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

MEETING OF NEGOTIATING GROUP OF 14-15 NOVEMBER 1988

Chairman: Ambassador Lars E. R. Anell (Sweden)

Note by the Secretariat

1. As proposed in GATT/AIR/2710, the main purpose of the meeting was to discuss the report of the Chairman to the Group of Negotiations on Goods in preparation for the Montreal Ministerial Meeting of the Trade Negotiations Committee. A draft text of this report had been circulated to the Group, drawn up on the basis of informal consultations, including those at the level of the Group. The Group also had before it an informal paper setting out the Chairman's understanding of the main points emerging from the Group's examination of relevant GATT provisions. This paper was an extensive revision of Annex II of the letter of the Chairman of 11 August 1988, which took account of points made at the September meeting of the Group and in informal consultations since then.

2. Introducing the text of his report to the Group of Negotiations on Goods, the Chairman stressed the need for the guidance from Ministers on the future conduct of negotiations to be clear and well understood by all participants. Part II represented his best assessment, on the basis of his consultations, of the common ground in which an eventual compromise could be found. He did not believe that there existed as yet any text that would immediately command general acceptance. He had taken into account the need to reconcile diverging views in the Group; but the extent of divergences was such that the points made were often mutually inconsistent and it had therefore not been possible to take account of all of them. Commenting on certain parts of the report, he said that the expression in paragraph 8 "will be guided by" the clarification of GATT provisions should be understood to have the same meaning as "against the background of". In regard to the first indent of that paragraph, the most-favoured-nation principle had not been specifically mentioned, since it was understood to be covered by the formulation in that indent. The second indent did not specify what kind of enforcement measures should be the subject of commitments, for example whether they should cover action both at the border and internally; it would be for the further work to decide what was necessary for the means of enforcement to be "effective". In regard to the third indent, concerning the specification of reference points regarding the availability, scope and use of intellectual property rights, he said that most participants had presented or indicated distortions or impediments to international trade caused by the availability, scope or use of intellectual property rights. In this connection, some had emphasized excessive and discriminatory scope or use, while others had stressed inadequate protection or use. All these problems would be addressed under the indent. As to the use of different words to introduce the various indents ("commitments", "specification" etc.) he said that this should not be taken to imply any order of priority or differentiation in the level of commitment between the indents; there would be "detailed work" on all the indents.

3. In regard to Part I of the draft report, some participants sought greater reflection of their views. Some others found the balance of presentation in Part I broadly acceptable, but reserved the right to insist on a greater reflection of their views if other changes were considered.

4. Some participants considered that the third sentence of paragraph 2 did not adequately reflect the divergence of views on the different practices mentioned in the paragraph. It was also proposed that the word "excessive" be replaced by the word "arbitrary".

5. In regard to paragraph 3, a participant said that the characterisation of the General Agreement as containing no specific obligations with respect to the enforcement of intellectual property rights was too strong because, in his view, the General Agreement did impose certain enforcement obligations, for example in Article IX:6. Another participant, supported by some others, proposed that the last sentence of this paragraph be replaced by "others have maintained that the work of the Group should be to address the trade-related aspects of IPRs along the lines recognized in the General Agreement, as distinct from the question of substantive standards and norms".

6. In regard to paragraph 4, a participant requested that the following sentence be inserted: "views were also expressed that substantive matters related to IPRs are outside the mandate of the Group and of the General Agreement." Another participant suggested that it was necessary to elaborate on the notion of providing "benefits to all participants", by adding "taking account of the interests of importers as well as exporters of technology". The insertion of the following sentence at the end of the paragraph was also proposed: "at the same time, it has been pointed out that adequate protection of intellectual property not only helps to prevent distortions and impediments to international trade but also contributes to the economic growth and development of the participating countries".

7. In regard to paragraph 6, a participant suggested the insertion, at the end of the first sentence of the paragraph, of the following sentence: "some participants have stated that negotiations in this Group should seek to enhance cooperation among the relevant organizations and not prejudice initiatives in those fora". Another participant said that if the Chairman considered it appropriate to include that sentence, he should also consider the addition of: "some participants also thought that the attainment of this and other relevant negotiating objectives would be enhanced by providing for an obligation for parties to a GATT agreement to adhere to and implement the Paris and Berne Conventions".

8. A participant stated that, if some of the proposed changes were considered for inclusion, his delegation's views should also be reflected. These related, in paragraph 5, to the reasons why, and extent to which, trade in counterfeit goods should be treated as part of the wider issue of enforcement and in paragraph 6 to the extent to which it was appropriate to address in GATT work that was subject to consideration in WIPO and other organizations.

9. Some participants said that they generally considered Part II a useful basis for further work in the Group. Some saw Part II as constituting a useful basis for discussions at the Montreal meeting of the TNC. Some participants considered the text fell short of providing the necessary clear guidance that would enable effective work in the Group on the problems that existed in this area. A participant said that he could neither endorse nor reject the text at the level of the Negotiating Group. He found two basic problems with it. First, it lacked clarity on the issue of the principles relating to fundamental issues of intellectual property right protection; his delegation had the understanding that the notion of reference points covered that aspect but he was not sure that all participants interpreted it in the same way. Secondly, paragraph 8 created the impression that there could be differences in the level of commitments as between different issues covered by the indents; as a minimum, there should be a common understanding that all that would be done in the Group was intended to lead to the negotiation of appropriate and effective multilateral rules and disciplines. Some other participants shared these concerns. A participant said his delegation could not endorse the draft text as it stood, but would be willing to do so if changes to paragraphs 7 and 8 were made; these included the deletion of references to the protection of intellectual property rights in paragraph 7 and the chapeau to paragraph 8, of the term "commitments to provide" in the second indent of paragraph 8, and of the reference to "inadequate" protection in the third indent of paragraph 8. Another participant found the present text unacceptable but expressed his delegation's willingness to reconsider its position if the changes notes above were made. His delegation could agree to the

elaboration of rules and disciplines as suggested in the chapeau to paragraph 8 but not on the issues covered in the four indents that followed.

10. Different suggestions were put forward on the need for placing square brackets around Part II of the report. Some participants favoured placing the entire text within square brackets while others argued against it. A participant proposed that the whole text, as well as specific areas of contention, be placed within square brackets. A participant suggested that Part I be put in square brackets.

11. With respect to paragraph 7, a participant proposed the deletion of the work "limits". He said that this work should not be construed as imposing constraints on the work of the Group on substantive standards and enforcement issues. Some others suggested the replacement of the words "trade aspects of the protection and enforcement of intellectual property rights" by "trade-related aspects of intellectual property rights as distinct from questions of substantive norms and standards". It was also suggested that paragraph 7 was premature in the absence of a consensus on the nature and extent of trade problems that the Group should address.

12. In regard to the chapeau of paragraph 8, some participants suggested that references to the protection of intellectual property rights be deleted because, in their view, the question of substantive standards fell outside the scope of the Negotiating Objective of the Group and should be dealt with in WIPO and other relevant international organizations. Some others said that the chapeau to this paragraph should reflect the passage in the Punta del Este Declaration concerning the need to promote the adequate and effective protection of intellectual property, which was the only part of the Group's Negotiating Objective not reflected in the Chairman's text. It was also proposed that the notion contained in paragraph 4 of the report, namely that intellectual property laws should reflect national policy objectives and the public interest, be reflected in the chapeau. Some participants asked for the replacement of the phrase "guided by" by "taking into account". A participant said that it was his understanding that the phrase "guided by" implied, in that context, that GATT provisions had to be taken account of where they applied to the trade problems identified. It was said that the phrase "guided by" should not be interpreted as implying any sequence in the work of the Group. It was also proposed that the "elaboration" be "aimed at" the clarification of GATT provisions rather than be "guided by" it. Some participants suggested that the word "negotiations" replace the phrase "detailed work". Some participants stated their understanding that the phrase "detailed work" implied negotiations, since this work would take place in a Negotiating Group, whose purpose was to negotiate.

13. In regard to the first indent of paragraph 8, it was said, for the sake of clarity, it would be preferable to mention explicitly some or all of the following GATT principles: most-favoured-nation treatment, national treatment, non-discrimination, transparency, dispute prevention through notification and surveillance, dispute settlement and special and differential treatment of developing countries. A participant argued that this indent was redundant if negotiations were to be conducted within the framework of GATT.

14. With regard to the second indent of paragraph 8, a participant said that he found it unacceptable as it would prejudge the outcome of negotiations. Another participant proposed the deletion of the words "commitments to provide". A further member said that the indent should be clarified so as to refer to GATT commitments on protection as well as enforcement. Different participants stated their understanding that this indent referred to one of the following: enforcement measures at the border and internally; enforcement measures at the border; trade in counterfeit goods.

15. In regard to the third indent of paragraph 8, a participant stated the understanding of his delegation that this indent referred to the fundamental principles of intellectual property right protection other than those referred to in indent two of the paragraph. Some others understood it as referring to substantive standards and norms of intellectual property protection. These participants elaborated that such reference points should be drawn from existing international conventions and from national laws, and should be capable of further elaboration in the future as new problems emerged. One participant said that reference points could also consist of indicative lists. Some of these participants, however, were concerned that the indent lacked clarity, since it

did not refer specifically to substantive standards and norms of intellectual property protection. It was also suggested that the text did not bring out clearly enough that treatment of substantive standards was essential for work on enforcement. For some others, the indent was unacceptable because it clearly referred to substantive standards and norms which, in their view, were outside the scope of the Group's Negotiating Objective. It was also proposed that the reference to inadequate protection be deleted as there did not exist a consensus in the Group on the need to discuss this issue. The point was made that the concept of "reference points" needed further clarification. In this regard, one participant suggested that a link to paragraph 12 would help in clarifying the notion of reference points. A participant suggested that the last words of the indent should read "intellectual property rights" rather than "intellectual property".

16. In regard to the fourth indent of paragraph 8, it was suggested that dispute settlement was a basic GATT principle already covered by the first indent and as such did not have to be singled out. Some considered the reference to national trade policy instruments inappropriate, arguing that it was measures taken in application of legislation and not legislation as such which was subject to GATT disciplines. Another participant believed that this concern was not valid since the indent referred to the "use of legislation".

17. In regard to paragraph 9, some participants expressed disappointment that a piracy was also not mentioned. The point was made that account had to be taken of the work of the Group of Experts Trade in Counterfeit Goods, which had suggested that future work should also consider counterfeiting affecting forms of intellectual property rights additional to trademarks. The view was expressed that issues related to counterfeiting would be addressed in the context of enforcement referred to in indent two of paragraph 8. One participant stated his understanding that counterfeiting referred exclusively to matters related to trademark rights.

18. A number of participants argued for the deletion of paragraph 10. A participant believed that the reference to mutual advantage was inappropriate because this was often obtained, in practice, by balancing benefits and losses across different areas in the negotiations. One participant suggested that the reference to mutual advantage be replaced by a reference to the balance of rights and obligations as this was clearer in a GATT context. It was proposed by some members that the word "flow" be replaced by the word "transfer". It was also suggested that the promotion of the development of developing countries, recognized in the Punta del Este Declaration, should be reflected by the addition of the words "and promote the social and economic development of developing countries".

19. A number of participants proposed the deletion of paragraph 11. One of these said that the concept of special and differential treatment was a basic GATT principle and the manner in which developing countries had to be treated should not be prejudged. Another participant said that the paragraph should include a specific reference to special and differential treatment and to the need to extend financial co-operation to developing countries.

20. A participant recalled that his delegation, on behalf of the least-developed countries, had submitted to the Sub-Committee on the Trade of the Least-Developed Countries a communication outlining some proposals for consideration by the different Negotiating Groups. This communication had been submitted in pursuance of paragraph 2(d) of the Enabling Clause and Part I, Section B(vii) of the Punta del Este Declaration. He proposed for the inclusion in Part II of the report the following text: "the negotiations shall take into account special and particular situations of the least-developed countries in order to provide for special and exceptional treatment for them in any arrangement resulting from the negotiations".

21. The Chairman indicated the changes he intended to make, in the light of the discussion, before submitting his report. Part II would be put in square brackets. The statements made would be reflected in the records of the meeting and all rights of participants were reserved.

22. Some participants expressed their concern that their suggestions regarding Part I might not be taken into

account. The representative of India suggested that the following text, which had been read out during an informal session of the Group and which had then been supported by some participants, be reflected in the records of the meeting as an alternative to Part II of the Chairman's Report to the GNG: "1. It is recognized that the substantive matters relating to intellectual property rights are outside the mandate of the Group on trade-related aspects of intellectual property rights and the General Agreement. It is recognized that international organizations, such as WIPO, UNESCO and UNCTAD deal with these matters. 2. The Group should, according to its mandate, continue its work on trade-related aspects of intellectual property rights as distinct from the questions of substantive norms and standards. 3. In order to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the work of the Group on clarification of GATT provisions should be carried forward so as to determine the nature and contents of any new rules and disciplines which may be elaborated as appropriate. 4. The negotiations to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods should be concluded expeditiously. 5. The negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters".

23. Responding to this intervention, the representatives of the European Communities and the United States suggested that their preferred formulation of Part II of the report, also presented at the Group's informal session, be reflected in the records of the meeting. The formulation would contain the following points: that participants would engage in negotiations with a view to concluding a GATT agreement, covering all intellectual property rights, that would lay down obligations on
(i) substantive standards for the protection of intellectual property, drawn from existing international conventions and from national laws where the provisions of existing conventions were inadequate; these standards could be elaborated in the future as new problems emerged in this area; (ii) effective border and internal enforcement measures; (iii) GATT principles such as national treatment, non-discrimination and transparency; (iv) an effective dispute settlement mechanism. With regard to the dispute settlement mechanism, the representative of the European Communities added that such a mechanism should include obligations regarding recourse to multilateral mechanisms rather than unilateral instruments.

24. The Group agreed to hold its next meeting on 9-10 February 1989.