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

COMPILATION OF WRITTEN SUBMISSIONS AND ORAL STATEMENTS

Prepared by the Secretariat

Revision

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Introduction

1. At its meeting of 10 June 1987, the Negotiating Group agreed that the secretariat prepare a factual, generic compilation based on the written submissions and oral statements of participants in order to permit a more focussed discussion in the Group (MTN.GNG/NG11/2, paragraph 8). It was understood that it would be an evolving document, taking into account additional written submissions and oral statements. The original document (MTN.GNG/NG11/W/l2) was based on material available by 17 July 1987. After the Group's meeting of 23 September 1987, an addendum was issued to take account of the additional points made at that meeting. This revision takes account of the subsequent discussions, including the specific suggestions tabled and the comments made on them.

2. This compilation is divided into four main sections. Section I concerns issues raised in connection with the enforcement of intellectual property rights. The question here is not what the rights themselves should be, but, given the rights that do exist under national law, what are the trade implications of the means, or lack of means, available to right holders to ensure that their rights are respected. The subject matter of this Section is divided into two sub-sections dealing respectively with enforcement at the border and internal enforcement. The main issues raised by participants are suggestions that trade problems are arising, on the one hand, from discriminatory or excessive enforcement of intellectual property rights against imported goods relative to domestically produced goods and, on the other hand, from inadequate enforcement procedures and remedies, whether at the border or internally. Section II puts together the issues raised in connection with the availability and scope of intellectual property rights themselves. These concern trade problems considered to arise, on the one hand, from inadequacies in their availability and scope and, on the other hand, from the excessive or discriminatory protection of intellectual property rights. Closely allied to the scope and availability of intellectual property rights are the issues covered in Section III, which puts together the issues raised in connection with the use of intellectual property rights - on the one hand, governmental restrictions on the terms of licensing agreements and, on the other hand, the abusive use of intellectual property rights. Section IV is concerned with mechanisms for the settlement of disputes between governments in connection with intellectual property rights. Two main issues have been raised: alleged inadequacies in multilateral dispute settlement mechanisms; and certain national practices for settling disputes with other countries which involve the unilateral use, or threat of use, of trade measures. In a final section, a number of other matters raised, which do not fall readily under the other sections, are described.

3. At the June 1987 meeting of the Group, it was noted by the Chairman that the compilation would be without prejudice to views on the scope of the Group's mandate and on where, or by whom, any action should be taken (MTN.GNG/NG11/2, paragraph 8). The discussions so far have shown divergent approaches to these questions. Some participants have indicated their belief that trade distortions and impediments that should be tackled by the Group are arising from a wide range of practices involving the inadequate or excessive protection of intellectual property. Some others have taken the view that the Group should not deal with questions of what should be the proper level of protection of intellectual property rights, but should confine itself to the negative effects on international trade of the implementation of existing laws and treaties for the protection of intellectual property rights. In this regard, they have said that the Group should be guided in particular by the scope and objectives of the existing provisions of the General Agreement and that the mandate of the Group is limited to matters related to trade in goods and does not concern trade in services. Some participants have said that the scope of the Group's mandate might be clarified by a further examination of the issues raised, in conjunction

with an examination of the operation of relevant GATT provisions, having particular regard for the trade aspects of the practices in question.

I. ISSUES IN CONNECTION WITH THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

4. The issues raised by participants in connection with the enforcement of intellectual property rights are considered first as they relate to the means available for the enforcement of intellectual property rights at the border against the importation, exportation and transit of infringing goods and, secondly, as they concern the internal enforcement of rights against the domestic production and sale of infringing goods.

(a) Enforcement at the border

5. Two categories of problem have been raised in connection with enforcement at the border: practices that are said to discriminate against imported goods and border enforcement measures that are considered inadequate for the effective enforcement of intellectual property rights.

(i) Discrimination against imported products

Issues

6. A general issue raised by many participants is the danger that unilateral national measures, or bilaterally agreed measures, to deal with problems felt to exist in connection with intellectual property rights could lead to restrictions on, or other distortions to, legitimate trade and thus have the effect of discriminating in favour of domestic production and possibly between supplying countries. The question was not whether governments would take action to deal with trade problems associated with intellectual property rights but rather how this would be done. In this regard, it has been recalled that the Group has the objective of ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

7. Some participants have referred to tribunals, remedies and procedures which are directed specifically at the importation of goods suspected of infringing intellectual property rights and which are separate and different from the those applicable to the domestic production or sale of such goods. It has been said that, where the procedures applicable against suspect imported goods are more onerous from the point of view of compliance and put respondents in a less favourable position than under the domestic procedures, discrimination against imported goods may ensue. Attention has also been drawn to the limitation to domestic industries of access to such special procedures and remedies. However, it has been said that the removal of this limitation would not resolve the main problems experienced with these procedures and remedies, and might even exacerbate them.

8. A number of features of such special procedures and remedies directed at imported goods that may put respondents in a less favourable position than under domestic law have been listed:

- limited periods allowed for investigation and for replies, which can lead to the possible prohibition of imports before the status of similar domestic goods has been litigated before the domestic courts;

- absence of remedies for damage caused by erroneous measures taken against non-infringing goods;

- continuation of the investigation under the border control procedure even when the patent upon which the complaint is based is subject to a re-examination procedure before the patent office or a trial for invalidation before the domestic courts;

- failure to lift exclusion orders prohibiting importation for a substantial period of time after the violation has ceased to exist;

- non-admissibility of counter-claims by the respondent against the complainant's infringements of the respondent's patents or of other forms of defence available to domestic respondents;

- application of exclusion orders resulting from an action to importations from persons other than the respondent in the action in question;

- the possibility of imported goods being challenged under legal or administrative procedures applying only to imports and, simultaneously or subsequently, in domestic courts, thus putting them in a position of double jeopardy. The cost and difficulty of defending the validity of imported goods may thus be greater than those in relation to similar domestic goods.

9. While the above issues have essentially concerned actions available under trade laws, some participants have expressed concern that customs procedures might be misused so as to discriminate against imported goods. It was suggested that customs enforcement actions which result in treatment of imported goods less favourable than that accorded to domestic goods could act as an impediment to legitimate trade. This could happen, for example, if customs seizures could be effected under administrative authority whereas domestic seizures required a court order, or if only domestic interests could request customs intervention. Given the scale of the problem of trade in infringing goods, new or strengthened customs procedures were likely to proliferate. There was thus urgent need for multilateral disciplines to forestall the possibility of their constituting impediments to legitimate trade. The representative of the Customs Cooperation Council has informed the Group that one of the main objectives of the model legislation drawn up in the CCC to give customs powers to implement trademark and copyright legislation was to ensure that customs action did not constitute an obstacle to legitimate trade and that this was reflected in the scope and method of customs intervention envisaged in the model legislation (MTN.GNG/NG11/W/5/Add.5).

Trade effects

10. In regard to the application of differential procedures and remedies to imported goods, the basic concern expressed was that such procedures might constitute an impediment to legitimate trade or a means of discrimination between trading partners. A specific point that has been made is that the differential treatment of imported goods that puts respondents at a relative disadvantage can provide domestic industry with a lever to extract unbalanced settlements or agreements from foreign firms, for example for the licensing of intellectual property rights. More generally it is suggested that such systems are inherently disadvantageous to foreign suppliers.

Relevance of GATT provisions

11. Reference has been made in particular to GATT Articles III and XX(d). Some participants have said that GATT Article XX(d) specifies clear guidelines as to the limits of national action to protect national markets for reasons related to intellectual property rights. A participant has expressed the view that certain existing national laws and procedures are inconsistent with GATT provisions, notably Articles III and XX. This participant has suggested that, if it were to emerge from the discussions in the Group and from other GATT activities related to this issue that its view was not shared by other contracting parties, the Group would need to consider interpreting the provisions of Article XX(d). It has been said that measures to enforce intellectual property law vis-à-vis the importation of goods are taken in a legal and procedural context different from that of

pure border measures. Such procedures and measures were more akin to certain domestic procedures and measures, from which they differ largely because of discriminatory aspects against foreign products. In regard to concerns about discrimination between trading partners, reference has also been made to Articles I and XIII of the General Agreement. It has also been suggested that GATT Article X as it concerns the publication of trade regulations is relevant to the issue of the transparency of border enforcement mechanisms.

Suggestions

12. In their sections on enforcement or implementation, the suggestions of the United States, the European Community and Japan (MTN.GNG/NG11/W/14, 16 and 17) contain elements aimed at ensuring that procedures and remedies to enforce intellectual property rights do not become barriers to legitimate trade and further suggestions to this end have been made in the discussion in the Group. These are summarised in the synoptic table at Annex I of this note, which describes the main features of the suggestions on enforcement and of the comments made in the discussions of them so far. It might also be noted that both the suggestions and discussion comments have indicated that the appropriate procedure and competent body/bodies might vary according to the type of intellectual property right in question. The European Community and Japanese suggestions also suggest certain basic principles (non-discrimination or mfn treatment, national treatment and transparency); these are described in section V(a) below.

(ii) Inadequate procedures and remedies at the border

Issues

13. The central issue raised is the adequacy of the possibilities available to intellectual property right owners to obtain effective action at the border against the importation, exportation and/or transit of infringing goods, notably through the intervention of the customs authorities. Some participants have said that in many countries border enforcement measures are deficient or difficult for intellectual property owners to avail themselves of, and that existing international conventions do not provide for adequate enforcement mechanisms at the border. However, some participants have emphasised the conclusion of the GATT Group of Experts on Trade in Counterfeit Goods that the present international law contained important principles for guiding action against trade in counterfeit goods (L/5878, paragraph 16) and have expressed their support for the views contained in paragraph 15 of that document on this matter. Some presentations have not dealt separately with the adequacy of border enforcement measures but have treated it as part of the issue of the adequacy of enforcement procedures and remedies generally; these points are dealt with in the next section of this note.

14. Some participants have referred to the analyses of the issue of border enforcement procedures in the Group of Experts on Trade in Counterfeit Goods (documents L/5878 and MDF/W/19) and to the draft agreement submitted on this matter in 1982 (MTN.GNG/NG11/W/9). Mention has been made of the possible extension of the approach suggested against trade in counterfeit goods, with the necessary adaptations, to cover also (i) action against the exportation and possibly the transit of goods infringing trademark rights and (ii) similar action against goods infringing other intellectual property rights. One view put forward in this connection was that the Group should focus on extension of the approach to other intellectual property rights that were widely recognized, such as copyright, neighbouring rights, industrial designs and geographical denominations. In regard to geographical denominations, it has also been suggested that the existing Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods provides sound international rules for enforcement and that more countries should accede to the Agreement. The question of the possible extension of this Agreement, in the context of the Paris Union, to cover action against goods infringing registered trademarks has also been raised. Some participants have stressed the importance they attach to the question of trade in counterfeit goods being treated separately from the general issue of the trade-related aspects of intellectual property rights, in accordance with the separation of these two matters in the Group's Negotiating Objective.

15. Three specific difficulties in connection with border control measures have been mentioned:

(i) The difficulty of controlling at the border international trade in goods which, although not bearing unauthorized trademarks, are presented in such a way as to deceive or cause confusion about their source, for example through imitating the packaging or copying the user's manual of another manufacturer.

(ii) Trade in goods where there is unauthorized use made of intellectual property but where the individual goods crossing borders may not necessarily infringe intellectual property rights, or at least not in a blatant and readily controllable way. One example given is the separate exportation of look-alike goods not bearing infringing trademarks and of the corresponding trademark labels, and their subsequent combination in the country of destination. Another situation referred to is the manufacture of unfinished products in such a way as to avoid infringing a patent on the finished product, and subsequent exportation of the goods to a country where the patent is not held for assembly into the complete product.

(iii) In regard to products that involve the infringement of a process patent in their manufacture, problems of securing action against such infringement, which are already considerable when the manufacture takes place locally, are particularly difficult when the goods are produced in a foreign country.

Trade effects

16. Some participants have suggested that the insufficiency of border control measures and of international disciplines in this respect is a major factor in the large and growing international trade in goods infringing intellectual property rights. The principal direct effect on international trade mentioned is the loss of export markets for the genuine products of their manufacturers in third countries as a result of the export of counterfeit or pirated goods from other countries. This effect is partly the result of the direct displacement of the genuine good by the counterfeit or pirated copy and partly the result of the effect of the existence of poor quality counterfeited or pirated copies on the reputation of the producer of the genuine article.

17. Some other trade difficulties said to result from inadequate border measures are common to the points made in connection with views on inadequate internal enforcement of intellectual property rights and are treated in this context (paragraphs 27-31 below).

Relevance of GATT provisions

18. The point has been made that Article XX(d) of the General Agreement recognizes the right of contracting parties to take action at the border to prevent trade in goods infringing intellectual property rights, subject to certain conditions. The point has also been made that Article XX(d) and other GATT provisions, other than Article IX:6, do not put any obligation on countries to enforce intellectual property rights through action at the border, but only permit them to do so provided they respect the conditions specified, which are essentially aimed at ensuring that such action does not constitute a barrier to legitimate trade. To some participants, this implies that only the second aspect is a matter that falls within the proper scope of the work of GATT and that therefore only this aspect should be addressed by the Group. To some other participants, it points to the need for the negotiation of new rules and disciplines to deal with the trade problems arising. It has also been suggested that GATT Article X as it concerns the publication of trade regulations is relevant to the issue of the transparency of border enforcement mechanisms.

19. Some participants have emphasized the importance of Article IX:6 of the General Agreement in putting enforcement obligations on contracting parties regarding the prevention of the use of trade names in such a manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or

geographical names of products of the territory of another contracting party as are protected by its legislation. It has been said that, under this provision, a contracting party to which a request has been made for such action should, by means of rules, including coercive implementation, ensure that adequate protection is given. It has been suggested that, if differences of interpretation regarding Article IX:6 were to become evident from the work of the Group or from activities elsewhere in the GATT, it would be necessary for the Group to clarify this provision. Another participant has indicated that it saw Article IX:6 as a basis for enlarged action against the importation of counterfeit goods.

Suggestions

20. The United States, the European Community and Japanese (MTN.GNG/NG11/W/14, 16 and 17) papers put forward suggestions aimed at ensuring effective border enforcement procedures and remedies. The Community suggestion addresses border enforcement separately from internal enforcement, whereas the other two address these issues together. The Community suggestion also raises specifically the question of enforcement not only at the point of importation of goods but also where goods are subject to other customs régimes (exportation, transit, inward processing, temporary admission, customs bonding). The main features of these suggestions and of the comments made in the discussion of them so far are presented in the synoptic table at Annex I of this note.

21. It might also be noted that some suggestions have been made concerning enforcement with specific reference to trade in counterfeit goods (MTN.GNG/NG11/W/9 and 11). Since these were not presented in connection with the agenda item that this compilation relates to, but with respect to that on trade in counterfeit goods, these are not dealt with in this note.

(b) Inadequate internal enforcement procedures and remedies

Issues

22. The basic issue raised by some participants is that trade problems are arising from inadequate procedures and remedies for effective enforcement of intellectual property rights against the internal production and sale of infringing goods, as well as from inadequate border measures. In their view, the minimum standards in existing international conventions for national action regarding enforcement are not adequate. The specific inadequacies in national laws and procedures that have been mentioned are as follows:

- procedural or administrative problems impeding easy access to courts or administrative authorities;
- slowness of procedures;
- absence of provision for preliminary relief, including for provisional seizure;
- arbitrary or discriminatory procedures;
- lack of procedures to facilitate obtaining evidence to build a case ("discovery" procedures);
- absence or inadequacy of dissuasive criminal sanctions;
- inadequate civil remedies, such as damages;
- failure of public authorities to take action in the face of large-scale, blatant infringement activity;

- excessive cost of legal actions, especially for small and medium-sized enterprises;

- additional delays and costs in obtaining effective action in countries where both local and federal bodies have jurisdiction.

23. In some presentations, these problems have been mentioned as arising in connection with the enforcement of intellectual property rights generally, while in other presentations they have been related to specific intellectual property rights. In this connection mention has been made of goods illicitly bearing trademarks; the piracy of books, sound and video recordings and of computer software; difficulties in enforcing appellations of origin and geographical indications even when nominally protected under national law; and the misappropriation of industrial designs. Some participants have emphasized the increased ease of copying, and consequent increased problems of enforcement, resulting from new technologies of reproduction, especially in the copyright area.

24. A specific problem highlighted in some presentations is that of difficulties of patent owners establishing infringement of a process patent in jurisdictions where the burden of proof in such cases is on the intellectual property right owner. It has been said that this is particularly disadvantageous for intellectual property rights owners where only process, and not product, protection is available. One suggestion made is that in such cases the burden of proof should be on the defendant, to demonstrate that the patented process had not been used in making the product. Difficulties referred to in relation to action against imports of goods in the production of which a patented process has been used have already been mentioned in paragraph 15 above.

25. The other specific enforcement difficulties mentioned in paragraph 15 above have also been raised as issues with internal as well as border aspects.

26. Some participants have maintained that it was not a task of the Group to attempt to raise the level of protection of intellectual property rights through the strengthening of procedures. If national procedures were not always adequate and improved international minimum standards were called for, these should be formulated in the context of the existing international conventions relating to these matters. Some participants have also expressed the view that the mere occurrence of infringement did not in itself establish that enforcement procedures were inadequate; it had to be recognized that, however effective were national enforcement procedures, it would never be possible to eliminate entirely the infringement of intellectual property rights, just as other illegal activities continued despite all enforcement efforts.

Trade effects

27. In discussing the trade implications of the infringement of intellectual property rights, the view has been expressed that the intellectual effort incorporated in goods constitutes a part of their proper value in the same way as the material inputs in them do. Failure to protect adequately, through intellectual property laws, this intellectual content against unauthorized copying therefore deprives the producers of a proper return for their efforts and, by the same token, has a corresponding adverse effect on the commercial interests of their country. The inadequate or ineffective protection of the intangible elements of the value of a good has the same damaging effects on international trade as if property rights in physical goods were not protected.

28. The view has been expressed that there are important constraints, in terms of resources, feasibility and the need to avoid procedures that would hinder legitimate trade, on the extent to which border control measures can prevent trade in goods infringing intellectual property rights. Moreover, border control measures cannot prevent the displacement of legitimate exports by the domestic production and sale of infringing goods in export markets. The most effective action to prevent trade distortions and impediments arising from the infringement of intellectual property rights was therefore at the point of production of infringing goods.

29. It has been said that inadequate internal means for enforcement of intellectual property rights have adversely affected trade principally by preventing, or making difficult, effective action against:

- the domestic production and sale of infringing goods that displace exports of genuine goods to that market;

- the production and export of infringing goods to the country of production of the genuine good; and

- the export of infringing goods that displace exports of the genuine product in third markets.

30. Other effects that have been pointed to include:

- possibly higher prices charged for the genuine good during the period before unauthorised copies become available and in markets where rights are respected, in order to recoup the cost of developing intellectual property;

- the damage to the reputation and thus sales of national exporters from poor quality, unauthorized copies of their products;

- the reduced incentives to research and development, innovation, and the creation of new works of authorship resulting from the losses consequent on the infringement of the corresponding intellectual property rights, especially where such activities require a global market to be financially viable, with consequent negative effects on the volume and variety of international trade;

- diminished trade resulting from the unwillingness of intellectual property right owners to enter markets where their rights are difficult to enforce;

- the additional uncertainties created for international trade from unreliability in the enforcement of intellectual property rights.

31. In addition, some participants have said that intellectual property right owners suffer from adverse consequences for their royalty payments from, and investments in, countries where enforcement of intellectual property rights is inadequate. Moreover, they may sustain important additional legal, detection and other costs. Other effects of the infringement of intellectual property rights referred to include deception of consumers and risks to health and safety.

Relevance of GATT provisions

32. Some participants have said that the GATT recognizes the legitimacy of measures to enforce intellectual property rights, and that the production, sale and trading of infringing goods undermines the achievement of GATT objectives and can reduce the value of tariff concessions negotiated in GATT. However, it has been noted that, at least apart from Article IX:6 as it applies to certain geographical indications (see paragraph 19 above), no GATT provision specifically puts obligations on governments to provide adequate means of enforcement of intellectual property rights. For some, this indicates the need for new rules and disciplines in this area to deal with the trade distortions and impediments arising, while to some others this indicates that these matters should not be considered as "trade-related" ones falling within the mandate of the Group.

Suggestions

33. Three specific suggestions have been tabled dealing with the enforcement of intellectual property rights, by the United States (MTN.GNG/NG11/W/14), the European Community (MTN.GNG/NG11/W/16) and Japan (MTN.GNG/NG11/W/17). These suggestions cover both enforcement at the border and internally. Their main features and the comments on them made in the Group are presented in the synoptic table at Annex I of this note.

34. Another participant has said that his country's intellectual property experts saw merits in working out a WIPO Convention requiring the adaptation of existing laws on the protection of trademarks by building on the rules concerning blatant infringements of trademarks by identical or virtually indistinguishable marks. By not asking too much, such a convention could be attractive to many countries. In a second stage, international efforts could address the difficult cases where decisions on the similarity of two products were required. Cooperation in uncovering illegal trade flows and in seizure of counterfeit goods could also be envisaged for this stage.

II. ISSUES IN CONNECTION WITH THE AVAILABILITY AND SCOPE OF INTELLECTUAL PROPERTY RIGHTS

35. The detailed issues raised relating to the availability and scope of intellectual property rights in different countries concern trade problems considered to exist as a result of:

- inadequacies in the availability and scope of intellectual property rights;
- excesses in their availability and scope; and
- discrimination in their availability and scope.

(a) Inadequacies in the availability and scope of intellectual property rights

Issues

36. Some participants have said that inadequacies in the availability and scope of intellectual property rights in many countries are a major source of trade distortions and impediments. Some of these participants have given detailed information about the inadequacies they believe to exist, in some cases ordered by type of intellectual property right and in other cases by type of inadequacy. The detailed points made are contained in paragraphs 40-48 below. Most of the points made concern: the absence in some countries of certain basic rights, either generally or for particular classes of subject matter; inadequate duration of rights; compulsory licensing provisions; and unsatisfactory procedural requirements. Points made about procedures in general are (i) that unduly lengthy procedures before grant of the right increase the risk of unauthorized copying and difficulty of dealing with it, and (ii) that their complexity and costs, such as in the form of fees and legal expenses, are often burdensome, especially for small, medium-sized and foreign enterprises.

37. Some participants have expressed the view that there were major problems in the provision of adequate rights for certain new technologies, such as computer software, the designs of integrated circuits and biotechnological inventions, and that there was need for greater adaptability and responsiveness of intellectual property systems to technological change if trade difficulties were to be avoided.

38. Some participants are of the view that the above picture of the adequacy of the protection of intellectual property and of international conventions regarding these matters is exaggeratedly negative. Moreover, if it were felt that the scope and availability of intellectual property rights provided for under national laws and internationals conventions were inadequate, the appropriate course would be to seek improvements in the context of the international conventions in question and of the international organisations whose job it was to

deal with these matters, chiefly the World Intellectual Property Organization. Most, if not all, the issues raised were already under discussion in WIPO where there was a long history of international consideration and negotiation of these matters.

39. The compilation below of the detailed issues raised is structured by type of intellectual property right, the ordering of the different intellectual property rights treated being by volume of material presented.

(i) Patents

40. Some participants have expressed the view that difficulties in connection with the availability and scope of intellectual property rights available to companies and nationals were most widespread in the area of patents. There was not yet an adequate international consensus on the proper basic rights in this area, and this was reflected in the absence of adequate minimum standards in the Paris Convention.

41. The specific points mentioned by these participants include:

- The absence of a patent law to protect inventions in some countries.

- Exclusions from patentable subject matter. Some participants have referred in particular to the exclusion in some countries of chemical, pharmaceutical and food products. The protection of processes of manufacture only, where it exists, is not regarded by these participants as an adequate substitute, because of difficulties of enforcement and the scope for inventing around the patent. It has been said that in some countries this is facilitated by requirements to incorporate in the patent claim scientifically unnecessary but legally limiting process parameters. Another view expressed was that protection of chemical and pharmaceutical products could impede technological progress in the invention and development of new ways of producing such products. Reference has also been made to certain countries that allow patents for chemical compositions but not compounds or which do not allow, or in practice do not issue, patents for new uses of known products or compounds. Other exclusions of product areas mentioned as a cause of problems include cosmetics, agricultural machinery, fertilizers, metal alloys, anticontaminant equipment or processes, atomic energy or nuclear-related inventions and methods for the treatment of the human/animal body. An issue raised some participants is the lack of patent or other protection in many countries for biotechnological inventions. In this connection, reference has been made to the absence of protection for plant breeders' rights in some countries or differences in the systems of law under which they are protected (specific legislation or patent law).

- Inadequate duration of the patent right, such as limitation of the patent term to five or ten years. The view has been expressed that such limitation may particularly reduce the value of patent rights on chemical or pharmaceutical products or processes, for which testing and registration requirements before authorization for public sale may take up much of the term. Some participants have referred variously to 15-20 years, 17 years from issuance or 20 years from filing as a normal or satisfactory patent term, sufficient for the recovery of the cost of investment in research, development and production. Another view was that it was by no means evident what should be considered "sufficient" profits for these purposes and, more particularly, to what extent different geographical areas of the world should be expected to contribute towards them; exclusive rights for these sorts of periods could equally well generate excessive profits.

- Procedural problems with obtaining of rights. Some participants have said that procedural obstacles make it difficult and expensive to acquire rights in some countries, especially for foreign applicants. An example given is that an overly strict interpretation of the requirement of unity of invention not only increases unnecessarily the number of patent applications, thereby

slowing down the procedure, but also leads to substantial complications and increased costs. Other participants have referred to excessive delays in the period between filing of the application and grant of the right, with the attendant risk of serious infringement during this period.

- Non-voluntary (compulsory) licensing and forfeiture of patents. This issue mainly concerns the circumstances under which compulsory licences are granted in the event of non-working of the patent. It has been said that the criteria for defining non-working and the reasons considered legitimate for such non-working vary among countries. Most of the issues raised relate to those countries where working is not considered to be achieved by importation, but requires domestic production of the patented product or using the patented process. Some participants have said that this renders the patent of little value in countries where local production is not economic. The view has also been expressed that provisions on compulsory licensing and forfeiture are necessary for dealing with the abuse of unjustifiable non-working and that patent laws should be framed so as to encourage national industrial and technological development; these matters, which had a long and established history in national and international law on patents, were presently being discussed in detail in the context of the revision of the Paris Convention. It has also been said that it should be for the government of the importing country, rather than a multinational company owner of patent rights, to decide whether domestic production should be promoted or not. The following more specific points have also been raised:

  - Countries not members of the Paris Convention are not bound by the conditions for the issuance of compulsory licences in Article 5A of the Convention; some other countries are not members of the most recent Stockholm Act of the Paris Convention but of earlier Acts and are bound by lower standards in respect of compulsory licences.

  - Some countries issue compulsory licences and at the same time exclude the patent holder from importing goods covered by the patent; if this is combined with investment controls that prevent a foreign patent owner from establishing a subsidiary to produce the patented product or process, it is particularly burdensome.

  - In a submission it is stated that in some countries compulsory licences are granted on pharmaceuticals two years after the patent is granted. Another submission also refers specifically to compulsory licensing of pharmaceutical patents, saying that such licences awarded before the product has enjoyed the necessary minimum period of exclusivity in the market have depressed sales of the patented product and had a negative impact on the recovery of the considerable investment needed to sustain innovation in the pharmaceutical sector.

  - In several submissions it is stated that compulsory licences are sometimes issued even though the patent is worked in the country by the patent owner. One of these submissions describes compulsory licences as being issued systematically in certain countries on pharmaceuticals without regard to whether the invention is worked or not. Another refers to at least one country where compulsory licences are sometimes issued despite local working by multinationals. A third submission says that such licences are issued almost automatically on grounds other than non-working, e.g. public welfare, even though the patent holder is practising the invention in the country; and that the criteria for the issuance of such non-voluntary licences are not regulated by international conventions.

- The procedures for the issuance of compulsory licenses often lack transparency.

- The level of royalty obtained under a compulsory licence is often significantly lower than that which would have been negotiated in the context of contractual licensing.

- A submission refers to a country, which is a member of the 1925 Hague Act of the Paris Convention, where forfeiture can take place 4 years after the grant of the patent (rather than a minimum of 5 years after issuance or 6 years after filing, whichever is the later, under the 1967 Stockholm Act of the Paris Convention) and that, furthermore, in this country forfeiture can be carried out without prior grant of a compulsory licence. Another submission talks of laws in some countries that allow for a patent to lapse after 2 years from issue.

- Restrictions on the patent rights of foreigners in order to protect domestic technology. A participant has said that, in a certain country, the production, sale and importation by foreign enterprises of products which are identical or similar to products related to newly developed domestic technologies are prohibited and foreign enterprises are thus unable to exercise their patent rights for goods related to these new technologies.

(ii) Copyright and neighbouring rights

42. Some participants have suggested that, in general terms, the existing international conventions on copyright, the Berne Convention for the Protection of Literary and Artistic Works (WIPO) and the Universal Copyright Convention (UNESCO), reflect a measure of international consensus on minimum standards for copyright protection. An important issue was thus the non-participation in these Conventions of some countries and the need for their provisions to be fully reflected in the national laws of member States.

43. A number of specific issues have been raised:

- in some countries, the copyright protection granted may be restricted to nationals only or extended only to works first commercialized in the country;

- in some countries the duration of copyright is insufficient, limited for example to 20 years; and

- as regards compulsory licensing of copyrighted works, a participant has said that problems have arisen where countries attempt to go beyond the limits of the areas where compulsory licensing is permitted under the international copyright conventions.

44. A number of issues connected with specific product areas have been referred to:

- Sound and video-recordings: It has been said that in this area the persons primarily interested in taking action against piracy, the producers and performers, may not have been granted a clear legal right of their own on which to base their actions. In this respect, it has been noted that membership of the Convention for the Protection of Producers against Unauthorized Duplication of their Phonograms (WIPO, ILO, UNESCO) is limited.

- Computer software or programmes. It has been said that there are countries which do not provide legal protection for computer software, for example because of an absence of basic copyright legislation or because of uncertainties about its application to computer programmes, and that at least one country is actively opposed to copyright protection for computer software.

- Cable retransmissions. It has been said that copyright protection in regard to cable retransmissions of copyrighted material is sometimes absent.

(iii) Trademarks

45. The issues raised by some participants about inadequacies in the scope and availability of trademark rights are:

- the absence of effective systems for registering and recording rights in trademarks in some countries;

- the absence of protection for trademarks on single ingredient pharmaceutical and chemical products or for service marks in some countries;

- difficulties with obtaining trademark rights in a country where an application for registration is considered abandoned if the registration is opposed and is only pursued if the applicant reaches an agreement of reconciliation with the opponent or raises a suit of opposition within a year;

- lack of clarity in the validity of the trademark right in countries with no system of examination of applications for registration;

- difficulties in preventing the unrestricted use as generic words of well-known foreign trademarks in some countries, leading to rejection of applications for renewal of registration;

- the difficulty of meeting use requirements in some countries for the maintenance of trademark rights because of high tariffs and import restrictions;

- inadequate control of the registration of trademarks similar or identical to well-known foreign trademarks in some countries;

- insufficient duration of the period before the right lapses without use; in some countries, renewal of registration must be made after 5 years and is denied if commercialization has not taken place;

- difficulties in taking action against unauthorized use of a trademark in a country because of problems in meeting local use requirements due to delays in the registration of licensed users and in the consequent legal permission for the licensee to use the mark.

(iv) Appellations of origin and geographical indications

46. Some participants have referred to problems of imitation, counterfeiting and usurpation of appellations of origin and geographical indications arising in their view because of insufficient protection in many countries. A participant has said that the protection provided for in the Paris Convention in this connection was limited and that, while the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration provided for more extensive protection, their membership was limited. Such protection as existed was therefore largely based on national provisions on unfair competition and bilateral arrangements offering recognition on a reciprocal basis. Some other participants have indicated that there are fundamental differences of view about basic rights in regard to geographical indications, particularly appellations of origin.

(v) Industrial designs

47. Some participants have referred to countries where no protection is available to industrial designs. The point has also been made that, in countries where no system of examination of applications for protection exists, there is uncertainty about the validity of the right, which consequently limits its usefulness.

(vi) Integrated circuits

48. Some participants have referred to the absence of protection for semi-conductor chips and mask works in many countries and to the absence, as yet, of an international treaty in this area.

Trade effects

49. The trade effects pointed to by those participants considering that the availability and scope of intellectual property rights are frequently inadequate are essentially the same as those referred to by these participants in connection with the views on inadequate enforcement of intellectual property rights (paragraphs 27-31 above). In their view, both constitute inadequate protection of intellectual property against unauthorized copying and have similar trade effects, in the one case because rights established under national law cannot be properly enforced and in the other case because the basic rights are absent or inadequate under national law. These points regarding trade effects, therefore, are not repeated here.

50. Some participants have also drawn attention to a number of aspects particularly in connection with the availability and scope of intellectual property rights. One issue in this connection is the deliberate use of intellectual property policy to discourage imports of goods and to encourage local production. To some participants, this constitutes an impediment or distortion to international trade, while to others it is a justifiable use of intellectual property policy to promote national industrial and technological objectives. Another point that some participants have made in connection with the nature of basic intellectual property rights is that discrepancies between countries in this regard can themselves lead to trade distortions or impediments, quite apart from the question of the adequacy of the protection accorded.

51. Some participants have referred to the trade effects of difficulties with the acquisition of rights even where such rights are provided in national law. Since the ability of nationals of one country to obtain rights in other countries creates opportunities for trade, difficulties with national rights granting procedures or regulations, whether from inefficiencies, excessive costs and delays, discrimination or lack of harmonisation, inhibits international trade. In this regard, mention has been made of the potentially beneficial effects on trade of the international harmonisation of rules and procedures, such as that under consideration in WIPO on the harmonisation of patent procedures and that being promoted by WIPO under the Patent Cooperation Treaty.

52. It has been suggested that greater international participation in the provision of basic standards of intellectual property protection would lead to increased trade in non-infringing goods because:

- the additional incentives provided by greater international participation would lead to the creation of new goods and services by innovators and creators in all parts of the world and, hence, to new trading opportunities;

- greater participation in the benefits provided by ownership of intellectual property rights in foreign markets can be an important tool in the development of export markets by all participants; and

- wide acceptance of basic standards of protection would reduce the tendency for some countries to introduce trade restrictive measures in order to protect their own intellectual property owners.

53. Some participants have referred to trade difficulties being experienced in connection with particular types of products:

(i) Sound and video-recordings. It is said that the absence of adequate rights for authors, producers and performers is a major element in widespread unauthorized copying which is having a substantial negative impact on the sales of legitimate recordings in many external markets.

(ii) Wines and spirits, other foodstuffs. A participant has said that the lack of adequate protection of appellations of origin and geographical indications is having severe negative effects on the marketing of its products, particularly wines and spirits. Unfair trade in the wines and spirits sector from countries that do not respect appellations of origin and whose producers do not have to conform to the standards of production under such regimes occurs not only in those countries but also in third country markets due to competition from produce from such countries.

(iii) Chemical and pharmaceutical products. Several participants have referred in particular to what they consider to be unfair competition for the chemical and pharmaceutical products of their companies resulting from inadequate levels of patent protection for inventions in this area.

(iv) Computer programmes. Some participants have referred to widespread unauthorized copying of the computer programmes of their companies, particularly with the development of mass, retail outlets for such products.

54. Some participants, net exporters of technology and other subjects of intellectual property rights, have expressed the view that there is a basic commonality of interest between all countries in providing for the adequate and effective protection of intellectual property rights. If a country does not provide such protection, enterprises would not be willing to transfer to it technology or other forms of intellectual property. Simply copying new technology on the basis of disclosures elsewhere was not an option in most areas of advanced technology, where inventions cannot be used without the assistance of the inventor through the provision of related know-how. Deprived of adequate access to modern technology, the products of such countries were likely to face increasing problems of competitiveness, especially in export markets. While copying of distinctive signs and the appearance of goods might be easier, this also risked generating prejudices against the goods of countries where such practices took place.

55. Some countries, net importers of intellectual property, have indicated that they accept the need for its adequate protection, both in order to encourage domestic inventiveness and creativity and the development of indigenous distinctive goods, and in order to provide conditions under which foreign owners of intellectual property would be willing to make it available on reasonable terms.

56. Some other participants have expressed the view that intellectual property rights are monopoly rights which are created by society in order to promote certain goals, but which in themselves create economic distortions, both generally and to trade in particular. It was therefore justifiable and necessary for countries to frame these rights in such a way as to limit these distortions and to serve the particular national objectives justifying their creation, such as the promotion of national technological, creative and industrial resources, consumer protection, health, food supply etc. For these participants, to approach the question of the adequacy of intellectual property rights from the angle of their trade effects for other countries was to misunderstand the nature of the contract between society and the intellectual property right owner underlying them. The present international law, based on the reciprocal extension of national treatment, allowed for diversity in rules and practices for the protection of intellectual property, depending on how each country perceived its interests and on its own economic and social system. This enabled each country to provide in its national law what it considered to be the appropriate balance between the rights and obligations of owners of intellectual property. Pursuit of a uniformity that would undermine this freedom was undesirable, especially if it were a uniformity based on the interests and practices of the technologically advanced countries.

Relevance of GATT provisions

57. Some participants have said that the General Agreement recognizes the legitimacy of national laws to protect intellectual property rights, and that the lack of such protection undermines the achievement of the objectives of the General Agreement and the value of tariff concessions.

58. A participant has said that Article IX:6 of the GATT indicated that contracting parties must endeavour to afford the same kind of protection of specific regional or geographic names on imported goods on its territory as those products enjoyed in their territory of origin. In the view of this participant, this did not mean that a contracting party had to incorporate in its legislation the legislation of other contracting parties, but that a contracting party to which a request was made under this provision should, by means of rules, including coercive implementation, ensure that adequate protection was given to another contracting party's product.

59. Reference has also been made to the provisions of Articles XII:3(c)(iii) and XVIII:10 as they relate to ensuring that import restrictions are not used in such a way as to prevent compliance with procedures under intellectual property laws.

60. Apart from the above, it has been widely observed that the General Agreement does not contain provisions requiring contracting parties to accord any particular level of protection to intellectual property. To some this points to the need for new rules and disciplines, while to some others it implies that the issue is outside the proper area of concern of the GATT.

Suggestions

61. The four suggestions tabled address the question of norms but in rather different ways. The main features of these suggestions and of the comments made in the discussion of them so far are described in paragraphs 71-79 and at Annex II of this note.

(b) Excesses in the scope and availability of intellectual property rights

Issues

62. The following issues have been raised in regard to practices in a certain country:

- Because the patent term starts from the date of grant and there is no limit on its duration from the date of filing, the termination of the patent right, with the corresponding exclusion of other persons from the right to use the invention, may be unduly delayed if the patent acquisition procedure is long drawn out, whether intentionally by the applicant or not. Moreover, other enterprises which have started, in good faith, to use the invention during the period before the grant of the patent can face difficulties if the patent right is then given after a lengthy delay. (Another aspect of this issue, relating to delayed issuance of the patent causing difficulties for the patent holder in not being able to take effective action against unauthorized use of the invention in the meantime, was raised in the previous section).

- A similar problem can occur where the procedures between the time of filing of the patent application and its grant are kept secret.

- Since interventions before the patent office aimed at the re-examination of, or correction of defects in, a patent right are permitted to the patent holder only, the difficulties of third parties with the patent cannot be fully heard. Bilateral solutions to such difficulties thus tend to favour the patent holder.

Trade effects

63. The points made have concerned economic effects generally. It has been said that:

- these practices may deprive economic agents other than the patent holder of the use of inventions for an unreasonable period or oblige them to negotiate on unfavourable terms the use of the patent;

- delay in the grant of patents and secrecy in application procedures may cause uncertainties and economic disruption; and

- in general, excessive standards of protection can result in unwarranted stifling of competition, both on the domestic market and in international trade.

Relevance of GATT provisions

64. No GATT provisions have been specifically cited in connection with these practices.

Suggestions

65. The main features of the suggestions on the scope and availability of intellectual property rights and of the comments on these suggestions are described in paragraphs 71-79 and at Annex II of this note. It might be noted that the suggestion of Japan includes in its annex on patents a requirement that measures be taken to ensure that the expiration of a patent is not unduly delayed from filing date (MTN.GNG/NG11/W/17, page 6).

(c) Discrimination in the availability and scope of intellectual property rights

Issues

66. Some participants have said that problems for their industry arise in connection with patent laws that discriminate, in terms of eligibility for patent protection, in favour of national inventive activity and against that abroad. It has been said that this problem occurs where priority for purposes of patent eligibility is based on the date of invention for inventions made in the national territory but on the date of filing of the application for inventive activity abroad. Reference has also been made to the reservation of this country to Article 11(3) of the Patent Cooperation Treaty not to equate the filing (in another Contracting State of the Treaty) of an international patent application designating the country in question to an actual filing in it for prior art purposes (i.e. for assessing the novelty and inventive step involved in an invention for which a patent is being applied). In this country, an unpublished prior application only constitutes prior art as of the time of the actual filing date in the country in question. Moreover, it has been said that under this law priority in terms of the Paris Convention is not accepted for matters other than those described in the patent claim even if they have been described in the specifications of the patent application in another member State. Concern has also been expressed more generally about rights granting procedures that favour domestic productive activity.

67. A participant has said that in certain countries discriminatory measures have been taken that favour their nationals or the exporters of certain other countries only.

68. The view has also been expressed that the apparently excessively complicated procedures for obtaining intellectual property rights in some countries represent a particularly serious obstacle to foreign applicants.

Trade effects

69. Some participants have said that the practices mentioned in paragraph 66 above have had an adverse impact on the ability of their firms to develop commercial activities in a certain country, because they may be deprived of the possibility of acquiring patents to which they would otherwise be entitled and even faced with patents relating to their inventions granted to someone else.

Relevance of GATT provisions

70. No specific GATT provisions have been cited in connection with these issues.

Suggestions

71. The paragraphs that follow, together with Annex II of this note put together the suggestions made on the scope and availability of intellectual property rights and the comments made in the discussion of those suggestions. While these suggestions mainly address questions of the adequacy of protection of intellectual property rights, some of the suggestions concern discrimination in the availability and scope of intellectual property rights:

- In Part IV.C of its suggestion, the Community refers to conditions and procedures relating to the obtention and maintenance of intellectual property rights. The Community says that these conditions and procedures should, in particular, be subject to the principles and mechanisms described in Part II of its paper (non-discrimination, national treatment, transparency, consultation and dispute settlement procedures etc.).

- The Japanese suggestion also proposes commitments on certain basic principles - most-favoured nation treatment, national treatment and transparency. In addition, the annexes to the Japanese paper on patents, trademarks and industrial designs specifically call for the guarantee of equal and non-discriminatory treatment in the requirements for application for protection and for the obtaining, maintenance and exercise of the right in question.

72. The specific suggestions tabled address the scope and availability of intellectual property rights in three ways:

i) The United States and Japanese papers (MTN.GNG/NG11/W/14 and 17) suggest that a GATT agreement should contain annexes which would specify norms for the protection of intellectual property that national laws should conform to. Both the United States and Japan have indicated that they would expect the content of these annexes to evolve as the negotiations progress. The United States suggestion is that the standards annexed to a GATT agreement should be based on existing national laws and international agreements that provide a sufficient level of protection. Although similar in approach, the Japanese and United States suggestions differ somewhat in coverage and content. Both cover in their annexes patents, trademarks, copyright and semi-conductor integrated circuit layouts. The United States suggestion, but not that of Japan, also deals with trade secrets, while the Japanese suggestion, but not that of the United States, deals specifically with design rights. The United States position is that standards for the protection of all forms of intellectual property should be included and that the list of those covered in the annex to its paper is not limitative. The main features of the annexes to the United States and Japanese proposals and the main comments made on them are presented in the synoptic table at Annex II of this note.

ii) Switzerland has put forward the concept in its paper (MTN.GNG/NG11/W/15) that a body should be created within GATT as a result of the negotiations that would identify shortcomings as regards effects on trade of intellectual property norms and seek the assistance of WIPO in overcoming them. If and where this was unsuccessful, the body would take the initiative to strengthen existing norms or, if need be, to develop new ones. The Swiss delegation has explained that the form that the body might take was

a matter for discussion - whether it should be an existing GATT body, a new one or a joint GATT/WIPO body.

iii) The Community's suggestion reaffirms the Community's views that serious problems that require urgent multilateral solutions are arising from inadequate or sometimes excessive protection of intellectual property rights. It states that the Community is studying the various options and intends to present its conclusions and suggestions to the Group in due course (Part III of MTN/GNG/NG11/W/16).

73. In response to these suggestions, some participants have emphasised that it is not the rôle of GATT or in the mandate of the Group to further the protection of intellectual property through the negotiation of norms or standards. The Ministerial Declaration asked the Group merely to take into account the need to promote the adequate and effective protection of intellectual property rights in pursuing the objectives of its work; this was not an objective in its own right. The Declaration did not ask the Group to negotiate an agreement creating a new system for the protection of intellectual property rights as was proposed in some of the suggestions. Concern was also expressed that some of the suggestions dealt only with the rights of intellectual property owners and not with obligations accompanying these rights; adoption of these suggestions would entail a weakening of measures to protect the public interest against the abusive use of intellectual property rights. The present international law allowed for diversity in rules and practices for the protection of intellectual property, depending on how each country perceived its interests and on its own economic and social system. Adoption of some of the suggestions would lead to a uniformity that would be in the interests of the technologically advanced countries and which might in itself create distortions to trade, production and investment.

74. Some participants have welcomed the suggestions as positive contributions to how the trade problems that were symptoms of inadequacies in the scope and availability of protection for intellectual property rights and also of excesses or discrimination in this regard might be addressed by the Group. These participants have put forward a number of considerations that should be taken into account:

- the need for a proper balance between the adequate protection of creative ideas and ensuring access to such ideas and not stifling competition; for example, the need for standards to provide for well-defined rights for innovators and users, yet be sensitive to national objectives with respect to health, economic development, competition and security;

- the need for a balance between the interests of countries net exporters of subjects of intellectual property rights and those that are net importers;

- the desirability of encouraging greater participation by all parties in obtaining rights in foreign jurisdictions, through for example eliminating discrimination and reducing costs in national rights granting systems and promoting the harmonisation of rules and procedures.

75. A participant, who has questioned the consistency with the Group's mandate of the suggestions on standards or norms, and the technical and legal feasibility of negotiating the incorporation of standards or norms into the GATT, has proposed that the Group should study how countries of some importance in world trade, but not yet members of existing conventions, could be motivated by and in GATT to enact and apply effective intellectual property protection.

76. Some of the discussion has concerned the relationship between proposed norms in a GATT agreement and those existing or under development elsewhere, notably in WIPO. In this discussion, reference has been made to the requirement in the Group's Negotiating Objective that the "negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters". One view is that, since WIPO and not GATT has the competence to deal with norms for the protection of intellectual property rights, the suggestions made on norms are necessarily prejudicial to WIPO's activities; they would entail duplication of and possible conflict with the work of WIPO.

Another view is that the Group should examine the question of norms since important trade problems were symptoms of inadequacies or excesses in this area. A number of considerations regarding the relationship of this work to activities in other international organisations such as WIPO have been mentioned:

- WIPO should remain the primary organisation for the development of international standards;

- maximum use should be made of existing international standards where they are considered adequate;

- any formulation of separate GATT standards to meet the requirements of international trade should follow an examination of the extent to which existing standards meet or could be adapted to meet these requirements;

- full account should be taken of developments in ongoing work elsewhere, notably in WIPO;

- nothing should be done that was inconsistent with existing international conventions; any standards developed in GATT should be complementary to those developed elsewhere, notably in WIPO;

- the Group should adopt a cautious approach aimed at the minimum standards necessary to meet the requirements of international trade.

77. In regard to the legal relationship that might exist between any GATT commitments and international norms developed in WIPO and elsewhere, several possibilities have been mentioned:

- autonomous GATT commitments might be negotiated, reproducing existing norms where they are considered adequate and containing new or improved ones where they are not;

- the existing norms might be recognised and incorporated in a GATT agreement by reference (possibly in conjunction with new or improved norms where thought necessary);

- the main international conventions recognise the right of member States to negotiate special agreements provided they are not inconsistent with those conventions; where such agreements concerned trade-related aspects, it would be appropriate to negotiate them in GATT.

A point that has been raised for exploration is how to deal with the fact that some participants are not members of one or more intellectual property conventions, notably in securing a proper balance of advantage in any GATT agreement.

78. Some participants have put forward ideas about institutional links with other international organisations, notably WIPO, in negotiations on norms. The Swiss suggestion foresees a special body seeking the assistance of WIPO in overcoming shortcomings in intellectual property norms, as regards their effects on trade. Other ideas mentioned include:

- the Group might refer certain matters to other international organisations, such as WIPO;

- GATT and WIPO might attempt jointly to draw up new standards where a need had been identified.

79. Some participants have also drawn a distinction between the question of the contribution WIPO might make during the negotiating process and what might be the rôle of WIPO in the implementation of the results of the Group's work. In connection with the latter, attention has been drawn to the last paragraph of the Ministerial Declaration, "Implementation of Results under Parts I and II".

III. ISSUES IN CONNECTION WITH THE USE OF INTELLECTUAL PROPERTY RIGHTS

80. The points dealt with in this section concern for the most part the licensing of intellectual property rights - on the one hand, governmental restrictions on the terms of licensing agreements and, on the other hand, the abusive use of intellectual property rights in licensing agreements.

(a) Governmental restrictions on the terms of licensing agreements

Issues

81. Some participants have referred to systems whereby licensing agreements are subject to government authorization and only approved if the terms conform to certain conditions. These concern:

- restrictions on the rates of royalties payable;
- difficulties with the transfer of licence fees and royalties;
- conditionality of trademark licensing on the transfer of technology;
- non-approval of the licensing of foreign trademarks in joint ventures with foreign companies;
- obligations on the licenser to bear the responsibility if the technology in question infringes patents of a third party;
- exaggerated requirements for the disclosure of technology;
- restrictions on the duration of licences for know-how;
- conditionality of the renewal of contracts on the offer of improved technologies;
- obligation to grant patents to the licensee without compensation after the termination of the licensing agreements, even before the expiration of the terms of the patents;

  sluggish procedures.

Trade effects

82. These restrictions are presented in the submission in question as restrictions on international trade in intellectual property rights and as being employed for the purpose of protecting domestic industries. The view has been expressed that governmental restrictions on the terms of licensing agreements do not relate to trade in goods but to trade in services or technology. Since they therefore do not fall under Part I of the Ministerial Declaration, they are not matters that the Group should deal with. The view has also been expressed that the work on intellectual property in the MTN context should lead to greater trade in goods, services and know-how.

Relevance of GATT provisions

83. No specific GATT provision has been cited in connection with these practices.

Suggestions

84. The annex to the United States suggestion, in its section on trademarks, proposes that licensing of trademarks, with provision of adequate compensation for the licenser, should be permitted and that no compulsory licensing of trademarks should be permitted (MTN.GNG/NG11/W/14, pages 7-8).

(b) Abusive use of intellectual property rights

Issues

85. A number of participants have referred to conditions in licensing agreements which are abusive or anti-competitive and thereby represent unwarranted restrictions on international trade in goods. One view expressed is that such restrictions in licensing agreements are unjust where they exceed the scope of the intellectual property right in question. The points made by some other participants indicate a larger conception of what is abusive. The issue has been mostly raised as one of abusive practices by commercial enterprises, although a participant has also referred to government requirements to include such restrictions. The specific practices mentioned include licensing agreements:

- covering countries for which patents have not been granted;
- incorporating tie-in commitments on non-patented articles;
- incorporating restrictions on the export of the goods in question; and
- incorporating commitments on the importation of inputs for the manufacture of the goods in question.

86. It has been said that abuses can also arise through the exercise of the intellectual property right directly by its owner, for example non-working of patents or excessive pricing of patented products. Although the provision of adequate and effective intellectual property rights acts as a form of security to innovators that facilitates trade in technology, the exclusive nature of intellectual property rights can be used to preclude access to know-how. Therefore, countries have provisions in their national intellectual property laws to encourage the use of technology. Although rarely used, they are an important tool in encouraging the voluntary transfer of technology which would not otherwise be available in the domestic market.

87. A general issue that has been raised is that of the appropriate degree of private control over international trade that should stem from exclusive rights accorded under national intellectual property laws. It has been said that, whereas limits on private control over trade in national markets are generally governed by domestic competition laws, international standards regarding private control over international trade are not precisely defined. For example, policies concerning the parallel importation of trademarked goods are not uniform.

Trade effects

88. It has been said that abusive practices can restrict and distort international trade through the artificial sharing of markets, excessive pricing and price discrimination between markets, and restrictions on the scope for production, purchases and sales according to commercial considerations.

Relevance of GATT provisions

89. A participant has raised the question of the relevance of Article XI of the General Agreement to export restrictions in licensing agreements, especially when mandated by governments. Otherwise no specific GATT provision has been cited.

Suggestions

90. Few specific suggestions have been made under this heading. Some of those made in connection with the enforcement and scope and availability of intellectual property rights are relevant to issues raised in connection with the use of intellectual property rights, such as the suggested safeguards against unwarranted institution of enforcement proceedings (Section I), and the suggestions concerning compulsory licensing of patents, copyrights etc. (Section II).

91. It should also be noted that the guidelines proposed by the European Economic Community suggest, in the context of general principles, that measures should be provided against the misuse of rights, for example damages in the event of misuse of a procedure and deposit of security when bringing a complaint (MTN.GNG/NG11/W/16, Section II, (VI)).

92. Another suggestion is that the Group may wish to delineate the appropriate scope for the exercise of private rights over international trade, drawing where possible on national and regional experiences.

IV. ISSUES IN CONNECTION WITH THE SETTLEMENT OF DISPUTES BETWEEN GOVERNMENTS ON INTELLECTUAL PROPERTY RIGHTS

(a) Inadequate multilateral dispute settlement mechanisms

Issues

93. It has been said that under existing international agreements concerning the protection of intellectual property there are considerable divergences in the way that obligations are incorporated into national legislation by member States, and that there is a lack of means of effective recourse available to a member State believing that its interests are being damaged by the failure of another member State to meet its obligations.

94. The view has also been expressed that it would be wrong to state that the existing intellectual property conventions were not intended as or have not served as international mechanisms for the enforcement of intellectual property rights. Although they contain little by way of dispute settlement mechanisms, they provide for periodic review and, of course, recourse to national courts is left open.

Trade effects

95. It has been suggested that certain of the practices referred to in Sections I and II of the compilation which are considered to be giving rise to trade problems are in themselves inconsistent with existing international obligations. It has further been said that the effectiveness of the results of the work of the Group in diminishing trade impediments and distortions arising in connection with intellectual property rights will substantially depend on the provisions for notification, consultation and dispute settlement. The view has also been expressed that to link rights accruing under the General Agreement with the fulfilment of obligations in regard to the protection of intellectual property would go beyond the proper scope of the Group's work and would not be in the interests of some countries.

Relevance of GATT provisions

96. The point has been made that the consultation and dispute settlement procedures under the General Agreement (Articles XXII and XXIII) are relevant to situations where existing GATT obligations are not being fully carried out or where a benefit accruing under the General Agreement is being nullified or impaired for some other reason. The intellectual property rights questions to which existing GATT rules are relevant are discussed in the other sections of the compilation. Reference has been made in the Group to a number of disputes concerning Article XX(d) and Article IX:6. As noted in these sections, it has been widely observed

that the General Agreement does not contain provisions specifically addressing many of the intellectual property rights issues raised.

Suggestions

97. The suggestions made in connection with dispute settlement and the comments made on them are described at the end of this section (paragraph 101 below) and at Annex III of this note.

(b) Excessive national mechanisms for dealing with disputes with other countries

Issues

98. Concern has been expressed about certain national practices providing for unilateral trade measures, of a discriminatory nature, for the purpose of dealing with disputes on intellectual property matters with other countries, and also about a growing recourse, or threat of recourse, to such practices and measures.

Trade effects

99. It has been noted that the measures in question can lead to restrictions on legitimate trade.

Relevance of GATT provisions

100. This has not been discussed in this context.

Suggestions

101. Such of the four specific suggestions tabled so far address the question of dispute settlement mechanisms. The Swiss paper (MTN.GNG/NG11/W/15) advances the concept that a framework for negotiations might include the "establishment of a link between the intellectual property provisions of the General Agreement and its dispute settlement machinery". The other suggestions are somewhat more detailed and they, together with the main comments made, are described in the synoptic table at Annex III of this note.

102. In the discussion, some participants have expressed support for the exploration of a dispute settlement mechanism. The point has also been made that the precise form of any such mechanism could only be worked out when a clearer picture of the commitments likely to be entered into is available. V. OTHER MATTERS

(a) General principles

103. The papers of the European Community and Japan (MTN.GNG/NG11/W/16 and 17) suggest certain "general principles" or "general rules" that should apply. These concern non-discrimination or most-favoured-nation treatment, national treatment and transparency.

	EEC	Japan
Non-discrimination/ mfn treatment	The principle of non-discrimination must apply in regard to any form of discrimination,	Mfn treatment: With regard to the protection of IPRs, a participant shall not

	whether based on origin, nationality or residence	give the nationals or products of any country treatment which is less favourable than the treatment given to the nationals or products of any other country.
National treatment	Imported products must not be accorded treatment that is less favourable than that accorded to like products of national origin for reasons connected with the enforcement of IPRs.	With regard to the protection of IPRs, a participant shall not give the nationals or products of any country treatment which is less favourable than the treatment given to its own nationals or products.
Transparency	Transparency of measures relating to IPRs, whether they be substantive standards or to ensure enforcement, must be ensured by an appropriate procedure, based for example on the provisions of Article X of the GATT. Besides the publication of laws and regulations, this should include the transmission of any relevant information requested by trading partners. Examination of national texts by a competent committee or technical group should be envisaged.	With regard to laws, regulations, procedures, etc., for the protection of IPRs, transparency shall be ensured as much as possible by organising a system which will provide other countries with access to information through notifications, publications and so forth.

104. The European Community paper elaborates on its concept of national treatment by suggesting that one way of obtaining such treatment is that the courts that hear disputes among "resident nationals" should also hear cases involving foreigners, whether resident or non-resident, following the same rules as for resident nationals. If this is impossible, then the procedures and remedies concerning observance of intellectual property rights for imported products must not place the parties concerned, and in particular the defendants, in a less favourable position than the procedures and remedies for IPRs relating to national products.

105. In the discussion some participants have supported work on a set of general principles of the sort suggested by the European Communities and Japan.

(b) Coverage of intellectual property rights

106. The European Community has suggested (MTN.GNG/NG11/W/16, page 2) that the goals of the Group should apply to all intellectual property rights, in particular patents, trademarks, industrial designs, indications of source and appellations of origin, plant varieties, copyright and neighbouring rights as well as new forms of intellectual property (for example, topographies of semi-conductors). The United States has suggested that annexes to a GATT agreement should include standards for the protection of all form of intellectual property rights (MTN.GNG/NG11/W/14, page 5). Some participants have suggested that the Group should adopt the working hypothesis of a broad coverage of rights.

107. The United States suggestion (page 6) proposes that an agreement should be flexible enough to include new forms of technology and creativity as they appear. This general idea has received some support in the Group's discussions. The Japanese suggestion (page 5) envisages periodic review on the basis, inter alia, of technological progress.

(c) Technical cooperation

108. The specific suggestions tabled all refer to technical cooperation.

- The United States paper proposes that parties to its suggested agreement undertake to provide technical assistance in the implementation of the obligations of the agreement to parties that request such assistance under mutually agreed terms. It also suggests that parties with economic assistance programmes would undertake to include in their programmes means to provide direct assistance to contracting parties interested in improving their intellectual property regimes in order to become parties (MTN.GNG/NG11/W/14, page 6).

- The Swiss paper suggests that an element of a possible framework might be preparation of provisions concerning technical assistance (MTN.GNG/NG11/W/15).

- The European Community paper suggests that an appropriate mechanism (or procedure) should be established so that it is possible to accede to requests for technical cooperation that might be forthcoming from certain countries (MTN.GNG/NG11/W/16, page 7).

- The Japanese paper suggests that participants shall contemplate cooperating with developing countries by granting technical assistance and sending trained personnel needed by such countries for adhering to the agreed general rules and disciplines (MTN.GNG/NG11/W/17, page 5).

109. In the discussion, support has been expressed for the provision of technical cooperation. It has been said that any agreement should provide clear obligations and organised multilateral channels in this regard.

ANNEXES

ANNEX I Main Features of Suggestions on Enforcement and Main Comments in the Discussion of Them

ANNEX II Main Features of Suggestions on the Scope and Availability of Intellectual Property Rights and of Comments Made in the Discussion of Them

ANNEX III Main Features of Suggestions on Consultations and Dispute Settlement and Main Comments Made in the Discussion of Them

ANNEX I

MAIN FEATURES OF SUGGESTIONS ON ENFORCEMENT AND MAIN COMMENTS MADE IN THE DISCUSSION OF THEM

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
Objectives	- Effective economic deterrent to international trade in goods and services infringing IPRs through implementation of border measures. - Effective means of preventing and deterring infringement including both trade-based remedies and remedies under intellectual property laws. - Ensure measures to enforce IPRs do not create barriers to legitimate trade.	- Effective protection of all IPRs, in particular by action against trade in and production of goods violating IPRs. - Avoid creating barriers to trade and eliminate existing barriers. - Protection against misuse of rights.	- Effective and adequate enforcement to enable swift action against infringement and relief to IPR owners. - Assurance that measures taken do not become barriers to any legitimate trade.	- Need for a balance between, on the one hand, ensuring effective procedures and remedies and, on the other, safeguarding against the possible misuse of such procedures and remedies as a means of impeding or harrassing legitimate trade. - The Group should only concern itself with ensuring that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. - The Group's mandate does not cover trade in services.
Persons with right to instigate proceedings	- Owners of IPRs	- Natural and legal persons able to take action should be defined. - Participants should be free to decide on whether to provide for automatic ex officio action. - Appropriate proceedings should be opened upon compliant by the IPR holder.		
Type of procedure/ laws that should be available	- Procedures and remedies under both trade-based and intellectual-property laws. - Criminal procedures and remedies should be available in appropriate cases. - Which types of enforcement procedures were most appropriate for which types of IPR should be explored in the detailed negotiations.	- Different mechanisms and procedures according to point of intervention. - Both border and internal enforcement mechanisms. - Judicial or administrative border enforcement mechanisms. - As regards internal procedures, contracting parties should remain free to decide on the type - civil, criminal or administrative.	- Procedures at the domestic and border levels according to type of IPR. - Judicial and/or administrative procedures.	- The appropriateness of trade-based enforcement procedures and remedies has been questioned.

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
Competent body/ bodies to receive complaints, determine infringement and enforce any remedy	- Administrative and judicial enforcement procedures should be available. - Such procedures should include provisions enabling IPR owners to petitition the government to prevent importation of infringing products.	- Border enforcement: - usually intervention by the customs authorities as agent for the enforcement of decisions delivered by other appropriate bodies; - respective rôles of the courts, customs and/or other duly empowered authorities should be carefully defined and could depend on the nature of the right in question and on the infringement; - with respect to action by the customs authorities, account should be taken of the practical possibilities of effective interventions, which vary according to the type of IPR concerned and to the type of customs procedure (import, export, etc.); - furthermore, customs or other duly empowered authorities should have the right to prevent imports (and exports) of counterfeit (or pirated) goods, subject to review or appeal to an appropriate judicial authority; - the infringements in relation to which customs could intervene should be defined. - Internal procedures should provide for reasonable possibilities of referral to judicial authorities in order to enforce an IPR.		- Participants have different points of departure in regard to the possibilities for and constraints on the use of different measures; for example, some countries had customs services and techniques better adapted to meeting a requirement to control the importation of counterfeit goods than others. - Account should be taken of differing legal, procedural and constitutional requirements and practices. - The relative rôles of the courts and of administrative authorities, such as the customs, in receiving applications for action and determining the action to be taken should be carefully examined. - The degree of discretion to be given to administrative authorities and the appropriate enforcement mechanism might vary according to the type of IPR in question, especially in regard to the determination of infringement. - Judicial action would foreclose the possibility of governments becoming involved in disputes between private and perhaps being held liable for failure to act.

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
Requirements to be met by procedures	- Procedures should be timely providing for timely relief. - Parties pursuing judicial or administrative enforcement of IPRs should have prompt, fair, reasonable, and effective means to compel the discovery of facts relating to enforcement of their rights.	- Border enforcement procedures should enable IPR holders to secure enforcement of their rights in an effective and rapid manner, before products have left the control of customs authorities. - Internal mechanisms should also provide for reasonably simple and rapid procedures for determining the infringement of an IPR attached to a product.	- Adequate and effective procedures, providing for swift action.	
Requirements for equitable procedures/ safeguards against obstacles to legitimate trade	- Determinations relating to the infringement of IPRs must be reasoned and made in a fair and open manner which minimizes interference with legitimate trade. - The same criteria for determining whether an enforceable IPR exists and whether it has been infringed should be employed for all products whether imported or locally-produced.	- Border enforcement procedures should provide for: - the generally-accepted principles of due process; - the criteria and procedures used with respect to imported products to determine infringements (in particular, to avoid discrimination against imported products and ensure that such criteria and procedures are no less favourable than those used with respect to national products); - quite short time-limits for the adoption and maintenance of interim protective measures; - deterring the misuse of complaints by deposit of security, awarding of costs, obligation to compensate the dependant for any unwarranted prejudice to his interests, and possibility of appeal.	- The principle of due process of law must be ensured. Those subject to the enforcement procedure must be given prior notification concerning the procedures and ample opportunities for explanation and defence. - Innocent persons suffering damage as a result of preliminary injunctions or temporary orders wrongly based on the assumption that they were infringing IPRs shall be compensated by the petititioner. - Dispositions by the administrative authorities shall be reviewed judicially.	- There should be specific provisions to ensure due process and to safeguard against frivolous requests for customs intervention. - Non-discrimination and national treatment principles should be provided for. - Action by judicial, rather than administrative, authorities would offer greater guarantee of the rights of the defence and of the avoidance of obstacles to legitimate trade. - In regard to possible administrative action by customs at the request of an intellectual property right holder, the complainant should be obliged to put up an appropriate security; and to provide sufficient evidence that he is the owner of the IPR in question, of the validity of that right, and that the goods in question infringe the right and are not, for example, parallel imports. There should be

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
		- Internal procedures should also be balanced, particularly in regard to respecting the rights of the defence. - As a general principle, the negotiations should provide for measures against misuse of rights. For example: - damages in the event of misuse of a procedure; - deposit of security when bringing a complaint.		provision for a time-limit on the period during which the goods can be detained before the infringement finding is verified and confirmed, for right of appeal, and for compensation in the event of a groundless allegation of infringement. Differential treatment of imported compared to domestically-produced goods should be avoided. - In cases where a component part of a product was found to infringe a patent, sanctions against the product as a whole should depend on establishing that the producer of that product had reason to know that the component infringed the patent.
Interim relief	- Trade-based remedies should include appropriate, timely action to prevent the sale or other disposition of allegedly infringing goods pending a final determination of infringement. - Remedies under intellectual property laws should include preliminary injunctions.			
Sanctions and remedies	- Both trade-based remedies and remedies under intellectual property laws should be provided. - Trade-based remedies should provide for goods, upon determination of infringement, to be treated in a way that deprives the party undertaking the trade in infringing goods of the economic benefits of its activity and will effectively deter further transactions in infringing goods.	- Border enforcement mechamisms should provide for: - the prevention of imports (and exports) of counterfeit (or pirated) goods; - reasonable possibilities of seizure and destruction of goods infringing IPRs. - Internal enforcement mechanisms should also provide for:	- Injunction, compensation for damages, etc. - Sufficient sanctions on infringers.	

United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
- Remedies under intellectual property laws should include injunctions, as well as monetary awards adequate to compensate fully owners of IPRs. - In appropriate cases, seizure and destruction should be available under both trade-based and IPR laws. Criminal remedies should also be available in appropriate cases.	- appropriate damages for parties to a dispute concerning enforcement of an IPR; - appropriate deterrent penalties (for example large fines or prison sentences).		

ANNEX II

MAIN FEATURES OF SPECIFIC SUGGESTIONS ON THE SCOPE AND AVAILABILITY OF

INTELLECTUAL PROPERTY RIGHTS AND OF COMMENTS MADE IN THE DISCUSSION OF THEM

	United States (MTN.GNG/NG11/W/14)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
PATENTS			
General		Equal and non-discriminatory treatment in requirements for application, obtaining, maintenance and exercise of a patent.	
Criteria for obtaining protection	Inventions in any technological field that are of a new, useful and unobvious product or process.	Inventions that are novel, unobvious, and industrially applicable, in exchange for prompt disclosure to the public.	
Nature of right	To prevent others from making, using or selling the protected invention.		
Term of protection	Seventeen years from grant; twenty years from application.	At least fifteen years. Measures to ensure expiration not unduly delayed from filing date.	
Compulsory licences/ forfeiture	Compulsory licences generally not to be granted. Not where legitimate reason for not practising an invention, e.g. governmental regulatory review. If granted, should be on a case-by-case basis and subject to agreed narrowly defined circumstances. No discrimination by field of technology. No exclusive compulsory licence. Full compensation to the patentee.	In accordance with present Paris Convention, and taking into account, in balanced manner, interests of all parties concerned. Subject to judicial review. Appropriate compensation of patentee at time of issuance of compulsory licence.	Possibility of granting compulsory licences should be retained, for example in cases where an inventor has come up with a further development of a patented invention. Compensation should be granted on a case-by-case basis; if the patentee has not used the invention, automatic compensation might not be justified.
Exclusion from protection		Inventions contrary to public safety or health, or to the maintenance of public order or morality.	

	United States (MTN.GNG/NG11/W/14)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
TRADE MARKS			
General		Paris Convention rules plus guarantee of equal and non-discriminatory treatment in requirements for application for trade mark registration, and obtaining, maintaining and exercise of trade mark rights.	
Definition	Any word, symbol, design or device, including any distinctively shaped three-dimensional object, except the generic name of the goods and services or words descriptive thereof. Term "trade mark" should include service mark.		Questions of services which do not relate to trade in goods are outside the competence of the Group.
Basis of right/ well-known marks	Use or registration. Well-known marks should be protected.	Well-known marks must be protected if so widely known among consumers that their use by persons who are not registrants of the work on goods, even if dissimilar in nature from the original goods, is liable to cause confusion about their origin.	
Registration procedures	Systems for registration of trade marks and service marks should be provided on equal terms and at reasonable costs. Prompt opportunity to challenge registration should be available to owner of marks identical or confusingly similar to a mark for which registration sought.		
Duration and maintenance	Not less than five years. Renewals indefinitely for similar terms. Trade mark right should lapse if not used for a period of years and no special circumstances to justify non-use. Use of a trade mark should not be encumbered by special requirements.		
Licensing and assignment	Licensing with provision for adequate compensation for the licenser should be permitted. No compulsory licensing. Assignments of trade marks should not be unnecessarily encumbered.		
Exclusions from protection	Trade marks which offend national symbols, policies or susceptibilities.		

	United States (MTN.GNG/NG11/W/14)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
COPYRIGHT			
Coverage of the right	All forms of creative expression, including all traditional works, newer forms of expression (such as computer programmes and data bases) and forms yet to be developed.	Productions in which thoughts and sentiments are expressed in a creative way and which fall within the literary, scientific, artistic or musical domain. Protection of computer programmes should be given appropriate consideration in accordance with their nature, which include not extending the protection to any programming language, rule or algorithm used for making such works.	
Basis of right	Automatic on creation of the work, whether or not work is published and regardless of form or medium in which the work is embodied. Copyright, transfer of rights or enforcement not to be conditional on any formalities.	Automatic on creation of the work.	
Nature of the right	Should include exclusive right to, and to authorize others to, (a) copy or reproduce a work in whole or in part; (b) translate, revise or otherwise adapt or prepare derivative works; (c) distribute copies of the work by sale, rental or otherwise; and (d) publicly communicate (e.g. perform, display, broadcast or transmit the work).	Exclusive rights to the author as stipulated in Berne Convention, such as the right to reproduce the work.	
Term of protection	Minimum term: life of the author plus fifty years or fifty years for anonymous and pseudoanonymous works and works of juridical entities.	In principle, life of the author plus fifty years, in accordance with Berne Convention.	Such a term of protection may be excessive for the design of purely functional articles.
Limitations/exemptions/ compulsory licensing	Must conform to Berne Convention (1971) standards. No compulsory licences where legitimate local needs can be met by voluntary licensing. In case of compulsory licensing, strong safeguard and mechanisms to ensure prompt payment and remittance of royalties consistent with those that would be negotiated on a voluntary basis and to prevent exports.		

	United States (MTN.GNG/NG11/W/14)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
SEMI-CONDUCTOR INTEGRATED CIRCUIT LAYOUT DESIGN			
Coverage	Original layout design of a semi-conductor chip regardless of how that layout design is produced or fixed.	Semi-conductor integrated circuit layouts, other than: - layouts not produced as a result of a creator's intellectual effort; - layouts that are commonplace in the semi-conductor integrated circuit industry at the time of their creation; - layouts that are exclusively dictated by the function of the semi-conductor integrated circuit to which they apply.	
Nature of right	Exclusive rights must include rights to, or authorize others to, reproduce, import, and distribute. A layout design may be reproduced for teaching, analysis or evaluation (reverse engineering). No compulsory licensing.	Exclusive rights: - to manufacture semi-conductor integrated circuits from the protected circuit layout; - to transfer, to lease, to exhibit for the purposes of transferring or leasing, and to import such semi-conductor integrated circuits or products containing the circuit; - to authorize others to perform the above acts. Manufacturing another semi-conductor integrated circuit using the protected layout for the purposes of analysis or evaluation to be permitted.	
Duration of right	At least ten years from date of first commercial exploitation or from date of registration, if required, whichever date is earlier.	At least ten years from date of registration or from first date of commercial exploitation.	
Formalities	If formalities imposed, should be limited to registration and use of a uniform notice of protection. If deposits of identifying material or other material related to the layout design required, applicants for registration should not be compelled to disclose sensitive or confidential information.	Protection may be conditioned on registration of the layout. In the event that commercial exploitation precedes registration, registration must be completed within two years from first date of commercial exploitation.	

	United States (MTN.GNG/NG11/W/14)	Japan (MTN.GNG/NG11/W/17)	Discussion comments
INDUSTRIAL DESIGNS			
General		Paris Convention rules plus guarantee of equal and non-discriminatory treatment in the requirements for application for design registration and the obtention, maintenance and exercise of design rights.	
TRADE SECRETS			
Coverage	Should be broadly defined to include undisclosed valuable business, commercial, technical or other proprietory data as well as technical information.		There are divergences of view about the notion of trade secrets and their appropriate treatment.
Nature of right	Prevention of misappropriation, including unauthorized acquisition, use or disclosure. Trade secrets submitted to governments as a requirement to do business not to be disclosed except in extreme circumstances involving national emergencies or, in the case of public health and safety, provided that such disclosure does not impair actual or potential markets of the submitter or the value of the submitted trade secrets.		

ANNEX III

MAIN FEATURES OF SUGGESTIONS ON CONSULTATIONS AND DISPUTE SETTLEMENT
AND MAIN COMMENTS MADE IN THE DISCUSSION OF THEM

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Comments
Relationship to GATT mechanisms	Consultation and dispute settlement mechanisms should follow the model of such mechanisms in GATT agreements, recognizing that might additional elements may be necessary to address unique features of the subject matters.	Consultation and dispute settlement mechanisms of the General Agreement should be applicable (in particular Articles XXII and XXIII, and the agreements or practices relating to their implementation). Need for special procedures, in view of specific nature of issues to be settled, should be examined.	International mechanism should be established, following the examples of the consultation and dispute settlement procedures under the various Tokyo Round agreements.	Group should draw on the deliberations of the Negotiating Group on Dispute Settlement. Extent to which normal GATT procedures need to be adapted should be considered later in the light of the substantive commitments likely to be adopted.
Expert assistance	Provisions on consultation and dispute settlement should include recourse to technical expert groups and panels.		As the contents of IPRs are complex and diverse, participation of experts may become necessary.	
Criteria for instigation of mechanism	A party that considers that: - there is a violation of the agreement; - any benefit accruing to it under the agreement, directly or indirectly, is being nullified or impaired; or - the attainment of the objective of the agreement is being impeded.			Determination of validity of intellectual property right and infringement thereof, a matter for competent national body.
Remedies	In the event that recommendations are not complied with, the agreement should provide for retaliation including the possibility of withdrawal of equivalent GATT concessions or obligations.	Possibility of suspending or withdrawing certain benefits, where appropriate, in particular the rights stemming from the "new rules and disciplines".		- Linkage with GATT rights would not be acceptable; - Possibility for retaliation of sort suggested by US might reduce incentives to accede to an agreement;

	United States (MTN.GNG/NG11/W/14)	EEC (MTN.GNG/NG11/W/16)	Japan (MTN.GNG/NG11/W/17)	Comments
				- Need for further thought on how damage would be determined and appropriate areas in which benefits might be subject to withdrawal; - What would be relationship to dispute settlement provisions in intellectual property conventions? - What would be the rôle of WIPO in a dispute settlement mechanism? - Should provide for compensation for damage caused by groundless infringement proceedings or threat thereof.
Constraints on unilateral action	The discipline provided by a GATT agreement would be an incentive to all governments to join in order to resolve disputes under a multilateral dispute settlement mechanism.		In the case of disputes among participants over intellectual property rights, a participant must not take any unilateral actions but must settle the dispute in accordance with this mechanism.	Appropriate scope for the use of unilateral measures should be discussed in the Group.