and provide <em>ex officio</em> authority for customs authorities to suspend import, export and trans-shipment of goods, including merchandise in free trade zones, which are suspected of being counterfeited or pirated. Ensure close cooperation between national customs authorities and the special authorities of their free trade zones or free ports in order to provide for the efficient enforcement of anti-</td>
<td>Issues covering exportation, transshipment, free trade zones and in-transit goods are also key in combating counterfeiting and piracy, particularly in light of the increasingly sophisticated methods of manufacturing and transporting counterfeit and pirated goods. It is therefore critical that border measures set forth in ACTA cover these issues.</td>
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<td>counterfeiting and anti-piracy laws to check the offences of trafficking in counterfeit and pirated goods. This would include the seizure of equipment or materials suspected of being used to produce infringing merchandise.</td>
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<td>- <em>a de minimis</em> exception that could permit travelers to bring in goods for personal use;</td>
<td>No prior BRG recommendation on this issue.</td>
<td>The demand in counterfeit and pirated goods is a key contributing factor to counterfeiting and piracy. We believe governments should strongly discourage consumers from purchasing and importing counterfeits. While, we support the stated objective of ACTA with regards to targeting counterfeiting and piracy activities that significantly affect commercial interests rather than the activities of ordinary citizens, we believe making an explicit exception that permits travelers to bring in goods for personal use sends a wrong message to consumers that buying counterfeits is accepted by the government. This inevitably contradicts future public awareness efforts that would be outlined in Chapter Four: Enforcement Efforts of ACTA. We urge ACTA negotiators not to include a <em>de minimis</em> exception.</td>
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<td>- procedures for right holders to request customs authorities to suspend the entry of goods suspected to infringe intellectual property rights at the border;</td>
<td>Establish clear procedures for right holders to initiate suspension by customs authorities of import, export and trans-shipment of suspected IPR infringing goods, including (a) all relevant and reasonably available evidence that is in its control, which is needed to establish a <em>prima facie</em> case for the party's claims or defenses; (b) reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities to prevent abuse. Bond requirements, however, should be eliminated as a condition to processing counterfeiting cases by customs. At the very least, the requirements should be established at a reasonable level so as not to deter the procedures. Governments should also take appropriate steps to reduce or eliminate the burdens on trademark owners of suffering costs of storage and destruction of counterfeit goods.</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
</tr>
<tr>
<td>- authority for customs to initiate such suspension <em>ex officio</em> (on their own initiative, without a request from the rights holder);</td>
<td>Extend greater authority and effective powers to local customs and enforcement authorities and provide <em>ex officio</em> authority for customs authorities to suspend import, export and trans-shipment of goods, including merchandise in free trade zones, which are suspected of being</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<td>- procedures for competent authorities to determine whether the suspended goods infringe intellectual property rights;</td>
<td>counterfeited or pirated. Significantly increase inspections of exports/imports to find shipments of counterfeit or pirated goods and refer such findings to appropriate authorities for investigation and prosecution.</td>
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<td>- measures to ensure that infringing goods are not released into free circulation without the right holder’s permission, and possible exceptions;</td>
<td>No prior BRG recommendation on this issue.</td>
<td>We recommend that ‘competent authorities’ be clarified to ensure that the suspended goods are accurately identified by the most appropriate party.</td>
</tr>
<tr>
<td>- the forfeiture and destruction of goods that have been determined to infringe intellectual property rights, and possible exceptions;</td>
<td>Require authorities to take appropriate steps to ensure that all counterfeit goods are compulsorily destroyed, definitively removed from channels of commerce, or disposed of with the rights holders’ consent where there is no health or safety risk. The simple removal of the unlawfully affixed trademark should not be considered a sufficient course of action.</td>
<td>While we support that the infringing goods should not be released into free circulation without the rights holder’s consent, we also recommend that the counterfeit goods should be destroyed. We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<tr>
<td>- responsibility for storage and destruction fees;</td>
<td>Governments should also take appropriate steps to reduce or eliminate the burdens on trademark owners of suffering costs of storage and destruction of counterfeit goods....</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<tr>
<td>- capacity of competent authorities to require right holders to provide a reasonable security or equivalent</td>
<td>Establish clear procedures for right holders to initiate suspension by customs authorities of import, export and trans-</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the</td>
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<td>assurance sufficient to protect the defendant and to prevent abuse, and shipment of suspected IPR infringing goods, including (a) all relevant and reasonably available evidence that is in its control, which is needed to establish a <em>prima facie</em> case for the party’s claims or defenses; (b) reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities to prevent abuse. Bond requirements, however, should be eliminated as a condition to processing counterfeiting cases by customs. At the very least, the requirements should be established at a reasonable level so as not to deter the procedures.</td>
<td>memorandum.</td>
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<tr>
<td>– authority to disclose key information about infringing shipments to right holders.</td>
<td>In cases where relevant authorities have seized goods that are counterfeit or pirated, require authorities to inform the right holder of the names and addresses of the consignor, importer, exporter or consignee. Authorities should: (a) provide right holders access to relevant documents and information for use in conducting private investigations or filing complaints to the courts or other government agencies; (b) provide right holders with sufficient time to commence a proper action pursuant to a seizure/suspension of clearance by customs authorities by introducing</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
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<td>provisions that require a time period of at least 20 business days or 31 calendar days from the date of suspension or seizure, whichever is longer, for right holders to commence such action.</td>
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### Section 3: Criminal Enforcement

The following table compares provisions delineated in *Summary of Key Elements under Discussion* with recommendations set forth in the ACTA Business Response Group (BRG) memorandum to ACTA negotiators dated 08 October 2008.

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<tr>
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<td>clarifying the scale of infringement necessary to qualify for criminal sanctions in cases of trademark counterfeiting and copyright and related rights piracy;</td>
<td>Provide for criminal procedures and penalties to be applied to willful acts of counterfeiting and copyright piracy, which includes acts that cause substantial commercial harm. In addition, governments should treat importation or exportation of counterfeit or pirated goods as illegal activities subject to criminal penalties.</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum. We urge that ACTA negotiators strongly consider including importation or exportation of counterfeit or pirated goods as illegal activities subject to criminal penalties.</td>
</tr>
<tr>
<td>clarifying scope of criminal penalties;</td>
<td>No prior recommendation on this issue.</td>
<td>We support the application of criminal enforcement to cases of trademark counterfeiting and copyright piracy.</td>
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<td>in which cases the relevant authorities</td>
<td>Ensure the ability of law enforcement</td>
<td>We support including this element and</td>
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<td>should be empowered to take action against infringers on their own initiative (<em>ex officio</em>, i.e. without complaint by right holders) with respect to infringing activities; the authority to order searches and/or seizure of goods suspected of infringing intellectual property rights, materials and implements used in the infringement, documentary evidence, and assets derived from or obtained through the infringing activity; the authority of judicial authorities to order forfeiture and/or destruction of materials and implements that have been used in the production of the infringing goods; the authority of judicial authorities to order the forfeiture and destruction of the infringing goods; the authority of judicial authorities to order the forfeiture of the assets derived</td>
<td>authorities to take action at their own initiative and provide relevant officials with the authority to seize all materials and implements used to manufacture or package counterfeit and pirate goods and any documentary evidence relevant to the offense and assets traceable to the infringing activity. Officials should also be given the authority to impose imprisonment as a sanction against failure to comply with a disclosure order. Require that all counterfeit and pirate goods be destroyed, definitively removed from channels of commerce, or disposed of with the rights holders’ consent where there is no health or safety risk. Bond requirements and the imposition of the costs of storage and destruction of goods on rights’ holders should be eliminated. Criminalize the laundering of proceeds from counterfeiting and piracy, to ensure</td>
<td>suggest the negotiators consider the recommendation put forth in the memorandum. We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
</tr>
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<td>from or obtained, directly or indirectly, through the infringing activity;</td>
<td>that counterfeitors and pirates are not profiting from their crimes and strengthen confiscation regimes that provide for the identification, freezing, seizure and confiscation of funds and property acquired through counterfeiting and piracy.</td>
<td>recommendation put forth in the memorandum.</td>
</tr>
<tr>
<td>– criminal procedures and penalties in cases of camcording motion pictures or other audiovisual works; and</td>
<td>No prior recommendation on this issue.</td>
<td>Under a broad agreement like ACTA, it will not be sufficient to list a type(s) of method of infringement since an all inclusive list is not possible given the creative abilities of counterfeitors and pirates.</td>
</tr>
<tr>
<td>– criminal procedures and penalties in cases of trafficking of counterfeit labels.</td>
<td>No prior recommendation on this issue.</td>
<td>There is no current recommendation on this issue, however, we welcome criminal procedures and penalties for trafficking of counterfeit labels.</td>
</tr>
<tr>
<td>Not addressed in the Summary</td>
<td>Encourage judicial authorities to impose penalties at levels sufficient to deter future infringements, including imposing imprisonment and fines for willful counterfeiting and piracy actions. Governments should be encouraged to develop calculation methods that lead to fines against counterfeitors and pirates commensurate to the harms caused in order to increase the deterrent impact of fines, and impose sanctions, such as</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
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<td>Contempt of court, for failure to pay such fines.</td>
<td>Take measures to disrupt the sale of counterfeit and pirated goods on leased premises by establishing a legal framework under which landlords would be held liable for failure to terminate existing leases and preventing or otherwise controlling future IP violators on their premises.</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
<tr>
<td>Not addressed in the Summary</td>
<td>Provide prompt and reasonable access by rights holders to relevant documents and information on counterfeiters and pirates held by government agencies for the rights holders’ use in conducting private investigations, filing of complaints or pursuing proceedings in the courts or with other government agencies</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
<tr>
<td>Not addressed in the Summary</td>
<td>Create specialized intellectual property crimes investigation and prosecution units in law enforcement and prosecution structures, respectively, and allocate resources towards training judges and other relevant enforcement authorities.</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
<tr>
<td>Not addressed in the Summary</td>
<td>Establish a system for exchange of information between relevant enforcement officials in the signatory countries on</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this</td>
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<td>subjects such as criminal counterfeiters and pirates and best practices in investigating and prosecuting them.</td>
<td>recommendation.</td>
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**Section 4: Intellectual Property Rights Enforcement in the Digital Environment**

We understand that a draft proposal has not been tabled yet. We would therefore like to reiterate our recommendations and have pasted them below for your ease of reference. We look forward to receiving more news and information soon. The below recommendations were submitted with our memo sent on 12 December 2008 entitled “Business Perspectives on International Cooperation, Enforcement Education and Internet-related Issues.”

**Recommendations for Internet-Related Issues**

- An effective ACTA should address the growing problem of sale of counterfeit items and pirated copyright material through the Internet, which underscores the need for government and industry cooperation across borders. Relevant provisions in ACTA should encourage creative and innovative solutions and cooperation among the many actors including government and industry to explore market-driven, voluntary measures to remove counterfeit and pirated materials and/or deter the sale of counterfeits and pirated material on the Internet.

- Governments should work to ensure that data protection policy does not impede the legitimate protection of intellectual property rights. This should be achieved through a balanced approach that protects the rights of content providers and the interests of individuals and other stakeholders in the digital-networked environment.

- Governments should implement appropriate legal frameworks so as not to discourage the development of effective technological protection measures to address large-scale counterfeiting and piracy over the Internet. Furthermore, governments should provide effective legal remedies to deter circumvention of anti-counterfeiting/anti-piracy technological solutions.
CHAPTER THREE

INTERNATIONAL COOPERATION

The following table compares provisions delineated in *Summary of Key Elements under Discussion* with recommendations set forth in the ACTA Business Response Group (BRG) memorandum to ACTA negotiators dated 12 December 2008 entitled “Business Perspectives on International Cooperation, Enforcement Education and Internet-related Issues.”

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<td>- recognition that international enforcement cooperation is vital to realize fully effective protection of intellectual property rights;</td>
<td>No specific recommendation in prior memos</td>
<td>International enforcement cooperation is critical to combating counterfeiting and piracy at the global level. While there is no specific recommendation to recognize the importance of international cooperation in previous BRG memos, we strongly support this element in ACTA.</td>
</tr>
<tr>
<td>- cooperation among the competent authorities of the Parties concerned with enforcement of intellectual property rights, consistent with existing international agreements;</td>
<td>No specific recommendation in prior memos</td>
<td>We support this approach and element in ACTA.</td>
</tr>
<tr>
<td>- sharing of relevant information such as statistical data and information on best practices among the Signatories in accordance with international rules and related domestic laws to protect privacy and confidential information; and</td>
<td>Facilitate and create concrete incentives for cooperative enforcement actions among countries through renewed and strengthened existing systems of sharing information and exchange of best practices;</td>
<td>We support this approach and element in ACTA.</td>
</tr>
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<td>- capacity building and technical assistance in improving enforcement, including for developing country parties to the agreement and for third countries where appropriate.</td>
<td>Recommendations on capacity building and training programs are covered under the section “Recommendations for Education on Enforcement.” See below:</td>
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<td></td>
<td>- Foster specialized skills, training, capacity building programs and expertise in handling of IPR cases by law enforcement officials and courts. Creating specialized IP units within enforcement agencies, for example, will vastly improve the handling of counterfeiting and piracy cases;</td>
<td>We support the issue outlined and further recommend that the creation of specialized IP units within enforcement agencies be considered for inclusion.</td>
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<tr>
<td>Not addressed</td>
<td>- Establish mechanisms for international cooperation that will be available to both ACTA signatories and non-signatories;</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
<tr>
<td>Not addressed</td>
<td>- Establish national coordination mechanisms, such as designating a chief intellectual property enforcement officer with high-level authority to raise the profile of the issue, oversee coordination of relevant government officials and agencies, and allocate necessary financial and personnel resources;</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
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</table>
CHAPTER FOUR

ENFORCEMENT PRACTICES

The following table compares provisions delineated in *Summary of Key Elements under Discussion* with recommendations set forth in the ACTA Business Response Group (BRG) memorandum to ACTA negotiators dated 12 December 2008 entitled “Business Perspectives on International Cooperation, Enforcement Education and Internet-related Issues.”

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<td>Not addressed</td>
<td>- Assist non-signatory countries to develop assessments of the economic and social benefits of participating in the ACTA process.</td>
<td>This issue has not been addressed in the Summary. We strongly urge ACTA negotiators to consider this recommendation.</td>
</tr>
<tr>
<td>- fostering of expertise among competent authorities in order to ensure effective enforcement of intellectual property rights;</td>
<td>Foster specialized skills, training, capacity building programs and expertise in handling of IPR cases by law enforcement officials and courts. Creating specialized IP units within enforcement agencies, for example, will vastly improve the handling of counterfeiting and piracy cases;</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the memorandum.</td>
</tr>
<tr>
<td>- collection and analysis of statistical data and other relevant information such as best practices concerning infringement of intellectual property rights;</td>
<td>No prior recommendations on these issues.</td>
<td>We support this approach and elements in ACTA.</td>
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<td>internal coordination among competent authorities concerned with enforcement of intellectual property rights, including formal or informal public/private advisory groups;</td>
<td>Establish internal government and external public education programs to enhance the understanding of the harms associated with counterfeiting and piracy, particularly the immediate and extenuating dangers and risks of producing, distributing, marketing, purchasing and consuming counterfeit and pirated products. Governments are encouraged to work with industry as well as with other governments on a coordinated approach, which would send a strong message to consumers, counterfeitors and pirates that they are serious about fighting counterfeiting and piracy.</td>
<td>We support including this element and suggest the negotiators consider the recommendation put forth in the BRG memorandum.</td>
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<td>measures to allow customs authorities to better identify and target shipments, which are suspected to contain counterfeit or pirated goods;</td>
<td></td>
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<tr>
<td>publication of information on procedures regarding the enforcement of intellectual property rights, and</td>
<td></td>
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<tr>
<td>promotion of public awareness of the detrimental effects of intellectual property rights infringement.</td>
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</tbody>
</table>
On behalf of:

United Kingdom: The Anti-Counterfeiting Group (A CG) - www.a-cq.org

European Union: AIM®

Russia: CIPR

France: COMITE COLBERT

European Union: ECTA

USA: The International Anti-Counterfeiting Coalition (IACC)

Mexico: ICC México

An IACC initiative: BASCAP - Business Action to Stop Counterfeiting and Piracy

International Trademark Association (INTA)

Ukraine: ICCUA - Ukraine Alliance Against Counterfeiting and Piracy

France: union des fabricants

Austria: VAP
Ron Kirk  
U.S. Trade Representative  
600 17th Street, N.W.  
Washington DC, 20508  
United States of America  
01 July 2009

Re: Anti-Counterfeiting Trade Agreement

Dear Ambassador Kirk,

On behalf of the member companies of the International Chamber of Commerce’s BASCAP initiative and the International Trademark Association (INTA), we wish to express our congratulations on your appointment and extend our support as you take up responsibilities as the new United States Trade Representative.

We welcome your recent statements on the many challenges ahead and the importance of pursuing new initiatives that will seek to channel trade as a driver of economic progress. As you take up the challenges of your new position, we draw your attention to the importance of the ongoing negotiations for the Anti-Counterfeiting Trade Agreement (ACTA).

Since negotiations were initiated in June 2008, the business community has widely and openly welcomed the initiative and has sought to contribute support and expertise to the process. In order to communicate widespread, global support for your efforts and the critical nature of the problems you seek to resolve, we have formed an ACTA Business Response Group, comprised of some 30 business organizations (appended), representing a diversity of industry sectors vulnerable to IP theft and reflecting a global audience of support. Together, we have provided governments of negotiating parties with input on various provisions upon which we understand ACTA is being created: civil enforcement, border measures, criminal enforcement, international cooperation, education on enforcement and internet issues. In response to the Summary of Key Elements of ACTA released in April by the negotiating governments including the USTR, we have prepared an analysis of the key elements against the recommendations that the group has provided. Please see attached for your kind reference. We also enclose a submission to the New Zealand Ministry of Economic Development in answer to their call for recommendations on various elements of ACTA.

At this point, we would like to express our continued support for the United States’ involvement in ACTA, and we encourage you to continue with the strong engagement necessary to bring ACTA to completion. Towards the achievement of ACTA’s unique potential, your
prioritization of this issue and your personal leadership in negotiations with national leaders is essential.

We look forward to hearing the outcomes of the next meeting of the negotiators scheduled to take place in July in Morocco and to future opportunities to share our input and expertise where appropriate. Thank you for your kind attention and consideration.

Sincerely,

Guy Sebban
Secretary General
International Chamber of Commerce

Enclosures

Alan C. Drewsen
Executive Director
International Trademark Association
ACTA Business Response Group

The following organizations represent business interests in support of ACTA and have endorsed input to the ACTA process. Please see enclosed memo for the organizations that have participated in this submission.

Canadian Chamber of Commerce
Japan External Trade Organization (JETRO)/IIPF
Korean Chamber of Commerce & Industry
ICC Mexico
ICC Morocco
ProMarca
Swiss Anti-Counterfeiting and Piracy Platform
ICC Switzerland
Cámara Nacional de Comercio y Servicios
International AntiCounterfeiting Coalition, Inc., (IACC)
AIM - European Brands Association
MARQUES
Coalition for Intellectual Property Rights (CIPR)
ECTA
SNB-REACT
Comité Colbert
Union des Fabricants
APM - Aktionskreis Deutsche Wirtschaft gegen Produkt- und Markenpirterie e.V. (APM)
ICC Germany
The Federation of German Industries Markenverband e.V. (BDI)
Indicam
Anti-Counterfeiting Group (ACG)
ICC UK
Verein für Anti-Piraterie der Film- und Videobranche (VAP)
ICC Austria
ICC Belgium
Association Belge Anti-Contrefaçon
Danish Anti-Counterfeiting Group (DACG)
Finnish Anti-Counterfeiting Group (FACG)
Aktionskreis Deutsche Wirtschaft gegen Produkt- und Markenpirterie e.V. (APM)
ANDEMA
ICC Spain
Swedish Anti-Counterfeiting Group (SACG)
Asociación Interamericana de Propiedad Industrial (ASIPI)
International Trademark Association (INTA)
ICC-BASCAP
Global Anti-Counterfeiting Group (GACG)
Norwegian Anti-Counterfeiting Group (NACG)
Ukraine Alliance Against Counterfeiting and Piracy (UAACP)
Re: Anti-Counterfeiting Trade Agreement

Dear Mr. Devigne,

On behalf of the member companies of the International Chamber of Commerce’s BASCAP initiative and the International Trademark Association (INTA), we thank you for your ongoing efforts on the negotiation process on the Anti-Counterfeiting Trade Agreement (ACTA) as well as continuing engagement with industry stakeholders through meetings such as the one held on 21 April 2009 in Brussels, Belgium.

Since negotiations were initiated in June 2008, the business community has widely and openly welcomed the initiative and has sought to contribute support and expertise to the process. Through an ACTA Business Response Group comprised of some 30 business organizations (appended), we have provided governments of negotiating parties with input on various provisions upon which ACTA is being created. Most recently, the negotiating governments, including the European Commission, have released a Summary of Key Elements of ACTA. We appreciate this step in making ACTA negotiations more transparent and including industry stakeholders in the discussion. In response to the Summary, we have prepared an analysis of the key elements against the recommendations that the group has provided. Please see attached for your kind reference. For your information, we also enclose a submission to the New Zealand Ministry of Economic Development in answer to their call for recommendations on various elements of ACTA.

At this point, we would like to express our continued support for the European Commission’s involvement in ACTA and ask that the EU persist in encouraging other negotiating governments to take necessary steps towards the completion of ACTA. We look forward to hearing the outcomes of the next meeting of the negotiators scheduled to take place in July in Morocco.

We look forward to future opportunities to share our input and expertise where appropriate. Thank you for your kind attention and consideration.

Sincerely,

Guy Sebban
Secretary General
International Chamber of Commerce

Alan C. Drewsen
Executive Director
International Trademark Association

Enclosures
ACTA Business Response Group

The following organizations represent business interests in support of ACTA and have endorsed input to the ACTA process. Please see enclosed memo for the organizations that have participated in this submission.

Canadian Chamber of Commerce
Japan External Trade Organization (JETRO)/IPF
Korean Chamber of Commerce & Industry
ICC Mexico
ICC Morocco
ProMarca
Swiss Anti-Counterfeiting and Piracy Platform
ICC Switzerland
Cámara Nacional de Comercio y Servicios
International AntiCounterfeiting Coalition, Inc., (IACC)
AIM - European Brands Association
MARQUES
Coalition for Intellectual Property Rights (CIPR)
ECTA
SNB-REACT
Comité Colbert
Union des Fabricants
APM - Aktionskreis Deutsche Wirtschaft gegen Produkt- und Markenpiraterie e.V. (APM)
ICC Germany
The Federation of German Industries Markenverband e.V. (BDI)
Indicam
Anti-Counterfeiting Group (ACG)
ICC UK
Verein für Anti-Piraterie der Film- und Videobranche (VAP)
ICC Austria
ICC Belgium
Association Belge Anti-Contrefaçon
Danish Anti-Counterfeiting Group (DACG)
Finnish Anti-Counterfeiting Group (FACG)
Aktionskreis Deutsche Wirtschaft gegen Produkt- und Markenpiraterie e.V. (APM)
ANDEMA
ICC Spain
Swedish Anti-Counterfeiting Group (SACG)
Asociación Interamericana de Propiedad Industrial (ASIPi)
International Trademark Association (INTA)
ICC-BASCAP
Global Anti-Counterfeiting Group (GACG)
Norwegian Anti-Counterfeiting Group (NACG)
Ukraine Alliance Against Counterfeiting and Piracy (UAACP)
July 2nd, 2009
Dr. Margarita Vilatimo
Independent Bureau of Intellectual Property
Intellectual Property Registrar

Re: SAPI’s Trademark Practices – Searching requirement and Classification System

Dear Dr. Vilatimo:

The International Trademark Association (INTA) is a 131-year-old membership organization, representing the interest of trademark owners throughout the world, currently with 5,500 member corporations and professional firms in 190 countries. Currently the Association has 31 member firms in Venezuela. One of the purposes of INTA is the development of clear and consistent principles, worldwide, regarding trademark issues and unfair trade practices. As an accredited, non-governmental observer to the World Intellectual Property Organization (WIPO), INTA has contributed to the work of WIPO and advised national trademark offices around the world on issues relating to harmonization of trademark law and practices and, in particular, on the harmonization of formalities of national trademark offices.

INTA takes this opportunity to put forward comments on newly established practices by Venezuela’s Independent Office for Intellectual Property, known under Spanish acronym, SAPI, with respect to the searching requirement and the trademark classification system for the registration of trademarks.

Searching Requirement

INTA would like to express its concern relative to SAPI’s Official Notice dated May 4, 2009, which sets in place new searching requirement in order to initiate the registration process of a trademark. According to the notice, the application must be accompanied by an official searching result issued by SAPI. This new requirement erroneously draws its legal basis from Article 71 of the Law on Industrial Property.

We call to SAPI’s attention that Article 71 refers to a single document, the application, which in itself bears indication that the trademark is not similar to or the same as a trademark already registered in the same class or a similar class which may lead to confusion or mislead the consumer or public at large. INTA contends, therefore, that resolution No. 020 seeks to establish a new searching requirement that has no basis in the controlling statute.
Moreover, a searching result does not guarantee trademark clearance with respect to other trademarks that may already be registered. Furthermore, the trademark applicant will encounter a number of administrative limitations specifically when dealing with searching services which are often unreliable and which create considerable delays in issuing searching results. The uncertainty as to the date in which the searching results will be issued constitutes an additional obstacle for the effective and prompt processing of trademark registrations.

Given the issues noted above, INTA urges SAPI to rescind Resolution No. 020 on the new searching requirement.

**Classification System**

Now that Venezuela has reverted to the 1955 Industrial Property Law, INTA would like to express its concern about SAPI's requirement that all applications be filed in accordance with the classification system as contained in this law.

INTA encourages countries to continually advance their trademark laws in order to increase legal certainty in rights protection. This process should avoid changes in legislation and regulations that would adversely affect the existing scope of protection of trademark rights.

It is our understanding that the classification provided in Article 106 of the 1955 Industrial Property Law is limited solely to products. As a result, uncertainty as to the protection of valid registrations for services would be greatly increased and applications for service mark registrations would no longer be accepted. The Article 106 classification also does not cover the products that are included in the International ("Nice") Classification that is administered by WIPO. Therefore, reverting to the 1955 local classification would deny effective protection to trademarks.

The requirement that trademark applicants abide by the 1955 local classification also raises many technical inconveniences. It is of our understanding that the SAPI's Industrial Property Registry database is in fact based upon and updated with the International Nice Classification. Therefore, when carrying out an availability search or simply researching the database, the classes provided in the search results for the trademark of interest are those of the international class. However, when filing an application under the 1955 law's local classification that corresponds to different international classes, separate applications must be filed. For example, if a party is interested in protecting services in class 38 and 42 under the international class, rather than filing a single local class application, two separate applications must be filed.

In sum, this reversion to the classification as contained in the 1955 law will result in uncertainty for applicants as to the correct classification of products and services. It also will increase the existing backlog of work at the Industrial Property Registry given the office actions that would be issued due to lack of fulfillment of formal requirements.
Finally, the expedited registration process of trademarks which has been in force until recently will be impeded.

INTA therefore urges that SAPI correct these inconsistencies in order to reduce uncertainty with respect to how products and services are to be classified.

**Conclusion**

INTA requests that SAPI consider the highly negative effects that the new requirements for searching and classification will have on trademark rights and trademark owners and respectfully urges that they either not be implemented or be corrected. The Association stands ready and willing to work closely with SAPI on these issues. Should you require further information, please contact Ms. Laura Cruz at leruz@inta.org.

Sincerely,

Richard Heath  
President
July 2nd, 2009

Dr. Jesus Mantilla Oliveros
Minister of the Popular Power for Health and Social Protection
Caracas, Venezuela

CC: Dr. Divis del Carmen Antúnez
Director of Health Control

Re: INTA Comments on Resolution N° 056 regarding tobacco packaging regulations

Dear Dr. Oliveros:

The International Trademark Association (INTA) is a 131 year-old membership organization, representing the interest of trademark owners throughout the world, with 5,500 member corporations and professional firms in 190 countries. Currently the Association has 31 member firms in Venezuela. INTA is dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce. As an accredited, non-governmental observer to the World Intellectual Property Organization (WIPO), INTA has contributed to the work of WIPO and advised governments around the world on issues relating to trademark law and practices.

INTA offers the following comments on the Resolution N° 056 published on April 3, 2009 that amended the Resolution N° 110, dated March 22, 2004, which regulates cigarette packing in Venezuela.

Our comments are limited to the potential implications for trademarks owners and consumers resulting from the obligation contained on Resolution N° 056 related to the change on the health warning from the back of the package to the front and the confusion that this situation can create for the consumers that cannot distinguish their preferred brands at the points of sale.

Intellectual property rights are a crucial aspect of the global economy and trademarks play a significant role in free trade and competition. Even if tobacco products could be regulated by laws according to the WHO, the inability to recognize a trademark in a product when it is displayed will lead to consumer confusion and, therefore, diminish the goodwill acquired in a trademark through investment and effort over time.
Our concern regarding the impairment of the recognition of a trademark relates to Article 2 of Resolution N° 056 regarding tobacco packaging\(^1\) which states that:

"In the cigarette boxes type (HL) "duras," the health warning will have to be located in the previous side of the packaging, maintaining the dimensions indicated in the Resolution N° 110 of date March 22, 2004, published in the Official Newspaper of the Bolivarian Republic of Venezuela N° 37,904 of date March 23, 2004."

INTA is concerned with the latest provision which weakens trademark awareness within the minds of consumers. Although Resolution N° 110 already placed limitations on trademarks in Venezuela, Article 2 of Resolution N° 056 goes further by requiring that the warning sign be placed on the front of the packaging rather than on the back as required since 2004 under Resolution N° 110.

Trademarks and trade dress play an integral role in facilitating consumer choice by distinguishing products from an enterprise which consumers know and trust from those of another entity that is not known and/or that could be potentially harmful. The prohibition by law of placing the trademark on the front of the package will make it extremely difficult for consumers to distinguish one brand from another, thereby seriously limiting consumers’ ability to buy the product of their choice and exposing them to risks.

Furthermore, trademarks also indicate the source of goods and/or services and assure consumers of the consistency of a product’s quality. This fundamental function can not be effectively fulfilled if health warnings are placed in the front of cigarette packaging and registered trademarks would be noticeable just after the product has been selected and sold.

Trademark owners are entitled to have their registered trademarks accorded the consideration and protection not only under national law, but also under various treaties to which Venezuela is subject including the World Trade Organization’s (WTO) Trade-related Aspects of Intellectual Property Rights Agreement (TRIPS) and the World Intellectual Property Organization’s (WIPO) Paris Convention for the Protection of Industrial Property.

Consequently, the limitation to the function of trademarks contained in Resolution N° 110 and the latest provision of Resolution N° 056, as explained above, restrict pre-existing rights of trademark owners in the tobacco industry and sets unsound legislative precedents. INTA is concerned this could result in further restrictions in the use of trademarks not only in tobacco but on other products in the future.

\(^1\) Official Newspaper N° 39,153 dated April 3\(^{rd}\), 2009
Additionally, INTA is of the view that this change in legislation only increases the risk of counterfeit and black market tobacco products to consumers, which can be easily sold in the market taking advantage of the confusion created by this resolution.

Our views and comments above are further substantiated by legal provision of International Law of Trademarks and Venezuela’s Consumer Law, as described in the following section and Appendix to this letter:

1. Violations of Treaty Obligations

The prohibition by law of the placement of on the front of the package would imply that tobacco manufacturers can not make their trademarks identifiable before consumers. This regulation would breach international treaty obligations under the Paris Convention and the ‘TRIPS agreement’ in two aspects:

a. Unjustifiable encumbrance – Articles 8.1 and 20 of TRIPS; and
b. Failure to provide effective protection – Article 6quinquies, Article 10bis of the Paris Convention and Article 2 of TRIPS.

a. Unjustified encumbrance

Article 20 of TRIPS provides that there shall not be an unjustifiable encumbrance “by special requirement” in the use of a trademark. Lack of exposure of trademarks to consumers would constitute an encumbrance on the use of a trademark whether it is justifiable or not.

In this respect, Article 8.1 of TRIPS provides some guidance, allowing measures which are “necessary to protect public health ... provided that such measures are consistent with the provisions of [TRIPS].” However, we do not believe that this proposal falls within this exception. The Venezuelan Health Authorities have not demonstrated that changing the health warning to the front side of the packaging would increase the awareness on the consumers and thus be in accordance with the exceptions on Article 8. Therefore, such regulation would be inconsistent with TRIPS and would constitute an unjustified encumbrance in breach of Article 20.

b. Failure to provide effective protection

The prohibition by law to expose a trademark to the consumers would fail to comply with Article 10bis of the Paris Convention and its provisions against unfair competition, a risk not only to trademark owners but also to consumers. This sort of measure makes it more difficult to fight against serious threats against the industry such as counterfeit products and smuggling. Combating counterfeit trade – on the legislative, regulatory and enforcement fronts – is a major ongoing policy initiative for INTA. However, these efforts hinge upon the maintenance of a principled, balanced and coherently articulated

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2 The relevant articles from TRIPS and the Paris Convention are set out in the attached appendix
system of national and international treaties, laws and regulations, particularly in regards to trademarks and related intellectual property rights.

The impossibility of recognition of a trademark would make both counterfeiting and smuggling more attractive. This presents the risk of an uncontrolled market for illegal products, potentially undermining the intention of this regulation to reduce smoking and instead leading to a prevalence of cheaper counterfeited or smuggled items, which are potentially more hazardous to health than established brands.

2. Violations to Venezuelan Consumer Law

Besides the implications this change has from a trademark perspective, it should be also taken into consideration that Resolution No 056 leads to a breach of consumers rights established under the Venezuelan Consumer Law.

According to the Venezuelan Consumer Law, consumers should be able to acquire any product in the best possible conditions without restrictions to choose among products that comply with legal standards. Moreover, consumers also have the right to sufficient information to allow them to recognize the range of products in the point of sale and assure them that the product chosen has a certain quality as it belongs to a producer they trust.

From a practical point of view, recognition of tobacco products would be very difficult if consumers cannot notice the trademark and trade dress that identifies them and should wait until the moment of the sale or later to see if it is the product they wanted to buy as the warning on the front of tobacco products obscures the trademark.

Conclusion

INTA respectfully urges the Health Authorities in Venezuela to revisit the new legislation and consider the highly negative effects it could have on consumers, on trademark owners in the tobacco industry and possibly across all sectors of consumer goods; on enforcement efforts against counterfeited and black market tobacco products, and on Venezuela’s international treaty obligations.

The Association hopes that authorities in Venezuela would, at the least, reconsider the change to the previous situation in order to avoid the impossibility of recognition of a trademark which will lead to confusion among consumers, especially because of the restrictions already in place on the tobacco products.

3 Article 7 numeral 2 of the Venezuelan Consumer Law
4 Article 7 numeral 3 and 5 of the Venezuelan Consumer Law
INTA would be happy to answer any questions you may have on these issues. Should you require any further information, please contact Ms Laura Cruz at lcruz@inta.org.

Sincerely,

Richard Heath
President
APPENDIX

Paris Convention for the Protection of Industrial Property (1883)

Article 6quinquies: Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union

"B. Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

(i) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
(ii) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
(iii) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order. This provision is subject, however, to the application of Article 10bis."

Article 10bis Unfair Competition

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.
Agreement on Trade-related aspects of Intellectual Property Rights (1994)

Article 2: Intellectual Property Conventions
"1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles I through 12, and Article 19, of the Paris Convention (1967).
2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."

Article 8.1: Principles
"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

Article 20: Other Requirements
"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking."

Venezuelan Consumer Law
Law on the protection to access to personal assets and services

Article 7°. These are persons rights in relation to goods and services declared essential or not:

... 2. The acquisition of the best quality and price, without conditions, taking into account the legal provisions governing the access of foreign and national goods and services.

3. The information shall be sufficient, timely, clear, accurate and comprehensible on the different goods and services available to them, price specifications, quantity, weight, features, quality, risk and other data of interest inherent in their design or performance, composition and contraindications to enable them to raise awareness for their needs fulfillment.

... 5. Knowledge of the political, economic, social and cultural aspects of the production, manufacturing, importing, storing, transporting, distributing and marketing processes of these goods and the generation and delivery of services to effectively exercise social oversight as well of the advocacy mechanisms and popular organization to act before the public entities and...