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

MEETING OF NEGOTIATING GROUP OF 5-8 JULY 1988

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

Note by the Secretariat

1. The Negotiating Group adopted the agenda set out in GATT/AIR/2625.

2. The Group had before it five new documents:

- a proposal by Switzerland (MTN:GNG/NG11/W/25);
- guidelines and objectives proposed by the European Community for the negotiations on the trade-related aspects of substantive standards of intellectual property rights (MTN.GNG/NG11/W/26);
- a communication from the Director General of the World Intellectual Property Organization making available to the Group the documents of the last meeting of the WIPO Committee of Experts on Measures Against Counterfeiting and Piracy (MTN.GNG/NG11/W/5/Add.6); and
- the remaining parts of the document from the International Bureau of the World Intellectual Property Organization on the existence, scope and form of generally accepted and applied standards/norms for the protection of intellectual property (MTN.GNG/NG11/W/24/Add.1-2).

3. On behalf of the Group, the Chairman expressed its thanks and appreciation for the documents furnished by the International Bureau of the World Intellectual Property Organization.

4. Introducing documents MTN.GNG/NG11/W/24/Add.1-2, the representative of the World Intellectual Property Organization said that these documents contained the remaining parts of the study that the Group had requested WIPO to prepare at its meeting of February/March 1988 (MTN.GNG/NG11/6, paragraph 39 and annex). Addendum 1 dealt with industrial designs and geographical indications. Addendum 2 dealt with neighbouring rights; it treated this subject in three sub-parts concerning respectively the protection of performers, the protection of producers of phonograms, and the protection of broadcasting organizations.

5. Commenting on the documents furnished by WIPO, a participant said that the additional parts confirmed that the member States of WIPO had at their disposal in that Organization all the necessary ways to review and improve the protection of intellectual property rights. This demonstrated the wisdom of her delegation's position that the Group should not discuss substantive standards for the protection of intellectual property rights, but should use the limited time available to it to deal with the trade-related aspects of intellectual property rights, that is to say the negative effects on trade that may result from the protection of intellectual property rights.

Trade-related aspects of intellectual property rights

6. Introducing his country's proposal in document MTN.GNG/NG11/W/25, the representative of Switzerland said that, in preparing the proposal, the points of departure had been the Group's Negotiating Objective and the will to elaborate a solution that would be applicable to all participants - a truly multilateral solution. Account had been taken of three contexts. First, the environment of the General Agreement which established a link between trade and intellectual property, and provided, in Articles XX(d) and XXIII:1(c), ways of tackling trade distortions arising in connection with intellectual property rights. These had provided inspiration for the Swiss proposal, which aimed to integrate the solutions found in the Group into the General Agreement. Secondly, account had been taken of the traditional environment of intellectual property and of the need to avoid legal conflicts between GATT and existing international conventions dealing with intellectual property. The third context was the environment of negotiations, which was characterized by diverging appreciations as to the appropriate approach to be taken. The Swiss proposal had two objectives: in the short-term to facilitate progress towards a basis for negotiations; and to provide a vision as to the possible overall result of the negotiations. He then spelt out the three main principles proposed in the Swiss paper. First, an obligation to avoid or eliminate trade distortions; this would be an elaboration of Articles XXIII:1(c) and XX(d) of the General Agreement. Second, the principle of non-discrimination, whilst taking into account the concept of proportionality contained in Article XX(d). The principle of non-discrimination could be made directly applicable. Third, the obligation to transpose into internal law a number of commitments of the General Agreement, based on Article X:3(b). These three principles should take the form of an article of the General Agreement. They would not only resolve a good number of trade problems in their own right but also constitute a legal basis for action to forestall or resolve trade disputes which had their origin in the field of intellectual property.

7. The representative of Switzerland further said that, in order to put into practice these general principles, it was suggested that indicative lists should be drawn up reflecting situations of fact or of law, in each area of intellectual property law, or procedural situations giving rise to trade distortions. As one of the bases for identifying these situations, the Group's documents W/12/Rev.1 and W/24 could be used. Such lists would have the effect of shifting the burden of proof. If a situation in a country figured on the list, that country would have in a dispute the burden of proving that the specific situation in question was not in practice causing a trade distortion. If the situation did not figure on the list, the burden of proof would be on the complaining party, as is the case presently under Article XXIII:1(c). In regard to other means of making progress, the Swiss proposal suggested the establishment of a system, inspired by practices under the Agreement on Technical Barriers to Trade, for the prior notification of laws and regulations that participants wished to introduce in the area of trade-related aspects of intellectual property, and a system for dispute settlement. The proposal also suggested the establishment of a committee on the trade-related intellectual property, which would: analyse the intellectual property systems of parties and exercise a consultative rôle for national intellectual property experts; play the rôle of a mediator between parties to a dispute; develop the indicative lists; co-operate with WIPO; and, only if necessary, draw up intellectual property norms where progress elsewhere had not been possible. The proposal further provided for technical co-operation in collaboration with WIPO upon request. In conclusion, the representative of Switzerland said that the proposal of his country offered a flexible approach based on the existing provisions and mechanisms of the GATT that would provide the GATT with means to work in the area of intellectual property after the end of the Uruguay Round. It respected existing national and international

legal systems while introducing a new dynamic that would lead to increased convergence and leaving open the option of a norm-setting activity in GATT.

8. Giving their general reactions to the Swiss proposal, some participants considered it a constructive contribution to the work of the Group. They welcomed the emphasis on the provisions of the GATT and on trade distortions arising in connection with intellectual property as the points of departure. Many participants wished for greater specificity to be given to the possible contents of the indicative lists and some reserved their comments until they had been able to look at such lists. Some participants were of the view that the proposal included elements that were outside the scope of the Negotiating Objective of the Group, in particular where the proposal touched on the question of substantive standards for the protection of intellectual property, notably the suggestion that a GATT committee might draw up norms where co-operation with other international organizations in this regard had failed. It was also suggested that Article XX(d) could not be treated as a basis for GATT commitments in the area of intellectual property since it was an exceptions provision.

9. Commenting on the approach suggested in the Swiss proposal, some participants indicated their interest in the idea of a possible new GATT article, which they considered to be a preferable approach to that which would involve the negotiation of a code. Some other participants took the view that it was premature to be considering questions of legal form; an attempt should be made first to see where agreement would be possible on points of substance. Some participants expressed concern that the Swiss proposal aimed at a comprehensive treatment of the trade-related aspects of intellectual property rights and thus did not respect the Negotiating Objective of the Group, which drew a clear distinction between trade in counterfeit goods and other aspects.

10. Some participants, noting that a basic commitment proposed was to avoid trade distortions caused by excessive, insufficient or lack of protection of intellectual property, said that a prior question that would need to be answered was what was excessive, insufficient or lack of protection of intellectual property. This proposal did not answer this question and concern was expressed about the subjectivity of judgements in this regard. It had to be recognised that the appropriate level of protection varied between countries according to their economic, social and legal circumstances. It represented a balance between, on the one hand, the need to stimulate inventiveness and creativity and the use of intellectual property within the country and, on the other hand, the need to avoid undue economic and social costs from the anti-competitive effect of such rights. This point of balance would not necessarily be the same for all countries. The fact that the practices in the area of intellectual property might have adverse trade effects did not necessarily mean that those practices were not justifiable, since the underlying objectives of the protection of intellectual property were not in the field of trade. Moreover, it had to be borne in mind that the protection of intellectual property was in itself a constraint on competition and therefore on trade; for example, many of the trade problems arising in connection with intellectual property stemmed from the restrictions contained in licensing agreements. The Group still had to undertake an in-depth discussion of what were the trade distorting effects arising in connection with intellectual property rights. A participant suggested the establishment of a specialist working group to study and analyse the impact of intellectual property rights on trade, other than in the area of counterfeiting in respect of which the Negotiating Objective was already clear. In his view, there was need for a common understanding of what was appropriate and inappropriate protection of intellectual property, if the Group was to find a solution to the issues before it. In such an exercise account should be taken of the existing international instruments and the work under way in WIPO on these matters.

11. A participant said that the issue before the Group was an economic rather than a legal one. Developing countries were net importers of technology and other subjects of intellectual property protection. The various proposals before the Group would, if implemented, improve the competitiveness of companies and countries which owned most intellectual property at the expense of worsening the terms of trade of developing countries and impairing their efforts to develop indigenous technology. He recognized that intellectual property rights had their price and was prepared to find an appropriate formula provided there was understanding on the part of developed countries for the position of developing countries, through for example, preferential treatment, exclusion of trade retaliation and shorter terms of patent protection. 12. A participant considered that the

Swiss proposal went beyond existing practice under the General Agreement in postulating the possibility of trade distortions as a result of internal measures.

13. A number of participants wondered what would be the link between the suggested indicative lists and norms for the protection of intellectual property. Some doubted that it would be possible to avoid a treatment of norms if the indicative lists were to lay down commitments of sufficient specificity to be the basis of dispute settlement proceedings and to generate the desired predictability. Some participants found the notion that the situations in the indicative lists would constitute a rebuttable presumption of nullification and impairment an innovative concept that would require careful study. Questions were also raised as to the practical effect of reversal of the burden of proof. The view was expressed that experience in GATT had shown that reversal of the burden of proof could, depending on how it was applied, either have the same effect as a binding obligation or the effect of not providing a set of functioning rules at all. If it was the former, it was not clear what would be the advantages of such an approach over binding obligations on norms that could offset the additional complications that it would entail. Some participants asked what would be the contractual nature of these indicative lists, for example to what extent would a participant be obliged to reflect them in its national legislation. Some participants also wondered how they would be drawn up, especially after the end of the Uruguay Round when it might be difficult to find an acceptable balance of advantage. Some participants indicated that they were ready to participate in an exercise to develop indicative lists.

14. Some participants welcomed the emphasis in the proposal on non-discrimination and national treatment. It was also said that the precise language for reflecting these principles would need further exploration.

15. In regard to the proposed amendment to Article XX(d) of the General Agreement (Section C.1(iv) of the Swiss proposal), some participants doubted the need for the proposed amendment. The view was expressed that Article XX(d) as it stood could apply to all intellectual property; support for the proposed amendment would imply a different interpretation.

16. In regard to the suggested commitment to prevent counterfeiting and piracy (Section C.1(ii)), some participants believed such a commitment would be excessive since it would make governments internationally responsible for illegal actions of private parties within their jurisdiction. Moreover, it would not be feasible for a government to be able to implement such a commitment since it could not guarantee the complete elimination of counterfeiting and piracy, any more that it could guarantee the elimination of smuggling, for example. It was said that the proposal was inconsistent with the position taken by some countries in the area of restrictive business practices where it was claimed that governments could not be responsible for the behaviour of private parties. It was also said that the proposed commitments on enforcement lacked specific elements, such as those suggested in the proposals made by some other participants. It was asked whether the indicative lists would serve to provide greater specificity in this regard. Noting the proposals in Section C.1(v) concerning the implementation and review of domestic laws and practices, some participants were concerned about the resource implications of the establishment of tribunals of the sort envisaged. The question was also raised as to the compatibility with legislative timetables of a deadline in this regard.

17. In regard to Section C.3 concerning dispute prevention, some participants doubted that prior notification and discussion in GATT of laws and regulations relating to intellectual property would be consistent with their national sovereignty and were of the view that it could constitute a breach of parliamentary privilege, especially if the views of other contracting parties had to be taken into account. With regard to practices in this connection under the Agreement on Technical Barriers to Trade, a participant said that there was an important distinction, since prior notification in that context referred to specific standards rather than to laws and regulations of general application. In regard to Section C.3(ii), support was expressed for the concept that efforts on the part of regional and local governments and authorities would also be required if there was to be a balanced outcome.

18. A number of questions were raised in regard to the proposed committee on trade-related aspects of intellectual property rights (Section C.4), including on its nature, functioning and status. Some participants

considered that it would not be appropriate for such a committee to propose international norms for adoption by the CONTRACTING PARTIES since this would be prejudicial to the work of the WIPO. A participant said that such a committee should not propose norms unless efforts to do so in other organizations such as WIPO had not proved successful. Another participant wondered what would be the circumstances in which co-operative efforts between GATT and WIPO would be deemed to have failed.

19. In regard to dispute settlement, a participant wondered if a two-phase process was being suggested - first in the proposed committee and then in accordance with Articles XXII and XXIII - and whether this might prove complicated and slow. In connection with the rôle of the proposed committee in mediating existing disputes, it was asked what was meant by the term "existing disputes". A participant was concerned that treatment of questions concerning Articles XXII and XXIII in the Group might prejudice work in another Group.

20. In connection with technical co-operation, support was expressed for commitments in this field. However, a participant was doubtful that the GATT should become involved in technical co-operation in regard to the development, the amendment and implementation of national laws and regulations and practices since this would mean entering the area of substantive norms and would prejudice initiatives that rightly belonged elsewhere. 21. Responding to the comments, the representative of Switzerland first referred to the points raised by some participants concerning the subjective nature of he evaluation of the sufficiency of the protection of intellectual property rights. He said that a purpose of the Swiss proposal was to overcome this problem by having such evaluations made through a multilateral process so that they were not simply a subjective one of each contracting party. The greatest objectivity would be achieved through international norms, but the Swiss proposal did not go this far. It proposed a multilateral process involving indicative lists and dispute settlement that would nevertheless introduce a high degree of objectivity. In the absence of such a system, the alternative would be a situation where the subjective assessments of individual contracting parties came into conflict with each other, and often it would be the stronger that would win the day. Concerning the question of the prevention of counterfeiting and piracy, he said that the commitment of governments being proposed would be to make available measures and procedures by which parties considering that their intellectual property rights were being counterfeited or pirated could themselves take action to prevent such illicit acts. As for Article XX(d), he said that this was not a basis of the Swiss proposal, rather it was a source of inspiration. In particular, Article XX(d) was interesting because it did not constitute an absolute exception but contained an aspect of proportionality. As to the statement that Article XX(d) already referred to all intellectual property rights, his delegation would be quite prepared to go along with such an interpretation if there were a consensus to that effect in the Group. Turning to the proposed indicative lists, he said that they should not be regarded as the main element of the Swiss approach. They were technical means to make it possible, to give, on a step-by-step basis, concrete form to the normative principles, which were the central features of the Swiss proposal. Their content would be the result of negotiation, to which he hoped all participants would contribute. It was possible that in the first phase lists would not be able to cover all the situations that had already been raised in this Group, for example, in documents W/12/Rev.1 and W/24. This was one reason why provision had been made for the lists to be evolutionary and for institutional machinery to permit this. The lists would cover situations, that is to say situations of fact or situations of law or situations reflecting the state of procedures, rather than set out norms. His delegation would provide concrete examples at the Group's next meeting. He did not agree that the notion of a presumption or reversal of the burden of proof was new within the framework of General Agreement; this was already provided for in agreed practices under Article XXIII and also in Note 26 to the Agreement on Subsidies and Countervailing Measures.

22. As to the suggestions on the prevention of disputes, the representative of Switzerland said that the long-standing and growing importance attached in GATT to mechanisms aimed at the prevention of disputes was reflected in the emphasis in GATT's work on transparency, notification and surveillance. The proposal aimed to make surveillance more effective as a means of preventing disputes. It would provide an opportunity for prospective intellectual property legislation to be examined form the trade policy viewpoint. He believed that given these advantages and the preferability of preventing rather than having to resolve disputes, even governments of trading nations highly conscious of their national sovereignty would see the benefits of such

mechanism. In the field of both dispute prevention and dispute settlement, a concern had been to present governments with as many options as possible for dealing with disputes. The possible rôle of the proposed committee as a mediator was designed to provide an additional option. The reference to existing disputes was a reference to disputes that would exist at the time that the committee would come into effect. As regards the possibility that the committee might, if necessary, propose international norms regarding intellectual property related to international trade, it was his hope that successful co-operation with WIPO would obviate any such need. Both in the committee and in the field of technical co-operation, close co-operation with WIPO was advocated, but on the understanding that each organization would maintain its specific characteristics and autonomy. In conclusion, he said that if the Swiss approach were supported, negotiations would need to concentrate on the following aspects: first, the normative principles; second, the contents of the indicative lists; third, the ways and means of preventing disputes; fourth, technical co-operation; and lastly, links with other relevant provisions of the General Agreement.

23. A participant informed the Group of the main conclusions which had emerged form a recent survey of industry in his country aimed at identifying some of the trade-distorting effects arising in connection with intellectual property rights. Piracy problems had been reported as particularly severe in the book publishing, music recording and film/video production industries. The computer software industry had also cited the incidence of overseas piracy as a major factor inhibiting exports. In the area of industrial property, the main industries affected by couterfeiting were chemicals, pharmaceuticals, automotive parts, apparel and a range of other manufactured goods. The survey had also revealed that trade problems related to intellectual property were not confined to one group of countries or to one region. Problems were evident in a range of countries, both developed and developing. The main causes of these problems, as reported by industry, were: the absence or inadequacy of relevant national laws; discrimination or lack of reciprocity in according protection to intellectual property rights; inadequate procedures for holders of intellectual property rights to enforce their rights; and "gaps" in the coverage of certain international agreements in the industrial property area. In addition, many firms were concerned that some countries administered their intellectual property right systems in such a way as to constitute a non-tariff barrier to trade. Overall, the survey had indicated significant trade losses to his country's economy from the displacement of genuine exports by pirated and counterfeited goods. More general economic losses had also been identified in the form of reduced incentives to innovation and creative activity and consequent lower levels of research and development and economic growth. He said that these results indicated the severity of trade-related intellectual property right problems and they provided a basis for establishing evidence of nullification and impairment of GATT rights. His delegation could support future work aimed at developing lists of trade distortions in this area. A critical point was how such distortions would be evaluated. One possibility could be for the Group to agree that specific trade-related provisions in major intellectual property conventions could be adopted in the GATT to provide a guide to determining the adequacy or otherwise of particular standards at issue.

24. Continuing, this participant presented the preliminary views of his delegation on the future direction of the Group's work on enforcement. The Group could usefully consider work aimed at codifying acceptable domestic mechanisms that would allow intellectual property right holders to enforce their rights. By and large, the existing international agreements did not specify such mechanisms. He suggested a two-stage approach to this exercise: first, recognition that enforcement should be conducted on the basis of the established GATT principles of non-discrimination, national treatment and transparency; and second, the codification of certain elements in order to introduce more predictability and uniformity to this area. The aim should not be to set down hard-and-fast rules, but to specify the essential elements which should be available in all countries to enable legitimate holders of intellectual property rights to enforce those rights. The elements which the Group could elaborate might include the following: forms of relief; forms of interim orders and discovery procedures; conditions required to establish the right to protection; rights of defence and counterclaim; details of judicial and clearly-defined administrative procedures; and time-limits for the conclusion of procedures. He believed that a greater level of uniformity in the enforcement area would be a significant element in overcoming many of the problems being addressed in the Group.

25. A participant made a number of suggestions for inclusion in any future revision of MTN.GNG/NG11/W/24/Adds.1-2. He also expressed the view that 20 years was too short a period of protection for phonograms and drew attention to the absence of a dispute settlement mechanism in the Phonograms Convention.

26. Introducing document MTN.GNG/NG11/W/26, the representative of the European Communities said that the proposed guidelines and objectives for the negotiations on the trade-related aspects of substantive standards of intellectual property rights complemented the earlier interventions and submission of the Community which had mainly referred to questions of enforcement. In preparing the paper on standards, a preoccupation of the Community had been to develop an approach which, while establishing GATT commitments on trade-related substantive standards, would have no negative effects with respect to the multilateral conventions and the multilateral system of co-operation already existing in the field of intellectual property including in particular the World Intellectual Property Organization. He believed that the mutually reinforcing series of commitments that the Community was proposing would lead to a strengthening of the multilateral system as a whole, including not only the General Agreement but also the World Intellectual Property Organization. He highlighted what he considered to be the main features of the proposal:

- provisions on trade-related substantive standards should constitute an integral part of a GATT agreement on trade-related intellectual property right issues;

- this part of a GATT agreement should cover at least the following types of intellectual property rights: patents, trademarks, copyright, computer programmes, neighbouring rights, models and designs, semi-conductor topographies, geographical indications including in particular appellations of origin, and acts contrary to honest commercial practices;

- all parties should be obliged to adhere to and respect the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works in their latest revisions;

- signatories should be invited to adhere to other international conventions and participate actively in the operation of new or revised conventions within the competent international organizations;

- there should be inserted into a GATT agreement a number of principles related to substantive standards of the intellectual property rights mentioned above;

- if efforts elsewhere to elaborate substantive standards on issues of particular trade relevance were to fail within a reasonable time span, parties could attempt to elaborate trade-related principles in order to overcome the trade distortions or impediments arising out of this situation;

- other international mechanisms should be encouraged or established, for example in the areas of the registration of geographical indications and trademarks;

- an agreement should provide for the appropriate application of the general principles and mechanisms of the General Agreement, including for example the principles in Articles I and III and the dispute settlement machinery.

27. Referring to Section III.D.3 of the Community paper, on principles related to substantive standards of intellectual property rights, the representative of the European Communities said that the "principles" were conceived of as differing from "substantive standards" in important respects. First, principles should be expressed in more general terms than would be a typical substantive standard in an international convention dedicated to substantive standards, such as for example the Paris Convention. Secondly, the translation of the proposed principles into national law would not be verbatim or even close to verbatim; rather parties would be

required to follow the thrust of these principles in drafting national legislation in the required detail, taking into account the greater precision often contained in international conventions and in the national legal system in question.

28. Commenting on the general policy context in which the proposal was conceived, he first said that the Community's paper aimed at promoting more widespread acceptance and implementation of the Paris and Berne Conventions. Its detailed principles drew inspiration from relevant trade-related substantive standard provisions of these and other relevant international conventions or agreements, such as those of Madrid, Lisbon and Rome, as well as of certain other international texts, including WIPO model laws, and the European conventions. This approach would strengthen not only the GATT but the WIPO and international co-operation in the whole general area of intellectual property and trade. A second major boost to the multilateral system would, in the Community's view, be created by the proposed commitment by parties that, when they encountered trade-related intellectual property problems, they would have recourse to the dispute settlement mechanism provided for under the agreement rather than having recourse to bilateral or unilateral action. the effectiveness of such a commitment would, in large part, depend on the scope and coverage of a GATT agreement; the wider and more substantial the contents of an agreement, the greater would be the incentive for parties to employ the GATT as an avenue for settling disputes as an effective alternative to bilateral or unilateral action. In conclusion, he said that some of the proposals were open-ended and preliminary in nature as indicated in the second paragraph of Section III.D.3. They were detailed because the Community believed that it was only by focusing the negotiations on reasonably concrete suggestions that it would be possible to keep up with the pace of the negotiations going on in other Groups, particularly given the complexity of the present area, thereby respecting the requirements of globality.

29. Some participants welcomed the Community proposal as a positive contribution to the work of the Group and indicated that in general terms they could support the thrust of the suggestions, although they had reservations or queries on specific points. Among the points of emphasis that were noted with satisfaction were those on the link with international trade and the problem of trade distortions, the desirability of effective multilateral action as a preferable alternative to bilateral or unilateral measures, the links with existing international conventions on intellectual property rights and activities in other fora, the general principles of the GATT such as most-favoured-nation treatment, national treatment and transparency, the broad coverage of intellectual property rights and technical co-operation. In their view, the Community proposal together with that of the Switzerland improved the basis for further negotiations in the Group. 30. Some other participants believed that the Community proposal dealt with matters that fell outside the Negotiating Objective of the Group. In their view, the Declaration of Punta del Este, together with the statements made by a number of delegations after its adoption, and the Group's Negotiating Plan made it clear that the question of the adequacy of substantive standards was not a matter for discussion in the Group. The suggestions that had been tabled in this regard constituted a reversion to ideas that had been put forward before Punta del Este, but which had been reflected at that meeting. It had not been explained how substantive standards for the protection of intellectual property rights could in themselves give rise to obstacles or distortions to international trade. The protection accorded to intellectual property represented a balance between a number of conflicting national considerations. It took the form of a balance of rights and obligations between each owner of intellectual property and the society at large that granted the protection. The protection granted was thus a function of the domestic situation within each country and its national policy objectives. This was recognized in the existing international conventions. Trade aspects were relevant but only secondary in importance. It was not sufficient to establish that a matter was trade-related for it to fall within the scope of the work of the Group. This criteria did not appear in the Group's Negotiating Objective itself, but only in the heading to that Objective. The Group had not been assigned the task of questioning the appropriateness of national standards for the protection of intellectual property rights, especially where they were in conformity with international conventions. Moreover, such a task would seriously prejudice the initiatives in WIPO and elsewhere and would thus be inconsistent with the Group's Negotiating Objective also for this reason. It was not the task of the Group or of the GATT to create an international system for the production of intellectual property parallel to that existing in WIPO and elsewhere. If countries considered the international protection under that system inadequate, they had full opportunities to

raise the matter in the appropriate fora. These participants also expressed concern that the Community proposal was another example of a tendency in the Group to seek a comprehensive solution that did not take into account the distinctions made in the various paragraphs of the Group's negotiating objective. Concern was further expressed that matters relating to services were dealt with, for example service marks; services were for discussion under Part II and not Part I of the Declaration of Punta del Este.

31. Some participants did not accept that the approach being proposed was desirable on the grounds that the alternative would be a proliferation of unilateral or bilateral actions. It was said that this view seemed to reflect a defeatist attitude to the question of the legality of such bilateral or unilateral actions, and its acceptance would be tantamount to creating a licence to force, in the name of trade, modifications in standards for the protection of intellectual property in a way that had not been found acceptable or possible so far in WIPO. Moreover, it was not clear what would be the advantages that would stem from entering into a multilateral arrangement that would entail a commitment to implement the standards being proposed. The only real difference would be that, whereas in the present situation retaliation which took the form of a withdrawal of GATT benefits would be illegal under GATT, a multilateral agreement of the kind being proposed would render such retaliation legitimate, as was indicated in the last two lines of the Community paper. For many contracting parties, adherence to such an agreement would be both costly, because it would require higher levels of protection to be given to predominantly foreign-owned intellectual property, and risky, because it would put at risk a country's rights to GATT concessions, while yielding benefits only to other contracting parties.

32. Some participants believed that GATT commitments should not just specify minimum standards but also maximum standards, because excessive as well as inadequate protection of intellectual property could give rise to distortions or impediments to legitimate trade. One participant said that raising the standard and scope of protection of patents could impede trade flows by increasing delays in the processing of patent applications.

33. Some participants expressed their agreement with the Community's view that adequate protection of intellectual property rights not only helped prevent distortions and impediments to international trade but also contributed to the economic growth and development of all countries. One of these participants believed, however, that the coverage of the proposal was too broad. He suggested that, as a first stage, work should deal with limited areas such as registered trademarks and patents. He also asked for clarification of the Community proposal that the negotiations should not aim at the harmonization of national laws. In his view, assuming the results of the negotiations were to be incorporated in national law, some harmonization would come about from the Community's suggestions. He further asked whether the proposed agreement would be incorporated into the General Agreement or have an independent existence.

34. Some participants commented on the relationship envisaged in the Community proposal between a GATT agreement and the conventions and activities of other international organizations concerned with intellectual property rights. Some agreed with the overall approach that the purpose of GATT action in this area should not be to attempt to provide a substitute for existing activities, but to complement them by identifying gaps related to international trade and filling them in a way not inconsistent with the existing international rules in the field of intellectual property rights.
Some participants expressed support for the idea that a GATT agreement should attempt to build on existing international rules. One participant expressed doubt about the appropriateness of using model laws as a basis for GATT commitments since such laws had not been drawn up with a view to establishing binding obligations. Some welcomed the proposed obligation on parties to adhere to the Paris and Berne Conventions in their latest revisions (Section III.D.1). Some others, however, saw difficulties with this proposal, for example there might be countries which would be willing to accept trade-related standards based on these conventions without necessarily wanting to adhere to all the provisions of their latest revisions. Difficulties might also arise because there were several different Acts of each of these Conventions that had been adopted at different times and to which different countries were parties. For example, in regard to the most recent revision of the Paris Convention, the Stockholm Act of 1967, some countries were parties only to its administrative and not to its substantive provisions. In regard to other international conventions (Section III.D.2), it was also said that the

reasoning in this Section appeared somewhat confusing in that, while no formal obligation to adhere was being suggested and minimum standards covering the areas concerned were being sought in the proposed GATT agreement, signatories were nevertheless being invited to adhere to these conventions. It was asked whether acceptance of the invitation to adhere to such conventions would create obligations under the proposed GATT agreement. Some support was expressed for the proposals on the elaboration and implementation of further substantive standards (Section III:D:4). A participant also asked how it would be determined what could be regarded as a positive, as opposed to a negative, contribution to the elaboration of standards in other fora. In regard to the proposed review clause permitting the incorporation into a GATT agreement of principles derived from new substantive standards adopted in other fora, some participants asked for elaboration as to how such a mechanism might work.

35. Some participants raised questions concerning the legal nature of the principles relating to substantive standards that were being proposed and how they might differ from standards. Some agreed that it should be left to each party to translate GATT commitments in this area into its own national law; this was desirable in order to provide the flexibility that would enable differing national circumstances to be taken into account. However, questions were raised as to what would be the legal implications of the Community suggestions that parties would be required to translate into national law the thrust of the principles rather than the principles themselves and that there should be proper regard in this process for the rules contained in existing international conventions. It was also suggested that the obligations would need to be sufficiently specific to provide a clear guidance as to what should be implemented. In addition, questions were raised in regard to the notion of a transition period as suggested in the fifth indent of Section III.C, for example what would be the benefits that a party would not reap until it had fully implemented the provisions of the proposed agreement.

36. In regard to the proposals on the general principles and mechanisms of the GATT (Section III.D.6), a participant sought clarification as to what types of information a signatory could be obliged, under the transparency provisions of paragraph (iii), to furnish in response to requests and how issues of confidentiality might be dealt with in this regard. In regard to the proposed mechanism for prior consultation, it was asked how such a mechanism might work, prior to what exactly would a party be obliged to enter into consultations, and what type of consultation would be envisaged. Some participants considered that the Community's proposals concerning the application of most-favoured-nation and national treatment commitments provided a helpful elaboration of these issues that warranted further detailed examination. It was also suggested that the proposals might prove unduly complicated and consequently a source of disputes, notably in the provision for qualification of the basic commitments depending on whether countries were parties to intellectual property conventions, and that more straight-forward commitments, based on those presently contained in GATT Articles I and III, might be preferable. A participant said that the implications of extending these basic GATT commitments to apply not just to goods but also to persons were a cause for concern. In regard to dispute settlement, clarification was requested about the extent to which the Community envisaged that the proposed committee would play a rôle in attempting to resolve disputes before procedures such as those provided for under Article XXIII were employed.

37. Comments were made and questions put on the specific principles related to substantive standards suggested by the Community. In relation to the rights that a patent should confer (Section III.D.a(i)), a participant doubted the appropriateness of extending this right to the importing or stocking of products, since practical difficulties with enforcing such rights would risk generating barriers to legitimate trade. In regard to the exceptions to the rights conferred, it was asked how would the "legitimate" interests of the patent owner and of third parties, which would have to be taken into account in establishing exceptions, be defined and who would do the defining; and why did the exceptions not include the concept of exhaustion of rights, as did the corresponding provision in the case of trademarks. On the criteria for patentability, it was asked whether the Community intended to define the term "inventions" and why the criteria of non-obviousness had not been employed. On patentable subject matter, one participant believed that the exclusion of plant or animal varieties and of essentially biological processes for their protection was inappropriate, and another participant asked the reasons for these exclusions. It was also asked why these were the only exceptions. In regard to the proposed

term of patent protection of "generally" 20 years, questions were raised as to the implications of the qualifying expression "generally", including who would determine whether this commitment had been met and whether this phrase was intended to provide for possibilities for patent extension. Some participants also asked what was the fundamental rationale for the choice of 20 years as the basic term and wondered whether a flexible term depending on the nature of the technology might not be more appropriate. In regard to compulsory licensing, a participant considered the proposed text as insufficiently precise. He asked whether it was envisaged that compulsory licences for failure to work might be used for production for exportation; would the compulsory licencee be obliged to supply the market in question through local production or could he import for his purpose; should there be any limitations on the circumstances in which a compulsory licence might be granted in respect of dependent patents, such as the requirement that the dependent patent would have to represent a significant technological advance over the basic patent; what was the scope of the public interest justification for compulsory licences; and what were the Community's views in regard to exclusive compulsory licences in the event of abuse of the patent. Some participants were concerned that the Community proposal attempted to establish a parallel system for the protection of patents that would regulate matters that under the Paris Convention had been recognized for over 100 years as being matters properly left to national law, for example the duration of patent protection. Another participant counselled against attempting to deal with the question of compulsory licences since, on the one hand, such licences were rarely employed and were of little practical significance and, on the other hand, a great deal of energy would be expended without finding a solution.

38. In regard to the rights conferred by a trademark (Section III.D.3.b), it was asked whether likelihood of confusion would have to be established in cases other than these where an identical sign was used for identical goods or services, for example where an identical or similar sign was used in respect of similar goods; what was the meaning of the term "legitimate" interests of the proprietor of the trademark and third parties which had to be taken into account in establishing any exceptions to the exclusive rights; what was the meaning in this connection of the expression "fair use of description terms"; and what limitations did the Community intend to flow from the concept of "exhaustion of rights", which was presumably a reference to parallel imports. In regard to the signs that should be protected, it was suggested that "colours" might be added to the list in paragraph (ii). In regard to the possibility of acquiring a trademark right by use rather than by registration, a participant believed that such a provision might not provide for the required degree of objectivity in the determination of rights. As to the period of non-use before a registration might be cancelled, a participant asked what was the rationale for the choice of five years when some countries employed a shorter period.

39. In regard to the proposed principles on copyright (Section III.D.3.c.1), some participants believed that the suggested approach of embodying by reference the rights conferred under the Berne Convention was practical and reasonable. However, in the view of a participant, this would leave unclarified a number of uncertainties concerning the application of the Berne Convention, such as in regard to the coverage of data bases, satellite transmissions and new works or new forms of works generally, and the definition of public performances. He was also doubtful about the trade effects of moral rights in the copyright area. In regard to neighbouring rights, one participant said that the proposed principles could create a problem in his country; another participant was doubtful about the distortive effects on international trade of the enforcement of such rights; a further participant believed that sound recording should be protected under copyright in accordance with the Berne Convention, with a term of life plus 50 years. In regard to computer programmes, a number of questions were asked about the relationship between the proposed protection and copyright protection under the Berne Convention. A participant believed that computer programmes should not be regarded as a separate type of intellectual property right but should be subject to protection under the two multilateral copyright conventions; the appropriate term was that specified in the Berne Convention, namely life plus fifty years. Another participant asked what was the justification of the proposed term of protection of twenty-five years. Reservations were also expressed about the appropriateness of copyright protection for computer programmes.

40. A participant welcomed the inclusion of models and designs (Section III.D.3.d). Questions were asked as to what was the difference between "models and designs", on the one hand, and "industrial designs" on "utility models" on the other. As to the criteria for protection, it was asked whether the criteria of originality or

novelty were the only criteria or could a country employ other criteria such as non-obviousness.

41. In regard to topography rights (Section III.D.3.e), some participants said that a successful conclusion to the on-going negotiations in WIPO on integrated circuits could obviate the need for the Group to work out specific rights in this connection.

42. Some participants said that they had difficulties with the section on geographical indications including appellations origin (Section III.D.3.f), in particular in relation to the respect of acquired rights to the use of denominations that had become generic. In relation to the protection that should be given to geographical indication (paragraph (ii), a participant noted that the concepts of unfair competition and misleading use had not been fully defined; he asked what other situations might be covered in addition to those described in the examples given. Another participant believed that use of a geographical indication where the true origin of the product is indicated or the appellation is accompanied by expressions such as "kind", "type", "style", "imitation" or the like, could not be considered as constituting misleading use. In regard to paragraph (iii), a participant asked who determines, and against what criteria, whether it is "appropriate" to accord protection to appellations of origin to the extent that they are protected in the country of origin. Another participant asked whether the reference to products of the vine in this paragraph was merely illustrative. In regard to the provision that appellations of origin for products of the vine shall not be susceptible to develop into generic designations (paragraph (iv)), some participants said that it was an empirical question as to whether a denomination became generic or not; this had been determined to be the case in a number of instances by the courts in their countries; and they doubted that such decisions could be reversed. It was asked whether this proposal went beyond the provisions of Article 4 of the Madrid Agreement. It was also suggested that the specific reference to products of the vine demonstrated that the Community proposal was more based on expediency than principle. In regard to the proposed international register of protected indications, it was asked whether this would be separate from that provided for in the Lisbon Agreement and who would administer it. A participant was concerned that such a register would be swamped with applications and would create grounds for numerous disputes. 43. In relation to the provisions on acts contrary to honest commercial practices (Section III.D.3.g), a participant welcomed the inclusion of this matter but believed the provisions did not go far enough; they did not deal with the improper release of proprietary information by government agencies. Another participant understood the proposal to suggest specific legislation and considered that his country and some other common law countries that already protected trade and business secrets under the common law or in other ways might be reluctant to legislate specifically. A further participant asked who would be prevented from disclosing those secrets - someone privy to the secrets or someone who had developed the know-how in question by their own efforts. It was also asked to what extent would the means of prevention include remedies such as injunctions.

44. Providing preliminary responses, the representative of the European Communities first addressed what he described as the systemic or fundamental issues raised in relation to the Community paper. He believed that the Community paper was in full conformity with the objectives defined at Punta del Este both as they related to the work of the Group and more generally. It had to be borne in mind that the GATT had not been oblivious in the past of substantive standards-related issues, as indicated in Article IX:6. Moreover, the commitments emerging from the Group could not ignore the issue of substantive standards, because enforcement commitments would not be possible without defining the standards to which these should apply. Further, if it were agreed that trade distortions arising out of excessive enforcement could be addressed, logically the same should apply to problems arising out of inadequate enforcement and standards. In regard to the proposals aimed at wider adherence to international conventions on intellectual property rights should not per se be an objective of the Group's work, he believed that the multilateral system had to be treated as constituting a coherent whole. Wider acceptance of the existing multilateral conventions would reduce trade distortions arising out of inadequate or excessive standards. This would also conform to the objectives of the Declaration of Punta del Este, which inter alia called for an increase in the responsiveness of the GATT system to the evolving international economic environment. The Community's preference for a multilateral rather than bilateral or unilateral approach was based on the belief that "might should not be right". However, the Community was not optimistic about the ability of the present GATT to resolve these problems. In the absence of an effective

interface between trade and other relevant issues, the GATT would, to some extent, be overtaken by events.

45. Turning to the comments made on some of the main features of the Community proposal, he said that, in Section III.C, the special, but finite, transitional period foreseen was a classical feature of international agreements, based on the concept of reciprocal commitments. No party would reap the full benefits of the proposed agreement before it had fully implemented its provisions; for example, a party might be able, subject to some form of GATT approval, not to extend commitments to another party comparable or corresponding to those that that other party had not yet implemented pursuant to the transitional provisions. As regards the concept of a review clause (Section III.D.4), this was another classical feature of international agreements that, in the present case, was rendered necessary in particular by the evolving nature of the subject matter being dealt with. The new substantive standards that might be incorporated into a GATT agreement would be either those derived from work elsewhere or, if need be, those arising out of work undertaken in the GATT itself. In regard to the proposals requiring adherence to the Paris and Berne Conventions, he said that such a notion was not new; for example the GATT was based upon the notion that contracting parties would normally have accepted international obligations in the area of finance. On the question of the legal implications of the proposed principles, he said that parties would undertake commitments to respect them as an integral part of a GATT agreement. They would, thus, be subject to the relevant dispute settlement procedures of the GATT. The purpose of the principles would not be to form the basis of a harmonization exercise, but to provide a reasonably clear definition of the objectives to be attained by national legislation. The actual translation of these principles into national law would be undertaken in the light of the objectives thus defined. Since the aim was to deal with rather wide-ranging trade problems and not to substitute for the work of WIPO, the principles would often be expressed in somewhat general terms. There would thus be a fairly wide margin for the national translation of these principles. To the extent that greater precision would be necessary at the national level, countries might find it useful to draw further inspiration from the intellectual property right conventions. As regards the rôle of the proposed committee or expert group, the Community had not reached any conclusions as yet as to whether such a body might play a rôle as normally defined under the General Agreement or as defined in some of the Tokyo Round agreements, with an explicit dispute settlement function. However, he was confident that bringing together trade and intellectual property experts within a well-defined institutional structure would be a constructive exercise. On the question of prior consultation, the proposed mechanism would take into account questions of national constitutions and sovereignty and was intended to constitute an optional system for the exchange of information, which parties would hopefully find it in their interest to use actively, for example by circulating non-confidential information at a reasonably early stage of domestic deliberations. In regard to the MFN and national treatment provisions contained in Articles I and III of the General Agreement, he recognized that they had been drafted for the purpose of providing commitments on trade in goods. Given that such provisions were of a fundamental and almost universal nature, he believed that it would be desirable and possible to apply them to the trade-related aspects of intellectual property rights with a number of qualifications rendered necessary by the particular nature of the subject matter.

46. Turning to the comments and questions in regard to the specific principles related to substantive standards, the representative of the European Communities said that, in elaborating the proposals on patents, account had been taken of the fact that the Paris Convention was less than specific in some of its provisions; the Community had sought inspiration from other sources, for example the draft patent law harmonization treaty and the European Patent Convention. It was in this light that the Community interpreted the term "invention". He saw the notion of inventive step as largely covering that of non-obviousness. As to the protection of plant and animal varieties and the subject of compulsory licensing, the Community had wished to touch upon these subjects but without prejudicing the intricate ongoing debate on these matters. On trademarks, the Community had found inspiration in the Paris Convention, notably in its Articles 6 and 6bis. He believed that requiring a likelihood of confusion where identical or similar signs were used on similar goods was a criteria worthy of consideration. On copyright, neighbouring rights and computer programmes, the Community had tried to strike a balance. It would welcome wider adherence to conventions other than the Berne Convention, such as the Universal Copyright, Rome and Phonograms Conventions. With respect to computer programmes, the Community favoured a copyright-type solution. As regards models and designs, the Community concern was

to ensure more effective protection than had been secured so far under Article5B and 5quinquies of the Paris Convention. On semi-conductor topography rights, he confirmed the high priority that the Community and its Member States placed on the welcome work towards a diplomatic conference under the auspices of WIPO. In regard to geographical indications including appellations of origin, he emphasized the importance attached to this area by the Community; it would continue to figure prominently in Community proposals in the Group. With respect to acts contrary to hones commercial practices, he said that the term "by law" in the Community proposals was intended to include aspects covered by common law.

47. A participant said that in his view the Community proposal was fully consistent with the Group's Negotiating Objective, notably in taking into account the need to promote effective and adequate protection of intellectual property rights and in elaborating appropriate new rules and disciplines in this connection. He considered that the fact that the issue of trade in counterfeit goods was referred to in a specific paragraph of the Negotiating Objective did not preclude the possibility of treating this matter in a wider context. He believed that the trade effects stemming from inadequate protection of intellectual property rights had been amply demonstrated and referred in this connection to the study prepared by the United States International Trade Commission. He did not see any inconsistency between the adequate protection of intellectual property rights and the objective of the GATT in establishing an open trading system. In his country, the elements that were the strongest supporters of the open trading system were also those most concerned about trade distortions or impediments arising from inadequate protection of intellectual property. In regard to the suggestions that adherence to a GATT agreement might be risky or costly because of exposure to retaliation, he said that the aim of any dispute settlement process would be to clarify the obligations under the agreement and to bring national legislation and practices into conformity with those obligations. If this were not possible, other actions might be foreseen, but this was an unfortunate consequence rather than the intent of the agreement. 48. A number of other participants outlined their understanding of the Group's Negotiating Objective. They stressed the importance of the third paragraph of the Group's Negotiating Objective in circumscribing the rôle of the Group. It was said that this constituted a recognition that the Uruguay Round must not interfere with, or intrude upon, the work of WIPO and all other relevant Organizations on all aspects of intellectual property rights. They also emphasized that the distinction between the first and second paragraphs of the negotiating objective. Only the second paragraph, concerning international trade in counterfeit goods, spoke of a multilateral framework of principles, rules and disciplines. The objective in this paragraph was qualitatively different from that in the first paragraph and this underlined the need for these two specific aspects of the Group's work to be kept separate. The primary purpose of the first paragraph was to clarify existing GATT provisions and it had to be approached from this angle. The purpose of the GATT provisions as they related to intellectual property was not to protect intellectual property or to enforce intellectual property rights but to ensure that action avowedly taken for these purposes did not in reality distort or impede international trade by constituting a disguised restriction on trade or a means of discrimination. It also had to be borne in mind that there was an underlying conflict between the protection of intellectual property, which involved the restriction of trade, and the basic objective of the General Agreement which was to liberalize trade. For these reasons, the Group should consider trade distortions or impediments arising from excessive or discriminatory enforcement of intellectual property rights, but it was not its function to consider whether the rights granted were themselves sufficient; this was a matter for national governments. One participant saw the basic concern of the Group's work under paragraph one of the Negotiating Objective as being with excessive enforcement mechanisms that would interfere with legitimate trade; he would, for example, like to explore the relevance of Sections 301 and 337 of the United States Tariff Act to the Group's work. Another participant suggested that the Group should concentrate on examining the actions of governments which, under the pretext of ensuring respect for national laws on the protection of intellectual property, interfered with the normal flow of merchandise trade, including through the imposition of unilateral trade restrictions on imports. This participant was also concerned about the use of intellectual property laws as a means to establish dominant trade positions. Some participants were of the view that an important problem for consideration was the ability of intellectual property right owners to use intellectual property rights to distort trade, for example through the terms of licensing contracts. It was suggested that the Group should examine the issue of restrictive business practices and, in this regard, give close attention to Chapter V of the Havana Charter. It was further suggested that, in order to establish what were the trade

distortions arising in connection with intellectual property rights, it would be necessary to examine the trade restrictive effects of the protection of intellectual property rights, for example those stemming from the prolongation of the term of patent protection, the widening of the scope of patent rights or the extension of the protection of patents from processes to products. Trade in Counterfeit Goods

49. The Chairman opened item B of the Agenda, trade in counterfeit goods, without closing item A, trade-related aspects of intellectual property rights.

50. A participant said that his comments were relevant to both item A and item B of the agenda. In regard to the basic objectives of GATT disciplines concerning enforcement and trade in counterfeit goods, he could agree, as a first formulation, that they should be to lay down principles, rules and disciplines to oblige governments, on the one hand, to provide effective procedures and remedies by which owners of intellectual property rights could themselves take action to enforce their rights and, on the other hand, to ensure that measures and procedures for this purpose did not themselves become barriers to legitimate trade. Further elaboration of objectives would depend on progress in the Group on the scope of its work in this area and on other matters. In regard to the question of scope, he first took up the issue of which intellectual property rights should be covered by GATT commitments concerning enforcement. In his view, excessive or insufficient enforcement of all intellectual property rights was capable of creating distortions or impediments to international trade and therefore all intellectual property rights should be covered. If disciplines established by the Group were limited to only trademarks and copyright, the absence of multilateral guidelines would no doubt lead to trade problems in respect of other intellectual property rights. The types of mechanism that might be appropriate would vary according to the type of intellectual property right in question and the legal system of individual countries. While all intellectual property rights could and should be subject to domestic enforcement mechanisms, border mechanisms might have to be more closely circumscribed for some types of intellectual property rights if the risk of barriers to legitimate trade were to be avoided. For example, it was often argued that trademarks and copyright lent themselves more readily to prima facie determinations of possible infringement, allowing for temporary seizure pending a court order, without such a system creating major risks of trade distortions or impediments. Few, if any, customs administrations would be able to take on such a task for more complex determinations of infringement. In regard to the question of what types of infringement of intellectual property rights should be covered, he believed that GATT commitments should cover all types of infringement related to trade. Limiting coverage to infringements embodied in or associated with a good would fail to address major problems. The Group might also examine the implications of the qualifying criteria put forward in this regard in the draft WIPO model legislation on measures against counterfeiting and piracy. In regard to the points of intervention, he said that this question was related to the types of intellectual property rights that would be covered. In his view, domestic enforcement measures were generally preferable to border measures since they ran less risk of distorting or impeding legitimate trade. Moreover, only efficient domestic measures that operated against production and distribution could go to the root of the problem. Effective domestic measures could reduce the rôle of border measures to that of a safety net and might avoid the need for commitments on transit trade. Conversely, the less successful were the negotiations on domestic enforcement measures, the greater would be the need for strong border enforcement mechanisms.

51. The representative of the United States presented further thoughts on the five points concerning enforcement procedures that appear in the United States proposal of October 1987 (MTN.GNG/NG11/W/14, pages 4-5). He said that his comments were relevant to both item A and item B of the agenda. The responsibility to enforce intellectual property rights should remain that of the holders of those rights. The proposed obligation on governments would be to provide effective and adequate procedures for such enforcement, both internally and at the border. They should cover not only infringement of intellectual property rights embodied in internationally traded goods, but unauthorized use of intellectual property rights more generally. Appropriate procedures should be provided to determine the validity and enforceability of intellectual property rights. The commitments should be sufficiently flexible to allow countries to make available within their respective legal systems appropriate judicial or administrative, or administrative and judicial, procedures for the assertion of intellectual property rights against any person or judicial entity,

including governmental entities. The procedures applied to right holders of other parties should be no less favourable than those applied to nationals. In this connection, detailed examination should be made of Article 2(3) of the Paris Convention and of Article 5 of the Berne Convention which made certain exceptions for judicial and administrative procedures. Consideration should also be given to the operation of a most-favoured-nation provision among parties to an agreement. There should be obligations to ensure the fairness and openness of procedures: appropriate notice of action should be given to all parties to a case; the substantive standards applied to imported and domestically produced products should be the same; there should be provisions to ensure that the necessary facts are assembled, before the parties to the dispute have to make their arguments; and determinations should be in writing, reasoned and made in a fair and open manner without undue delay. In addition, consideration should be given by the Group to the possibility of ex parte decisions, subject to appropriate procedural safeguards, where actions on an emergency basis were necessary to protect the rights of intellectual property right holders.

52. A participant said that the basic objective of work was to reduce or eliminate trade distortions arising from the intellectual property right system. Although all elements of intellectual property rights had a direct bearing on trade, this did not mean that all types of intellectual property rights should be covered by the current negotiations. He favoured a piecemeal approach, concentrating initially on those elements that were most important and clear; a good point of departure would therefore be the counterfeiting of registered trademarks and industrial designs. In determining the types of infringement to be covered, the criteria suggested in the WIPO draft model legislation on measures against counterfeiting and Piracy should be employed, i.e. that the goods should have been manufactured on a commercial scale without the authorization of the owner of the right in question. As to points of intervention, internal measures were much preferable to border ones: border measures could easily become barriers to legitimate trade and they might be difficult to enforce in view of the recent spread of free trade and industrial zones which by their essence were outside the customs control of the country in question.

53. A participant urged further detailed discussion of the issue of trade in counterfeit goods. He recalled, for example, a number of questions his delegation had raised at the group's last meeting which were recorded in MTN.GNG/NG11/7, paragraphs 35 and 37. In regard to the appropriate points of intervention, he said that since the Group was dealing with international trade in counterfeit goods, these points were the points of importation or exportation. He asked whether there was experience with customs intervention at the point of exportation that could be shared with the Group. A multilateral framework should take into account not only the interests of the holders of intellectual property rights, but also the consumer and public interests, thus respecting the balance of interests that went into the formulation of national intellectual property legislation.

54. Some participants stressed the importance they attached to keeping the discussion of trade in counterfeit goods separate from other matters before the Group. This was required by the Group's Negotiating Objective, its Negotiating Plan and its agenda. The question of enforcement should not be equated with that of trade in counterfeit goods. The objectives, scope and modalities of work on trade in counterfeit goods should not be confused with the objectives, scope and modalities of the Group's work in other aspects. Only in relation to trade in counterfeit goods did the Negotiating Objective talk of a multilateral framework of principles, rules and disciplines.

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

55. The representative of the World Intellectual Property Organization said that he had taken note of the observations made on documents MTN.GNG/NG11/W/24/Adds.1-2 and requested any other delegations with comments to provide them as soon as possible. He also informed the Group of forthcoming WIPO meetings of possible interest.

56. The representative of the Customs Co-operation Council informed the Group that the model for national legislation to give customs powers to implement trademark and copyright legislation that had been drawn up by

the CCC had been approved by the governing body of the CCC at its annual meeting in June 1988. That body had also approved a proposal of the Policy Commission of the CCC that the model legislation should be accompanied by a Recommendation of the CCC which would recommend the use of the model legislation as a basis for national legislation providing for customs intervention at the border. A CCC Recommendation was a semi-legal instrument requiring States, if they accepted it, to use the recommendation and to notify the Secretary General of the CCC. Through the Recommendation, the CCC could thus monitor whether and how the model legislation was being used by its Member States. A draft of the Recommendation would be first examined by the Permanent Technical Committee of the CCC in October 1988 and hopefully it would be presented to the Council for adoption in June 1989. He described four basic considerations underlying the model legislation. First, it was recognized that although customs could contribute effectively to the fight against counterfeiting and piracy, the rôle of customs had to be defined very precisely. Secondly, it was the owners of trademarks and of copyrights who had the prime responsibility for taking measures to protect their rights. The rôle of customs was limited to assisting in the enforcement of protected rights. However, in countries where the exportation or importation of pirated or counterfeit goods was prohibited, customs had the sole responsibility for enforcing the law in accordance with normal practice regarding any restrictions or prohibitions. Thirdly, the extent and effectiveness of customs intervention would be dependent upon the resources available to customs. The model legislation therefore provided for alternative levels of customs intervention so that countries could choose the level which was most appropriate in the light of the resources available. Finally, any infringement of intellectual property rights by the importation of counterfeit or pirated goods should, to the extent possible, be remedied in a way that would achieve an effect equivalent to the remedies applicable in the event of infringement of the right by the production of counterfeit or pirated goods within the customs territory. He said that the CCC was appreciative that the Negotiating Group recognized the intitiatives being taken in other fora. Recalling that this had also been the case in the Tokyo Round when the CCC had been given a rôle in administering the GATT Agreement on Customs Valuation, he said that it could be envisaged that the CCC would be the appropriate body for administering any practical measures of a customs nature that might be agreed in this field by the GATT CONTRACTING PARTIES.

Other Business, including Arrangements for the Next Meeting of the Group

57. The Group agreed to meet again on 12-14 September 1988. It tentatively agreed on the dates of k17, 18 and 21 October for its subsequent meeting.