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Negotiating Group on Trade-Related Aspects
of Intellectual Property Rights, including
Trade in Counterfeit Goods

MEETING OF 25 MARCH 1987

Note by the Secretariat

Appointment of the Chairman

1. Ambassador Lars E.R. Anell (Sweden) was appointed Chairman of the Negotiating Group for the initial phase.

Trade-related aspects of intellectual property rights

2. Some participants said that the protection of intellectual property rights, including the way in which such protection was accorded and enforced, was an issue of significant and growing importance in international trade and economic relations. International trade in goods increasingly involved the international exchange of technologies, creative activity and other subjects of intellectual property rights. Some of these participants stressed the importance they attached to satisfactory results in this area, which were necessary in order to achieve an acceptable overall balance of results of the Uruguay Round.

3. Some participants said that trade problems were arising as a result of deficiencies in the protection accorded to intellectual property, both because of inadequacies in the scope and availability of intellectual property rights under many national laws and because of lack of effective procedures and remedies for the enforcement of such rights where they existed. As regards inadequacies in the scope and availability of rights, reference was made to the absence in certain countries of patent or copyright laws or of the protection of designs, computer programmes or geographical indications; exclusions of categories of products or of works from protection; insufficient duration of protection; misuse of compulsory licensing; and procedural obstacles or de facto discrimination that makes it difficult for foreign firms to obtain protection for their intellectual property. In regard to difficulties facing intellectual property right owners in the enforcement of their rights, mention was made of: lack of police enforcement or access to border enforcement measures in appropriate circumstances; difficulties of gaining access to competent judicial or administrative bodies; procedural problems with the burden of proof and assembly of evidence; unavailability of preliminary relief; insufficient penalties; the relationship between local and federal jurisdictions; and in general the duration and cost of legal proceedings.

It was said that enforcement of intellectual property rights was often a particular problem for small manufacturers with limited financial resources.

4. Some participants spoke of the trade problems they saw as arising from the inadequate or ineffective

protection of intellectual property. The point was made that such problems frequently involved several countries in each specific case: the country of the owner of the intellectual property right in question; the country or countries where unauthorized copies were being made; and the country or countries where these copies were being offered for sale. It was said that trade distortions and impediments were resulting from, among other things: the displacement of exports of legitimate goods by unauthorized copies, or of domestic sales by imports of unauthorized copies; the disincentive effect that inadequate protection of intellectual property rights had on inventors and creators to engage in research and development and in trade and investment; the deliberate use in some instances of intellectual property right protection to discourage imports and encourage local production, often of an inefficient and small-scale nature; and the inhibiting effect on international trade of disparities in the protection accorded under different legislations. Reference was also made to trade problems arising from restrictive business practices linked to intellectual property rights. Some participants emphasized that trade problems were arising in different ways and to varying degrees over the whole range of intellectual property rights.

5. Another trade problem related to intellectual property rights mentioned by some participants was that measures and procedures for their protection and enforcement could constitute barriers to legitimate trade. In this connection, reference was made to procedures in some contracting parties which were said to entail not only a separate treatment of imported goods, but outright discrimination, for example by imposing substantial procedural disadvantages.

6. Some participants said that they were not clear as to what were the trade-related aspects of intellectual property rights. It was suggested that the Group should aim to clarify this matter on the basis of information from participants on their national experience. It was also suggested that there was need to clarify the coverage of intellectual property rights for the purposes of the work of the Group, taking into account issues arising from technological developments.

7. The question of how the Group should pursue its work on the trade-related aspects of intellectual property rights was addressed in many statements. Some participants were of the view that the Group should deal both with trade problems arising from the inadequate protection of the whole range of intellectual property rights or their ineffective enforcement, on the one hand, and with ensuring that action to protect such intellectual property rights does not give rise to barriers to legitimate trade on the other. In their view, the aim should be to seek a proper balance between these two sets of sometimes conflicting considerations and to strengthen the multilateral consensus and disciplines on these matters. Some of these participants said that this would entail going beyond the clarification of existing GATT provisions to the elaboration of new rules and disciplines, and put forward specific ideas in this regard which are summarized in paragraphs 10-11 below.

8. Some participants stressed that the Group should abide strictly by the mandate given to it by the Ministerial Declaration and that this related to trade in goods only. Some of these participants were of the view that the mandate did not provide for an exercise to set standards of protection of intellectual property rights or to attempt to raise the levels of such protection through the strengthening of enforcement procedures. These tasks, in their view, should be undertaken in other negotiating fora, such as the World Intellectual Property Organization. The task of the Group was not to deal with the intellectual property rights themselves but with the effects on trade in goods of action to protect such rights, particularly so as to ensure that such action does not cause barriers to legitimate trade. The starting point for this exercise, as indicated in the Negotiating Plan, was the identification and examination of relevant GATT provisions. A participant said that it would be inconsistent with the Group's mandate, and unacceptable, to link the fulfilment of obligations assumed under the GATT with the observance of obligations under existing or future international treaties on the protection of intellectual property rights. In regard to the form that the results of the Group's work might take, some participants were of the view that a code approach would not be desirable.

9. On the identification and examination of relevant GATT provisions, a number of provisions were referred to, including Articles IX:6, XII:3(c)(iii), XVIII:10, and XX(d), the preamble to the General

Agreement, and articles laying down the basic rules and procedures of the General Agreement. Some participants said that these provisions recognized the legitimacy of measures to protect intellectual property rights, in the broad sense of the term, as well as the potential of these measures, or the lack of them, to adversely affect trade. Some participants stressed the importance of this aspect of the Group's work, which they saw as central to the initial phase of the work of the Group. One suggestion was that after an in-depth review of relevant GATT provisions, the Group should study the activities of other organizations, in particular WIPO, so as to be in a position to assess whether there was need for any additional action and, if so, what it should be what and where it should be taken. The view was also expressed that the Group should not become too pre-occupied with the existing GATT provisions since they did not address the distortions of trade and impairment of concessions that arose from inadequate and ineffective protection of intellectual property rights.

10. A participant said that the Group should embody in an agreement on protection and enforcement of intellectual property rights a recognition of those areas in which an international consensus on standards of protection for intellectual property rights already existed and a mechanism for enforcement of that consensus, and strengthened norms and standards in those areas where international norms and standards were deficient. This participant said that it intended to make suggestions and table texts that propose measures to improve protection and enforcement of intellectual property rights including patents, trademarks, trade dress, copyrights, mask works and trade secrets.

11. Another participant suggested that the Group should focus its activities on the following issues and priorities in parallel. First, clarification and interpretation of certain existing GATT provisions , for example to ensure more explicit disciplines to address the problems created by national rules which discriminate against imports in favour of domestic economic activity. Second, search for an early agreement on trade in counterfeit goods bearing trademarks, resuming where the Group of Experts on Trade in Counterfeit Goods had left off. This participant undertook to submit concrete suggestions in the near future, which would include possible principles for adequate enforcement procedures and remedies at whatever level necessary in order to address the trade problems at hand. Third, the Group should examine the extension of the type of approach envisaged for the counterfeit agreement to cover widely recognized intellectual property rights other than trademarks, for example, copyright, neighbouring rights, geographical denominations and designs, having in mind that such an extension had been envisaged by the GATT Group of Experts on Trade in Counterfeit Goods (L/5878, paragraph 10). The objective of both these areas of work would be to reduce trade problems created by inadequate enforcement, at the level of importation and perhaps elsewhere, and to ensure that new disciplines do not themselves create unreasonable barriers to legitimate trade. The other priority issue for examination, in the view of this participant, should be the trade distortions and impediments created by the inadequacy or inexistence of certain intellectual property rights. Initial work should identify such lacunae or weaknesses of a trade-related nature, without prejudice to the nature or institutional venue of eventual remedial action.

12. Some participants referred to the need for the Group in its work to balance the interests of technology importers and exporters and of more advanced and less-developed countries, particularly as regards the transfer of technology, and to recognize the legitimate different national interests and policy objectives in the area of intellectual property rights. It was also said that many of the problems identified were ones of enforcement of law against activities that were already illegal and that it was not clear how much multilateral action could achieve in this regard.

13. The Group took a number of decisions concerning inputs required as a basis for its further work. It invited participants to table their suggestions for achieving the Negotiating Objective in advance of the Group's next meeting, while leaving it open for participants to make suggestions in writing or orally subsequently if they so wished. In regard to factual information by the secretariat, it agreed that the secretariat would prepare brief factual notes on past work in GATT and on GATT provisions on trade-related aspects of intellectual property rights. The Group also agreed that an inventory of problems for international trade arising from policies and practices relating to intellectual property would be compiled on the basis of notifications to be made by

participants and put together by the secretariat for circulation to the Group. It was agreed that the notifications relating to intellectual property rights in the existing Inventories of Non-Tariff Measures should be incorporated into the Group's inventory.

Trade in counterfeit goods

14. Some participants said that multilateral action in this area was more than ever urgent. Inadequate action in GATT and in other multilateral fora in the past had allowed trade distortions to increase in intensity, despite a number of improvements introduced at the national level. The multilateral framework to be negotiated should aim to reduce distortions and impediments to legitimate trade resulting from trade in counterfeit goods and action to repress such trade. The view was also expressed that the objectives of the multilateral framework were a matter for negotiation, having regard to the relevant GATT obligations. Some participants said that, while action to deal with problems of counterfeiting was important, this should not divert the Group from work on other, more significant problems of intellectual property protection affecting trade, such as in the patent field, which needed to be tackled without delay.

15. In regard to how the Group should pursue its work on trade in counterfeit goods, one suggestion was that interested contracting parties should immediately sign, without modification or further negotiation, the draft Agreement on Measures to Discourage the Importation of Counterfeit Goods, circulated in 1982 as document L/5382. Some participants indicated that they would study this proposal but felt that the Group should take a fresh look at this draft with a view to examining possible improvements in the light of developments since it had been prepared. Some suggestions put forward in this regard are outlined in paragraph 11 above. The view was also expressed that the 1982 draft would not be an appropriate basis for the work; the work should be pursued in accordance with the initial phase of the Negotiating Plan, under which the basis was the Report of the Group of Experts on Trade in Counterfeit Goods, other work already undertaken in GATT and papers by participants. In this regard, it was pointed out that the Group would need to take into account that the report of the Group of Experts reflected the situation before the Declaration of Punta del Este. Some participants stressed that the scope of the work in this area should be extended beyond counterfeiting associated with trademark infringement to the whole problem of counterfeiting, which often involved the violation of other types of intellectual property rights.

16. In regard to inputs for its further work, the Group invited participants to table papers setting out their suggestions for achieving the negotiating objectives in advance of the Group's next meeting, while leaving it open for participants to make suggestions in writing or orally subsequently if they so wished. The Group also agreed that the secretariat prepare a factual note outlining work already undertaken in GATT on trade in counterfeit goods.

17. It was noted that certain other international organizations were engaged in activities regarding trade in counterfeit goods and reference was made to studies prepared and information put together by these organizations. It was agreed that the secretariat should contact the secretariats of WIPO, UNESCO and the CCC to seek and make available to the Group such information as might be available.

Consideration of the relationship between the negotiations in this area and initiatives in other fora

18. Among the points made, in addition to those already referred to above and to the third paragraph of the Negotiating Objective, were that the work in the Group and in other fora should be complementary; that unnecessary duplication should be avoided; that ongoing discussion in other fora should not be regarded as a limitation to the discussions in the Group; that there was need to establish where the primary competence for different matters lay; and that the respective speed, quality and results of the negotiations in the Group and of those conducted elswhere would be among the factors which, in practice, would determine the extent of respective rule-making activities. The Group agreed that the secretariat would enter into contact with the secretariats of WIPO, UNESCO and CCC and make available to the Group before its next meeting the

information that it had obtained from these organizations on their relevant initiatives. The Group agreed to revert to this agenda item at its next meeting on the basis of this information.

Communications from other international organizations including requests for observer status

19. The Group had an exchange of views on the requests received from the World Intellectual Property Organization as contained in document MTN.GNG/NG11/W/1 and on a request from the Customs Co-operation Council for observer status. The Group agreed that the Chairman should undertake consultations among interested participants on these matters with a view to formulating recommendations for submission to the GNG at its meeting of 13 April 1987.

Other business

20. It was agreed that the secretariat would issue after each meeting notes recording the main points raised and the specific suggestions made in the discussions.

21. The Group agreed to meet again in the week 9-12 June 1987 with the same agenda as for the present meeting. The Chairman said that, if the expected material were forthcoming, the Group would need to envisage a three-day meeting.