ITSSD
INSTITUTE FOR TRADE, STANDARDS, AND SUSTAINABLE DEVELOPMENT

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Dr. Lisa Forman
Associate Director, Collaborative Doctoral Program in Global Health
CIHR and CPHS Post-Doctoral Fellow
Munk Centre for International Studies
University of Toronto
1 Devonshire Place, Toronto,
Ontario, M5S 3K7, Canada

Re: A/HRC/12/WG.2/TF/CRP.5 (27 March 2009)

Dear Dr. Forman,

Thank you for responding to my recent communication seeking a dialogue on the substance of the recently distributed document entitled, "Desk Review of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property from a Right to Development Perspective" - A/HRC/12/WG.2/TF/CRP.5 (27 March 2009).

Having received a copy of this document as a member of the distribution list because I previously submitted on behalf of the ITSSD during 2007 comments in response to the "WHO CIPIH Draft Global Strategy and Plan of Action", the ITSSD believed it worthwhile to weigh in with our own perspective on the subject matter - namely, a "Private Property Right Perspective". Perhaps you and your colleagues would be willing to incorporate within your document this broader perspective on the issue grounded in defensible legal interpretation of the relevant treaty and U.S. constitutional texts and a rational and informed historical account of the compulsory licensing practices within the US and the European Union.

In this regard, I respectfully request incorporation of our detailed discussion, as summarized below, which explains the viewpoint of the Institute for Trade, Standards and Sustainable Development (ITSSD) on these matters which is relevant to the broader systemic issues relating to universal access to healthcare and information and communications technologies, and even, climate change technologies.

The ITSSD's more detailed discussion of this subject matter are, in part, included within ITSSD comments recently submitted to the WIPO Standing Committee on the Law of Patents (SCP). In particular, I wish to draw your attention to our hyperlinked comments to WIPO SCP Document SCP/13/3 – **ITSSD Comments Concerning WIPO Report on Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights** .

Other germane viewpoints on this and related subject matters are contained within the "ITSSD Comments on the WIPO SCP Report on Standards and Patents", and within the "ITSSD

P.O. Box 496
Princeton Junction, NJ 08550-9998
Email: info@itssd.org
Phone: 609-658-7417
Fax: 609-897-9598
Website: www.itssd.org

Response to the WIPO SCP Report on the International Patent System", "Supplement to the ITSSD Response to the WIPO SCP Report on the International Patent System" and the "ITSSD Comments on Annex III of the Report on the International Patent System", all of which are accessible online at the ITSSD website following the 3rd bullet on the ITSSD 'Program's page, at: http://www.itssd.org/programs.html .

In essence, these several comment documents focus, in part, on the so-called "WTO TRIPS flexibilities" contained within TRIPS Article 31, the Doha Declaration on TRIPS and Public Health, the TRIPS Council Decision on Paragraph 6 and the proposed Article 31*bis* Waiver to the TRIPS Agreement concerning same. These comments also relate such analysis to other TRIPS provisions that emphasize that intellectual property *are property rights*, first and foremost, within the meaning of TRIPS Preamble Paragraph 4.

Since property rights are natural, individual-based human rights, within the meaning of the 1948 Declaration, the 1948 American Declaration on the Rights and Duties of Man, the 1976 International Covenant on Economic, Social and Cultural Rights, and ultimately, the United States Constitution (1787) and its accompanying Bill of Rights (1791), then governments must pay heed to the strict substantive and procedural conditions imposed on unauthorized governmental 'takings' of private IP rights set forth within TRIPS Article 31(a), (d), (h), (i), (j) and (k); 44.2; and 62.44.

In other words, while the TRIPS Agreement may have grandfathered the highly disputed Paris Convention grounds for issuing compulsory licenses (incorporated by reference within TRIPS Article 2 and the Preamble to TRIPS Article 31 (*'the broad mouth of the funnel'*), these bases remain tightly circumscribed by the substantive and procedural conditions imposed by the subsections to TRIPS Article 31. These provisions were arguably intended to ensure protection of patentees' affirmative right to substantive and procedural *due process of law* against wanton governmental seizures of exclusive private property (human) rights within the meaning of the Fifth Amendment of the U.S. Bill of Rights and other U.S. constitutional provisions (*'the narrow neck of the funnel'*).

This means that when a government (e.g., Brazil, Thailand, Canada, France, India, etc.) or an intergovernmental organization such as the WHO, etc. wishes to 'take' patented private medicine or medical technology products for a 'public use' (i.e., on the basis of an identified and declared 'public interest'), that government or intergovernmental organization must pay itself, or cause a selected third party licensee to pay, *full, complete and adequate fair market value compensation* for such patents. After all, this is consistent with established U.S. Supreme Court jurisprudence and with the understanding of the parties to the WTO TRIPS and WIPO Agreements. And, fair market value means 'arms-length' pricing agreed to between a willing buyer and a willing seller; not some unilaterally predetermined price deemed to be 'fair' by a national or regional government or intergovernmental body.

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We hope that you find the materials noted above to be interesting and informative, and I look forward to receiving your response to our request.

Sincerely,

Lawrence A. Kogan

Lawrence A. Kogan
President

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Princeton Junction, NJ 08550-9998
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Fax: 609-897-9598
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