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

MEETING OF NEGOTIATING GROUP OF 6 AND 9 MARCH 1990

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

Note by the Secretariat

1. The Group adopted the agenda proposed in GATT/AIR/2931.

2. The Group focussed its discussion on agenda item I(A). It also discussed, in informal session, the institutional aspects of the international implementation of the results of the negotiations on TRIPS. No interventions were made under agenda items I(B) to I(F) and II.

3. The Group had the following new papers before it: a communication from WIPO on the beneficiaries and exceptions to national treatment under treaties administered by WIPO (NG11/W/66 and Corr.1), and a paper prepared by the secretariat, listing all TRIPS working documents (NG11/W/67).

I(A) The applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions

4. A participant reiterated that his delegation was willing to consider the applicability of GATT principles only to the extent that intellectual property rights were trade-related. Cross-fertilization of GATT principles into the intellectual property area should not go any further, especially as this might risk a relaxation of disciplines in the intellectual property field. He also expressed doubts as to whether there was as much meeting of minds on some points as suggested in the secretariat checklist, particularly with regard to transparency.

National treatment

5. The representative of WIPO, introducing document NG11/W/66, said that it responded to a request by the Group to list the beneficiaries of national treatment according to treaties administered by WIPO - in this regard the paper concentrated on those treaties administered exclusively by WIPO, the Paris and Berne Conventions and the Washington Treaty - and also to list the exceptions to national treatment according to those treaties. Responding to questions put to him during the previous meeting of the Group (NG11/18, paragraph 28), he said that none of the conventions administered by WIPO defined how the nationality of legal entities should be determined, leaving that matter, consequently, to the national law of the countries party to the conventions in question. However, the question of the nationality of legal entities was not of much importance, since legal entities could normally claim national treatment on the basis of criteria such as their place of domicile, residence, or real and effective commercial establishment, or on the basis of first publication in a member State. With regard to the treatment of persons with double nationality, he said that a person would be considered a national of a country party to a convention administered by WIPO, whenever this was justified by

one of his nationalities.

6. Using the secretariat checklist as a guideline, a participant said that in the view of his delegation, the national treatment provisions of a TRIPS agreement should apply to all intellectual property rights covered by the agreement. They should extend to non-nationals of participants, despite possible free rider problems, along the same lines as the national treatment provisions of existing intellectual property conventions, for example to persons domiciled or having a real and effective industrial or commercial establishment in a participant. The provisions should cover natural persons as well as legal entities, and intellectual property right holders as well as others that might be involved with intellectual property rights, such as defendants in intellectual property right legal disputes. Both intellectual property rights relating to goods and those relating to services should be covered by the national treatment provisions, which should apply to all government actions affecting intellectual property rights. There should also be provision for well-defined exceptions, which did not go beyond those contained in existing intellectual property conventions, such as Article 2(3) of the Paris Convention. Both national treatment provisions along the lines of those found in the GATT and those found in intellectual property conventions should incorporate the "no less favourable treatment" standard.

7. Another participant expressed the view that the applicability of national treatment principles would probably only become clearer when the Group would have a better picture of the content of a possible future intellectual property agreement. The same applied to the question of what allowance should be made for exceptions to national treatment. It would also be necessary to see if general provisions on national treatment should be supplemented by national treatment provisions relating to specific intellectual property rights. Nevertheless, his delegation had some preliminary views on the issue of national treatment. The general rule in the existing intellectual property right conventions, that foreigners from another contracting state should have the same protection as nationals, should be applicable. In establishing national treatment provisions, full regard should be had to the basic principles of territoriality and independence of protection. As regards the issue of national treatment for goods, laws and regulations on intellectual property rights were relevant to goods only in respect of those goods that consisted of or incorporated an object of protection duly recognized or granted under the law of the country concerned. A detailed formulation, limited to laws, regulations and requirements governing protection and enforcement of intellectual property rights, would be preferred to a term like all government action affecting intellectual property rights, which was too broad.

MFN/non-discrimination

8. Responding to a question, the representative of the European Communities said that the suggestions in document NG11/W/49 concerning areas where full application of the MFN principle would not be appropriate were not intended to deal with the special situation between the member States of customs unions or free trade areas. It might be necessary to include in a TRIPS agreement also a reference to this type of special treatment, as traditionally accepted in the GATT system.

9. A participant said that, whereas the national treatment principle would normally also suffice to prevent discrimination between third countries, his delegation believed that it may be necessary to deal with such discrimination arising from situations where certain foreigners were given more favourable than national treatment. His delegation was open to any suggestions in this respect, but at the moment it preferred the second approach mentioned in paragraph 18 of the checklist, which would envisage prohibiting arbitrary or unjustifiable discrimination between nationals of other signatories. Any MFN provision should parallel the national treatment provision, i.e. should be applied to all aspects to which national treatment applied.

10. With regard to paragraph 16 of the secretariat checklist, a participant said his country had accorded in some cases more favourable treatment to nationals of another country than to its own nationals. Unconditional MFN/non-discrimination would result in more favourable treatment of all foreigners than of the nationals of his own country. On the other hand, allowing exceptions to MFN/non-discrimination could endanger the purpose of a multilateral framework of preventing any kind of discriminatory actions. With a view to the effectiveness

of a multilateral agreement, there should, therefore, be limited scope for such exceptions, and, if possible, all exceptions concerning bilateral agreements should be phased out in a certain definite transitional period.

Transparency

11. The representative of Australia recalled that his delegation's proposal on enforcement, contained in document NG11/W/53, said that the primary aim of a transparency provision in a TRIPS agreement should be to require each signatory to make public promptly all laws, regulations, judicial decisions and administrative rulings pertaining to the availability, scope, acquisition and enforcement of intellectual property rights in such a manner as to enable governments and traders to become acquainted with them. Turning to specifics, he said his delegation shared the concerns of others with regard to an obligation to publish all legal decisions relating to intellectual property rights. He agreed that relevant laws and regulations and amendments to them should be notified. Australia had no difficulty in seeking to encourage participants to consult prior to changes in relevant laws and regulations, but could not support this being made an obligation.

Other basic principles

12. A participant emphasized that intellectual property rights by nature were State conferred monopolies, which States were entitled to regulate and balance with obligations. He stressed also that paragraph 5 of the April 1989 Mid-Term Review text mentioned the importance of public policy objectives and of technological and developmental dimensions; this made it clear that all related aspects, like balance of rights and obligations, public interest, non-reciprocity, independence of protection, special and differential treatment and freedom of scope and level of protection should be recognized as principles. They should all be spelled out in clear terms in a chapter dealing with basic principles in a possible TRIPS agreement, and should also be translated into operational form in the specific areas. His delegation was also prepared to discuss the need for exceptions; the exceptions in the Berne Convention would be acceptable, but others could also be considered. His delegation was still reflecting on the issue of reciprocity, which it was willing to discuss. With regard to the freedom of scope and level of protection, he referred to the different proposals submitted by his delegation, particularly in NG11/W/37. His delegation could also support access to technology as a principle. The developmental dimension underlying various basic principles, which was of fundamental interest to his delegation, had not yet been addressed by the Group.

13. With regard to special and differential treatment, a participant said that transitional arrangements in a TRIPS agreement should contribute to achieving the fullest participation in it. There should be a transitional arrangement for the adaptation of domestic situations in all participants; and considering the various developmental stages of participants there should be longer transitional periods for developing countries. The Hungarian proposal contained in document NG11/W/56 could be useful in this respect. Access to technology was a key area for developing countries; this might involve transfer of technology, training of personnel and provision of adequate means for regulating restrictive business practices by multilateral cooperations.

14. Addressing the principle of balance of rights and obligations, a participant expressed the view that there did not seem to be disagreement that an intellectual property system should balance interests, benefits or rights and obligations. Taking existing patent systems as an example, he said that the exclusive rights were granted for a limited period on condition that, in return, the patented technology would be disclosed clearly for the benefit of the public. Intellectual property rights were not necessarily monopolies in the economic connotation of the word: exclusive rights might or might not lead to a dominant position of market power in a particular product. Another participant emphasized the importance of balancing rights and obligations in all areas of the TRIPS negotiations, in that intellectual property right holders would be protected as effectively as possible, and users would be protected against any possible abuse of exclusive rights.

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

15. The representative of WIPO informed the Group about the first meeting of the Committee of Experts on the Settlement of Intellectual Property Disputes Between States, that was held 19-23 February 1990, with the attendance of representatives of 64 States. After an intensive discussion on the basis of the questions in the memorandum WIPO had prepared for the meeting, the Committee of Experts had decided to ask WIPO to draft for a second meeting a document containing principles for a draft treaty for the settlement of disputes between States in the field of intellectual property. Any principle could contain variants, and all would be accompanied by explanations. Another document to be prepared by WIPO would list the existing treaties in the field of intellectual property and would contain information on dispute settlement provisions in those and other treaties where such provisions could assist the Committee in its future work. The next meeting would take place from 22 to 26 October 1990.

IV. Other business, including arrangements for the next meeting of the Negotiating Group

16. The Chairman reported to the Group on the informal consultations he had had with a view to putting to the Group a proposal for a timetable of work for the Group until July and on the question of possible secretariat preparation of draft elements on basic principles for consideration at the Group's meeting in April. These draft elements would not have attempted to suggest compromise formulations in areas where there were fundamental points of difference between delegations but would have attempted to present the alternatives in sufficiently concrete terms to give a fairly clear idea of the possible formulations regarding these matters. While these suggestions had had widespread support, it had unfortunately not been possible to reach agreement on them. He could therefore only put to the Group some suggestions concerning the work that the Group might undertake at its April meeting. These were that the Group should focus on: any new proposals submitted by delegations; basic principles focusing on those more relevant to developmental considerations; transitional arrangements; and enforcement. Continuing, the Chairman said that he did not wish to hide from the Group his assessment that the failure to reach agreement on a work programme and on the initiation of drafting had created a serious situation, particularly from the viewpoint of the Chair which had a responsibility to ensure a transparent and equitable negotiating process as well as to do what could be done to enable the final product to be as coherent and well thought through as possible. Very little time was now left in which to develop common texts for submission to the GNG in July. He thought that all recognized that the Group was dealing with highly complex issues cutting across several fields of government policy and legislation. It had to ensure that whatever result was drawn up was compatible with an extensive body of international law, established both in the GATT and in WIPO and elsewhere. The task before the Group was one of drawing up a complex legal text in a way that would not impose an excessive burden on smaller delegations in particular. To do this satisfactorily would take months of detailed drafting. The earlier the Group started examining texts the more likely it was to achieve a result that was not only coherent but also took account as fully as possible of the views and concerns of all participants.

17. A participant emphasized the interest of his delegation in participating in any informal consultations held by the Chairman.

18. A participant said that the Uruguay Round negotiations had shed a new light on intellectual property right issues that had traditionally been discussed in other fora and in some cases had reached a stage where no further movement seemed possible. However, the difficulties in finding solutions to controversies inherently present in dealing with these issues had not disappeared, and it was therefore not surprising that agreement on how to make progress in the Group was not easy to achieve.

19. A participant said his delegation had been prepared to go along with the proposals put forward by the Chairman, which were fairly modest and reasonable, in the interest of having progress in the Group. He regretted the lack of consensus on these proposals, which would have allowed the negotiations to make progress in a fully transparent manner, with the participation of all delegations. Since positive, successful results in this Group were of the highest priority, his delegation could not accept any further slowdown in the negotiating

process.

20. Another participant said he did not think that the lack of consensus on a timetable until July or on the secretariat preparing a paper on the elements of basic principles had given any setback to the work of the Group. There was agreement to discuss the enforcement issues at the April meeting, as suggested in the timetable. The secretariat could not usefully be invited to start drafting on basic principles because some of the more important ones, from the viewpoint of his delegation, had not yet been adequately addressed by the Group; since these were linked with the other basic principles it would be unproductive to start drafting only on those which had been adequately discussed.

21. A participant expressed concern about the idea that failure to agree in the Group would automatically lead to a non-transparent process outside it. The relevance of work schedules should not be exaggerated; in some other Groups their establishment had been frustrated by the same delegations that were seeking them here. The Group should not proceed by trying to solve the issues before it one by one, since all issues were interrelated. His suggestion for the next meeting of the Group was to concentrate on some of the issues that had not yet been discussed seriously, such as paragraph 5 of the April text.

22. A participant suggested that the records of the meetings should identify the delegations making the points recorded. He indicated that he would refer to this matter in the GNG. The Chairman said that he would convey to the Chairman of the GNG that the matter had been raised in the Group, but not discussed.

23. The Group agreed to discuss at its meeting of 2, 4 and 5 April the items suggested by the Chairman. In addition to the meetings scheduled for 14-16 May and the week of 25-29 June, the Group agreed to reserve also 9 and 11 July for a further meeting.