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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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OUTCOME OF THE CONSULTATION

of : Justice and Home Affairs Counsellors

on : 26 September 2008

Subject : **Plurilateral Anti-counterfeiting Trade Agreement (ACTA)
3rd negotiating session 8-10 October 2008, Tokyo, Japan**
Chapter 2 :Draft Criminal provisions
Japan-USA Joint proposal, dated 12 September 2008

I. INTRODUCTION

In accordance with the terms of the negotiating directives relating to the Anti-counterfeiting Trade Agreement (ACTA)¹ and in view of the 3rd negotiating session, to be held from 8 to 10 October 2008 in Tokyo Japan, the Presidency has submitted the Japan-USA joint proposal on draft criminal law measures ² to be included in ACTA, to the consideration of the Justice and Home Affairs Counsellors for consultation.

¹ Doc. 7759/08 WTO 49 PI 15 UD 48 MI 101 JUSTCIV 56 COPEN 52 DROIPEN 29
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² Japan-USA Joint proposal dated 12 September 2008.

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During their meeting on 26 September 2008, the Justice and Home Affairs Counsellors, deploring the late submission of the joint Japan-US proposal on criminal measures, were able only to proceed to a general exchange of views and emphasized that they were merely making preliminary remarks.

In this respect, the Presidency may wish to express in the negotiations that it would be desirable that documents relating to forthcoming negotiating sessions are distributed well in advance, in view of the need for a thorough examination and consultation with regard to the arising issues .

Furthermore, the Presidency may wish to reiterate the request expressed by delegations for more transparency in ongoing discussions, so that stakeholders concerns can be dealt with appropriately and wishes to thank the Commission for its intention to hold another stakeholder meeting after the Tokyo session as well as for an up-dated press release, to be circulated between the Member States.

II. OUTCOME OF THE CONSULTATION

a) *General remarks*

The Presidency may wish to indicate that several delegations lodged reservations on the text of the draft criminal provisions. Conclusions reached on several points, set out below, should be considered as preliminary and do not constitute a common position by the European Union. Bearing that in mind, it has to be underlined that this consultation of the Justice and Home Affairs Counsellors on the draft criminal provisions cannot be considered as final.

During the preliminary exchange of views, delegations, while welcoming the eventual inclusion of criminal provisions in ACTA, indicated that there has been a need for definitions in the text and for a more clear and coherent drafting. The Presidency also noted that the majority of delegations wished to remain as close as possible to the terminology used in the European Union *acquis* of legal criminal instruments.

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The Presidency observed furthermore that the delegations have not taken a final position yet on the question of the scope of the criminal provisions to be included in ACTA and in particular on the question whether those criminal provisions should go or not beyond the scope of Article 61 of the Agreement on Trade related aspects of Intellectual Property Rights (TRIPS).

b) On the provisions as such

i. Article 2.14 (1) a) and b)

There was concern with regard to the contradiction introduced by the scope of the protection for the infringement of "wilful copyright or related rights piracy on a commercial scale" in the chapeau of this provision and indent a) which extends the scope of protection to infringements" that have no direct motivation of financial gain".

Delegations underlined that they wish to put the focus of the protection on the infringements linked to a financial gain.

ii. Article 2.14. (2) a),b), c), and d)

The Presidency noted that, with regard to indent a) in relation to indents b) and c), there is a confusion in the manner that the provision on penalties fits and mixes up with the provisions on seizure and forfeiture and that with regard to the level of penalties, delegations wish to remain as close as possible to the formulation used in the relevant European Union instruments.

Consequently, delegations wished to replace the second part of indent a) starting from the word "fines" until the end of the phrase, by the sentence "effective, proportionate and dissuasive penalties".

With regard to indent b) the Presidency observed a convergence of views between the delegations on the fact that the last paragraph of this indent, providing that seizure orders of suspected counterfeit trademark goods do not need to identify individually the items that are under seizure as long as " they fall with specified categories in the relevant order", is against their national legislations and consequently should be deleted. Delegations expressed furthermore the wish to replace the word "judicial" in the initial phrase of indent b) by the word "competent" making this provision more compatible with the national legislations of Member States of the EU.

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With regard to indent d) it was thought advisable to propose a more general drafting , while delegations at the same time expressed their preference for the Japanese option , namely " ... shall have the authority to...".

iii. Article 2.16

There was concern that with the inclusion of such a provision, ACTA seeks to criminalise behaviours the criminalisation of which, is still contested in the Member States of the European Union. It was felt premature at this stage to support the inclusion of such a provision.

In this respect, the Commission representative drew the attention of the delegations to the fact that Articles 2.16 and 2.17 aim at protecting environmental aspects as well as aspects of the consumer's health and should be considered also from this point of view by the delegations.

iv. Article 2.17

It was felt that, bearing in mind that this provision refers to Sections 3 and 4 of the draft which still need to be completed, delegations should abstain at this stage from taking a preliminary position.

III. CONCLUSION

Closing discussions, the Presidency indicated the European Union will be able to elaborate a more detailed position on the draft criminal provisions to be included in ACTA, after the third round of negotiations in Tokyo and after an in depth examination of the draft.