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

MEETING OF THE NEGOTIATING GROUP OF 10 JUNE 1987

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

Note by the Secretariat

1. The Negotiating Group adopted the agenda as set out in GATT/AIR/2426.

First indent of Initial Phase: Trade-related aspects of intellectual property rights

2. The Negotiating Group had before it: secretariat notes on past work in GATT on trade-related aspects of intellectual property rights (MTN.GNG/NG11/W/4) and on GATT provisions bearing on trade-related aspects of intellectual property rights (MTN.GNG/NG11/W/6); a note putting together the various notifications in the Inventory of Non-Tariff Measures that relate to intellectual property rights (MTN.GNG/NG11/W/8); and submissions from some participants on trade problems encountered in connection with intellectual property rights (MTN.GNG/NG11/W/7 and Add.1). In regard to the agreement of the Group to seek these submissions, as reflected in paragraph 13 of the note on the last meeting of the Group (MTN.GNG/NG11/1), the Chairman said that in that agreement the word "inventory" had been used as a synonym of the word "compilation". The agreement had thus been to make an inventory, in the sense of a compilation, of trade problems arising from policies and practices relating to intellectual property rights as they had been encountered by participants and based on submissions by participants.

3. Participants exchanged views on the trade problems arising in connection with intellectual property rights that they wished addressed by the Group. Some participants noted that there appeared to be a common view on the part of countries presenting written submissions and certain other participants that trade problems were arising in connection both with inadequacies and with excesses in the scope and availability of intellectual property rights as well as in the possibilities for their enforcement. It was pointed out that many of the specific issues and problems raised in the submissions were similar. However, reference was also made to differences of emphasis, for example in regard to problems in relation to appellations of origin and indications of source or in connection with procedures for the enforcement of intellectual property rights vis-à-vis infringing imports. Among other problems emphasized by

some of these participants were inadequate protection of new technologies and lack of effective dispute settlement procedures in existing international conventions for the protection of intellectual property rights.

4. Some participants said that some of the issues raised in the submissions did not appear to be primarily trade-related and felt that the countries raising them should provide further clarification of their trade impact. Some participants said that they doubted that some of the issues raised, for example those relating to services or inadequacies in the scope and availability of intellectual property rights, fell within the mandate of the Group and noted that they were matters being addressed elsewhere, including in WIPO. The task of the Group was not to deal with the protection of intellectual property rights as such, but with the negative effects that the implementation of existing laws and treaties might be having on international trade in goods as addressed by the existing GATT provisions. It was said that, since intellectual property protection resulted from the interplay of

many interests and goals, in which trade ones were secondary in importance, it would be unbalanced and unwise to develop an intellectual property system on the exclusive grounds of trade adequacy. It was also suggested that the Group should keep in mind the developmental function of intellectual property protection in developing countries and address the trade distortions arising from the abusive use of intellectual property rights, for example export restrictions or import requirements in licensing agreements involving intellectual property rights.

5. In regard to the identification and examination of the operation of relevant GATT provisions, some participants said that the provisions of the General Agreement, as outlined in the secretariat note (MTN.GNG/NG11/W/6), did not address many of the issues raised in the national submissions. To some of these participants this indicated that the existing GATT provisions did not adequately respond to the trade distortions and impediments arising in connection with intellectual property rights and that new rules and disciplines were necessary; while to some others this indicated that some of the issues raised fell outside the proper area of concern of the Group. A participant was of the view that the applicable GATT principles identify as liable to affect trade only legislation that in a direct and purposeful manner impairs the realisation of an act of trade concerning physical products and specified in the General Agreement. In referring to general GATT provisions, some participants stressed the importance of the most-favoured-nation and national treatment principles of Articles I, III and XIII; a participant also asked to what extent Article XI might be relevant to export restrictions in licensing agreements, especially where mandated by governments. As for specific GATT provisions, some participants emphasized the importance they attached to the provisions of Article IX:6 on the protection of specific regional or geographical names and the view was expressed that the Group might need to consider its clarification. Some participants also stressed the role of Article XX(d), especially in regulating actions at the border against goods infringing intellectual property rights. Some participants felt that difficulties in this connection were nonetheless arising and that the Group might need to consider clarification of the provisions of Article XX(d), for example the term "necessary" in this provision.

6. As regards the further work in the Group, some participants said that the various matters before the Group should be considered in parallel. It was suggested that the Group should continue its examination of the issues raised in the national submissions in conjunction with the examination of the operation of the relevant GATT provisions and should have particular regard for the trade aspects of the practices raised. The view was expressed that this process would enable the proper scope of the Group's work to be defined. A participant was of the view that the Group should identify, as a first step, the rules and practices relevant to GATT provisions that are intended in a direct fashion to disrupt trade in physical goods. Some participants said that the Group should avoid unnecessary duplication of work in the World Intellectual Property Organisation and that the Group would need to be adequately informed of the conventions and activities of that body.

7. In regard to the nature of the action that the Group should take in order to achieve the Negotiating Objective, some participants expressed their preference for multilateral solutions and said that a wide range of disciplines regarding the protection of intellectual property rights should be negotiated, aimed at avoiding trade problems by providing clear guidelines to permit a proper balance in national legislation between excessive and inadequate protection of intellectual property rights, including in regard to improved disciplines concerning the protection of national markets for reasons related to intellectual property rights. A participant reiterated its suggestion for a broadly-based intellectual property code, incorporating existing standards and norms for the protection of intellectual property and providing for enhanced and improved protection where necessary, as well as providing for effective enforcement under national laws and provisions at the international level for dispute settlement and consultation. Some participants said the Group would need to consider the rôle of other appropriate fora in the establishment of rules on the trade-related aspects of intellectual property rights, including the possibility of making recommendations to them.

8. As regards suggestions for achieving the Negotiating Objective, a participant said that it expected to submit to the Group its proposal for a broadly-based intellectual property code in the autumn. The Chairman urged participants to submit their suggestions for achieving the Negotiating Objective by the Group's next meeting, if possible, or by early October so that they could be the subject of an initial examination before the end of the year in accordance with the Initial Phase of the Negotiating Plan. A number of participants said that they were at present engaged in consultations in capitals aimed at developing submissions for the Group on trade problems encountered in connection with intellectual property rights to respond to the Group's invitation on this matter. The Chairman urged as many participants as possible to present their thinking and concerns about trade problems arising in connection with intellectual property rights in the form of written submissions,

whether comprehensive or focussing on a few points considered to be of particular importance. The Group agreed that the secretariat prepare a factual generic compilation based on written submissions and oral statements by participants in order to facilitate a more focussed discussion in the Group. The compilation would be prepared on the basis of the oral statements made and the written submissions available by 17 July 1987. If necessary, a revision would be prepared prior to the Group's September meeting to take account of additional submissions received. It was understood that this paper would include the views of participants on the trade-related aspects of the issues raised, including the relevance of the provisions of the General Agreement. Participants were requested to address these aspects in their submissions and to present supplementary material as necessary. The Chairman noted that this paper would be without prejudice to views on the scope of the Group's mandate and where or by whom action should be taken: these were matters that only the Group itself could pronounce on. A participant said that it understood the paper to be equivalent to a "compilation of issues considered relevant by participants". The Group also agreed to request the secretariat to provide a document listing existing international conventions regarding intellectual property rights and their membership.

Second indent of Initial Phase: Trade in counterfeit goods

9. The Group had before it the report of the Group of Experts on Trade in Counterfeit Goods (L/5878), a paper from the European Communities on their Regulation Laying Down Measures To Prohibit the Release for Free Circulation of Counterfeit Goods (MTN.GNG/NG11/W/3), a secretariat note on past GATT work on trade in counterfeit goods (MTN.GNG/NG11/W/4) and information from the Secretariats of WIPO, CCC and Unesco on their activities in this regard (MTN.GNG/NG11/W/5 and Addenda 1-2).

10. Some participants reaffirmed the importance they attached to effective action to combat trade in counterfeit goods while ensuring that such action does not give rise to barriers to legitimate trade. A participant said that it would make available the text of recent legislation adopted by his country in March 1987 on the prohibition of imports of goods infringing trademark rights; this demonstrated the determination of his government to cooperate in efforts to progress the negotiations in this area. He urged that the Group confine itself to the trade-related aspects so as to avoid duplication of work in other organizations. Some participants said that the work in the Group in this area should move forward in parallel with that in other areas of the Group's work. The view was also expressed that, without detracting from the importance of the issues of basic intellectual property rights, the work on issues of implementation should move forward as expeditiously as possible.

11. Reference was made to the proposal at the Group's last meeting (MTN.GNG/NG11/1, paragraph 15) for the signature, without further negotiation, of the draft Agreement to Discourage the Importation of Counterfeit Goods circulated in 1982 in document L/5382. Some participants said that in their view the 1982 draft required multilateral analysis in the Group with a view to improvement and possible extension. The proponent of this proposal said that, if sufficient delegations did not agree to sign the draft agreement in its current form, it intended to incorporate in its proposal for a broadly-based intellectual property code elements to deal with the issues addressed in the draft agreement.

12. Elaborating on ideas put forward at the Group's first meeting (MTN.GNG/NG11/1, paragraph 11), a participant said that the 1982 draft agreement did not appear to provide for adequate or sufficiently dissuasive measures. The negotiations should result in the adoption of an agreement on counterfeit goods which would permit right holders to request national authorities to intervene not only at the level of importation but possibly also at the level of exports and, if practicable, at the level of transit trade. Such a possible extension of the draft counterfeit agreement should be the subject of close scrutiny not only in the Group but also in other relevant international organizations, including for example the CCC and possibly WIPO. Since action at the border had inevitable limitations in dealing with the problem, due for example to the need to avoid hindrance to legitimate trade, there was also need for more effective domestic measures of enforcement in many countries against the production of counterfeit goods. The question remained of where minimum standards for such domestic enforcement should be negotiated, taking into account the difference between GATT and certain other international organizations in terms of the international consequences of non-implementation of the norms developed. This participant said that these remarks applied equally to the question of the possible extension of the counterfeit agreement approach to other widely recognized intellectual property rights, such as perhaps copyright, neighbouring rights, designs and geographical denominations. The most amenable of these rights to

treatment similar if not identical to that accorded to counterfeit trademarks might be copyrights, where there was a wide degree of international consensus on basic rights, as spelt out in the Berne and Universal Copyright Conventions, and where some of the problems of piracy of audio-visual recordings and books were similar to those of trademark counterfeiting.

13. A participant said that the 1982 draft contained several constructive concepts and principles which should be preserved and/or further developed, such as those recognizing that differences in the legal systems and customs procedures of various countries might require different methods for dealing with counterfeit goods, and the provision for possible extension of the coverage of the agreement to intellectual property rights other than registered trademarks.

14. A participant suggested that countries should sign the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, administered by WIPO, as a preliminary to any further discussion of trade in counterfeit goods. Extension of the Agreement from indications of source to the field of registered trademarks would be an easy task in the context of the Paris Union. This participant advocated a more active rôle for WIPO to help the Group avoid duplication of efforts and to provide information on experience with the Madrid Agreement.

15. A participant suggested that the Group should examine the Report of the Group of Experts on Trade in Counterfeit Goods (L/5878), as envisaged in the Initial Phase of the Negotiating Plan, for example the view expressed in the second indent of paragraph 21 of the Report.

16. In summing-up, the Chairman said that the 1982 draft agreement would be reissued for circulation to the Group and that, as requested by a participant, the Madrid Agreement would be circulated, as a suggestion by that participant. In addition, the recently adopted legislation of a participant would be circulated as requested by that participant. He urged more participants to come forward as early as possible and in any event by early October 1987 with suggestions for achieving the Negotiating Objective so that the Group could undertake its work on the Initial Phase as envisaged in the Negotiating Plan.

Third indent of Initial Phase: Consideration of the relationship between the negotiations in this area and initiatives in other fora

17. The Group had before it, in documents MTN.GNG/NG11/W/5 and Addenda 1-2, information received from the Secretariats of the World Intellectual Property Organisation, the Customs Co-operation Council and Unesco in response to the Group's request at its last meeting (MTN.GNG/NG11/1, paragraph 17). Some participants said that clarifying the relationship between the negotiations in the Group and initiatives in other fora was important for understanding the proper scope of the Group's work.

Communications from international organizations including requests for observer status

18. The Group adopted the following recommendation to the GNG on the invitation of international organizations to meetings of the Group:

> "1. The Negotiating Group agreed to recommend to the GNG to invite to formal meetings of the Group international organizations which could facilitate the work of the Group by providing appropriate technical
> support in the field of their expertise to complement the expertise primarily available from participants. This support might take the form of oral responses during the meetings to requests through the Chairman for factual information on and clarification of matters concerning the relevant instruments and activities of any such organization, and factual papers to be prepared at the request of the Group.
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> "2. The Group agreed to recommend to the GNG that the World Intellectual Property Organisation and the Customs Co-operation Council be invited to attend formal meetings of the Group in accordance with the above."

19. After adoption of the recommendation, the Chairman made the following statement: "The information

obtained by international organizations attending formal sessions will be for the benefit only of the secretariat of the respective organization".

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

20. The Chairman said that, on the assumption that the promised inputs were forthcoming in good time, the Group would need to allow, in his judgement, three days for its next meeting and that the general timetable as it was evolving indicated the dates of 23-25 September. He was aware that the Negotiating Group on Safeguards had also provisionally agreed to meet on 25 September, in addition to 21-22 September. The matter would therefore have to be resolved by the GNG.

21. As for the agenda of its next meeting, the Group agreed to continue its work on the basis of the same agenda as for its first two meetings.