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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 23 SEPTEMBER 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/2453.

2. The Chairman welcomed the representatives of the Customs Cooperation Council and of UNCTAD who were attending the Group for the first time, in accordance with the TNC decision of 3 July 1987. As regards the other international organisation invited, the World Intellectual Property Organization, he said that the Director-General of that organisation had replied that the invitation would be put to the WIPO Governing Bodies at their meetings of 21-30 September 1987; the Chairman expressed the hope that WIPO would attend the next meeting of the Group.

First and second indents of Initial Phase: Trade-related aspects of intellectual property rights and trade in counterfeit goods

3. In addition to the documentation available at its previous meeting, the Group had before it a submission by Switzerland on trade problems encountered in connection with intellectual property rights (MTN.GNG/NG11/W/7/Add.2), a compilation of written submissions and oral statements prepared by the secretariat (MTN.GNG/NG11/W/12), a secretariat note on international conventions regarding intellectual property and their membership (MTN.GNG/NG11/W/13), the 1982 draft Agreement to Discourage the Importation of Counterfeit Goods (MTN.GNG/NG11/W/9), recent legislation of Mexico on the prohibition of the importation of goods illegally bearing marks (MTN.GNG/NG11/W/10) and a suggestion by Brazil concerning the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (MTN.GNG/NG11/W/11).

4. After general statements, the Group took up the issues before it under each of the three main headings in the secretariat compilation, concerning respectively the enforcement, the availability and scope, and uses of intellectual property rights. Some participants indicated that their views on the document were preliminary in nature. The general points made in the discussion are recorded below. The specific additional points will be added to the secretariat compilation.

5. In the discussion, further views were exchanged on the proper scope of the work of the Group, in particular on the questions of what were the "trade-related aspects" of intellectual property rights and what were

the "distortions and impediments" to international trade arising in connection with intellectual property rights. For some participants, further study had confirmed their view that important trade distortions and impediments that should be tackled by the Group were arising from inadequacies, excesses and discrimination both in the enforcement and in the provision of intellectual property rights. The significant trade effects identified, as summarised in the relevant portions of the secretariat compilation, did not appear to be disputed. In response, some participants reserved their right to come back to these views on the trade effects after they had been studied further. The view was also expressed that, while it was true that many of the practices identified had trade effects, this did not necessarily mean they should be tackled in the Group: if the GATT were to deal with all issues having trade effects, there would be virtually no limit to the scope of its activities.

6. Some participants were of the view that many of the issues raised, as summarised in the secretariat compilation, went beyond the scope of the Group's mandate. In this connection, they drew attention to paragraph 4 of the compilation stating that it was without prejudice to views on this matter. One view was that only the enforcement issues summarised in Section I of the document should be addressed by the Group. Another view was that it was doubtful that the Group should go beyond questions of enforcement at the border. It was also suggested that, in approaching the scope of the work of the Group, the Group should be guided by the coverage of existing GATT provisions; in this regard, the view was expressed that Article III of the General Agreement might provide a good standard for identifying what could be considered acts of trade under the GATT. In response, it was said that the Group's mandate clearly envisaged going beyond the scope of existing GATT provisions if this was necessary to deal with trade distortions and impediments arising in connection with intellectual property rights. It was also suggested that, if it was accepted that the GATT should deal with trade problems arising from excessive or discriminatory enforcement, it was only logical that the GATT should also deal with similar problems arising from inadequate enforcement. To this, it was said that neither the General Agreement nor the Group's mandate treated the two issues in the same way. A further point made by participants believing some of the issues raised to be outside the Group's mandate was that the Group was concerned only with trade in goods - Part I of the Ministerial Declaration - and that some of the issues raised, for example those in connection with controls on the transfer of technology (section III(a) of the compilation), did not seem to concern trade in goods.

7. A participant, noting the difficulty of establishing what were the trade-related aspects of intellectual property rights, suggested that the Group might be able to make progress in clarifying the scope of its work if it were to adopt the approach of attempting to identify the aspects of intellectual property rights that were unrelated to trade.

8. In regard to the identification of relevant GATT provisions, it was suggested that, in addition to the provisions referred to in the secretariat compilation, Articles X, XXII and XXIII had a relevance to enforcement issues in connection with intellectual property rights. As regards the examination of the operation of the relevant GATT provisions, it was widely noted that the main specific provision, Article XX(d), was essentially concerned with problems of excessive or discriminatory enforcement at the border. As regards the other issues raised, reference was made to the relevance of Articles I, III and IX:6, and it was said that the General Agreement recognised both the legitimacy of measures to protect intellectual property rights and that these could affect trade. Some participants also stressed their view that the value of trade concessions negotiated under the GATT could be, and was being, impaired by the inadequate or excessive protection of intellectual property rights. However, the point was widely made that the General Agreement contained little apart from Article IX:6 to address the issues raised in connection with the inadequate enforcement of intellectual property rights or inadequacies and excesses in the scope and availability of intellectual property rights.

9. On the further work of the Group, some participants were of the view that the Group should focus on the clarification and possible extension of existing GATT disciplines, particularly as they relate to the enforcement of intellectual property rights. One of these participants considered that any involvement in questions of the availability and scope of intellectual property rights should be confined to making suggestions to WIPO as to how any trade problems might be dealt with. For some others, it was necessary to consider not only

improvements in existing GATT provisions but to pursue consideration of how to respond to other trade problems arising in connection with intellectual property rights. In regard to Article XX(d), it was suggested that clarification was necessary, and that this should be part of a wider examination of appropriate enforcement measures. Another view was that, if such a clarification exercise proved necessary, the question of whether it should be limited to Article XX(d) or be part of a wider GATT agreement on border and perhaps domestic enforcement questions needed to be further considered. In regard to matters where the establishment of new rules and disciplines might be necessary, one suggestion was that the creation of an appropriate GATT framework to resolve problems in the enforcement area was of particular urgency. Another view was that work should proceed equally on both the enforcement problems and problems connected with basic intellectual property rights. One suggestion was that the Group might concentrate on contributing to enforcement mechanisms for intellectual property rights, establishing appropriate links between GATT and bodies active in the field of intellectual property rights, perhaps drawing in this connection on experience under the Agreement on Technical Barriers to Trade in which reference is made to standards evolved elsewhere; where existing norms for the protection of intellectual property needed improvement, the Group should reflect on the extent to which it should fill these gaps. Another participant said that it intended to present its suggestions for achieving the negotiating objective, including thoughts on procedures and techniques for the implementation of an intellectual property code, in sufficient time for at least an initial examination by the Group in October.

10. On the specific question of trade in counterfeit goods, a participant urged discussion of the Report of the Group of Experts on Trade in Counterfeit Goods (L/5878) as required by the Negotiating Plan. His delegation was open to suggestions on how to proceed with this aspect of the Group's mandate. Another participant, referring to its earlier suggestion that countries adopt the 1982 draft counterfeit code (MTN.GNG/NG11/W/9), reaffirmed that it now intended to include in its proposal for an intellectual property code broader measures, similar to those in the draft counterfeit code, for the enforcement of all forms of intellectual property rights.

11. Concluding the discussion, the Chairman said that it appeared that document MTN.GNG/NG11/W/12, after incorporation of the additional points made, would serve as useful background material for the further work of the Group. At its next meeting, the Group should take up, as required by its Negotiating Plan, the initial examination of the specific suggestions by participants for achieving the Negotiating Objective and of the procedures and techniques that might be used to implement them. He noted that a number of participants had indicated their intention to make such suggestions, and urged as many as possible to come forward with them, not only describing the problems faced, but also making specific action - oriented proposals, whether comprehensive or addressed to some particular points, for how the Negotiating Objective might be attained. Turning to a suggestion that the secretariat prepare a paper summarising provisions relating to enforcement questions in international treaties on intellectual property, he said that he would revert to this matter in informal consultations with participants.

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

12. The Group had before it, in documents MTN.GNG/NG11/W/5 and Addenda 1-4, information received from the World Intellectual Property Organization, the Customs Cooperation Council and Unesco on their activities and initiatives relevant to the work of the Group. The representative of the Customs Cooperation Council made a statement amplifying the information on his organisation's activities as contained in document MTN.GNG/NG11/W/5/Add.1. After indicating the limits to what customs could do to combat counterfeiting, both because such goods often did not cross frontiers, being produced for local consumption, and because even when they did cross borders they were sometimes in a form not susceptible to customs action, he described the stage reached in work in the Permanent Technical Committee of the Customs Cooperation Council on the preparation of a model for national legislation to give customs powers to implement trademark and copyright legislation. It was hoped that work on the drafting of this model legislation would be completed in November 1987 and that he would be able to forward a copy to the Group at that time, it being understood that the final endorsement by the Council of the CCC would not take place until June 1988.

13. Some participants considered that further examination of the relationship between the negotiations in the Group and initiatives in other fora could help the Group identify the proper scope of its work.

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

14. Evaluating the Group's requirements in terms of meeting days, formal and informal, in order to carry out the Initial Phase, as requested by the GNG, participants were of the view that up to 4-5 additional days might be necessary. As for desired timing, it was noted that the dates of 28-29 October had been mentioned in informal discussions in connection with the Group's fourth meeting. No dates were considered for a possible fifth meeting since a participant indicated that his delegation had yet to come to a position on the principle of a fifth round of meetings.

15. As for the agenda of its next meeting, the Group agreed to continue its work on the basis of the same agenda and that the discussion would focus mainly on the specific suggestions for achieving the negotiating objective, having as background the secretariat compilation of written submissions and oral statements.