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

SYNOPTIC TABLE SETTING OUT PROPOSALS ON ENFORCEMENT AND CORRESPONDING PROVISIONS OF EXISTING INTERNATIONAL TREATIES

Prepared by the Secretariat

Revision

1. At its meeting of 11-12 May 1989, the Negotiating Group requested the secretariat to prepare synoptic tables setting out in a comparative manner the proposals tabled in the Group on enforcement of trade-related intellectual property rights and corresponding provisions of existing international treaties. The synoptic table contained in this note is a revision of the table earlier issued in response to this request. It takes into account the additional specific proposals circulated by delegations since that document was prepared (by India, Canada and Japan).

2. The various proposals and the corresponding existing international rules on enforcement do not share a common structure. In the attached synoptic table they have been structured in four main sections. Section A, General obligations, concerns proposed obligations that unless otherwise stated would apply to enforcement procedures and remedies generally, whether internal or at the border. Section B, Internal measures, concerns enforcement procedures and remedies that apply to the internal production, sale, distribution, etc. of infringing goods. Such measures would apply to the internal sale, etc. of both domestically-produced and imported goods. In some proposals, it is stated that these "internal" procedures should also be available against the importation and maybe exportation of goods. Section C, Special requirements related to border measures, concerns special provisions which have as their basic purpose providing for action against the importation (possibly exportation and transit) of infringing goods prior to their clearance through the customs authorities. Section D concerns proposed obligations regarding the Acquisition of IPRs.

3. Under each main heading, a number of sub-headings have been employed. It should be noted that these headings and sub-headings do not generally appear in the proposals or in existing international treaties; they have been used solely with a view to assisting the user of the synoptic table and have no standing beyond that. In this revision, two new sub-headings have been included in the first section, concerning national treatment and most-favoured-nation treatment/non-discrimination. This has been done because most participants that have made proposals have addressed these matters specifically in their submissions on enforcement.

4. The synoptic table attached to this note is thus organized as follows:

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5. It should be noted that in some cases the general obligation described in Section A is amplified in Sections B and C. For example, the proposed general objective and obligations concerning the avoidance of barriers to legitimate trade in A(1) and A(10) are dealt with more specifically in some parts of Sections B and C, including B(3) (conditions on provisional measures and indemnification of defendant), B(6) (indemnification of defendant), C(2)(b) (concerning parallel imports), C(4) (requirements for initiation of procedures by IPR owners) and C(5) (conditions on detention of goods by customs), as well as in other parts of Section A, such as A(4) (assurance of equitable procedures), A(10) (national treatment), A(11) (mfn treatment/non-discrimination) and A(12) (right of judicial review).

6. The first column in each table sets out the provisions of existing international treaties corresponding to the

proposals made. The following points about the scope of the information contained in this column should be borne in mind:

- Only the provisions of multilateral treaties have been included. Regional or bilateral treaties have not been referred to.

- The information given refers to the most recent revision of the treaty in question.

- In order to enable the information to be presented synoptically, it has been necessary in many instances to present the existing provisions of international treaties in summary form. References have been included to the articles of the treaties in question where the full text of existing international standards can be found.

7. Information on provisions of existing international treaties relevant to enforcement can be found in the document prepared by the International Bureau of WIPO on the Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property (MTN.GNG/NG11/W/24/Rev.1) under Section (8) of each of the parts dealing with different types of intellectual property right. This document also contains information on model legislations prepared by WIPO, the activities of WIPO and national policies and practices. Information can also be found in the note by the GATT secretariat on Provisions on Enforcement in International Agreements on Intellectual Property Rights (MTN.GNG/NG11/W/18).

8. The other three columns of the synoptic table set out the specific proposals by the United States (MTN.GNG/NG11/W/14/Rev.1), the European Communities (MTN.GNG/NG11/W/31) and Japan (MTN.GNG/NG11/W/17 and 43), India (MTN.GNG/NG11/W/40) and Canada (MTN.GNG/NG11/W/42). To avoid confusion, the language in these proposals has been standardized so that "signatories" refer to signatory governments of the proposed agreement and "parties" refer to private parties to an enforcement proceeding. In regard to Section D, Acquisition of IPRs, it should be noted that certain proposals corresponding to those of the European Communities reflected in this section have been presented by the United States and Japan in connection with standards for specific intellectual property rights and are reflected in the synoptic tables in document MTN.GNG/NG11/W/32/Rev.1. Canada has also indicated that, in its proposals, this subject will be dealt with as a matter of standards.

9. In regard to the Indian proposal, it should be noted that this is limited to internal enforcement of intellectual property rights. The Indian proposals on enforcement at the border have been presented under the agenda item on trade in counterfeit goods, in document MTN.GNG/NG11/W41. The Canadian proposal contains two main parts: a set of basic principles; and an annex containing Canada's more detailed views on the specific issues covered in the synoptic table, submitted inter alia to assist the Negotiating Group in addressing the level of detail appropriate for enforcement provisions. The proposed basic principles are reproduced without square brackets, whereas the more detailed views are those within square brackets.

10. In addition to the three proposals listed, it is recalled that a number of other suggestions, not amenable to presentation in the synoptic table, have been made relevant to enforcement, including those presented in writing by the Nordic countries (MTN.GNG/NG11/W/22), Switzerland (MTN.GNG/NG11/W/25), Thailand (MTN.GNG/NG11/W/27) and Brazil (MTN.GNG/NG11/W/30). It should also be noted that the synoptic table does not reflect suggestions made under the agenda item on trade in counterfeit goods, for example those contained in documents MTN.GNG/NG11/W/9 (Draft Agreement to Discourage the Importation of Counterfeit Goods), MTN.GNG/NG11/W/11 (by Brazil)[1], MTN.GNG/NG11/W/28 (by Mexico), MTN.GNG/NG11/W/41 (by India).

11. The Swiss proposal, like those of the United States, European Communities and Japan, suggests specific international obligations on enforcement that should result from the work of the Group. It will be recalled that, in connection with enforcement, the commitments proposed by Switzerland are as follows:

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[1] It will, however, be noted that the content of the Brazilian suggestion, which is that countries sign the WIPO Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, is reflected in column one of the synoptic table under "corresponding provisions of existing international treaties".

- A recognition that excessive, insufficient, or lack of protection as well as discriminatory treatment of intellectual property rights by contracting parties may cause nullification and impairment of advantages under the GATT. Such impairment and nullification may be caused both by substantive and procedural deficiencies.

- A commitment to avoid trade distortions caused either by excessive, insufficient, or lack of protection of intellectual property rights, inter alia of patents, trademarks, industrial designs, geographical indications, integrated circuits, copyright, and neighbouring rights; and a commitment to prevent counterfeiting and piracy.

- An amendment to Article XX (d) of the GATT as follows:

  "(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of intellectual property rights, and the prevention of deceptive practices".

- A commitment to provide full and prompt application and implementation of domestic laws and regulations related to the protection of intellectual property rights, including to maintain or institute judicial or administrative tribunals or non-discriminatory procedures for the prompt review of trade distorting practices related to such laws and regulations.

- The elaboration of indicative lists, indicating trade distorting effects caused by either excessive, insufficient or lack of protection of intellectual property rights, including practices and procedural deficiences. These would establish prima facie nullification and impairment of advantages and benefits accruing from the General Agreement.

The Swiss proposal, like those of some other participants, also contains a national treatment and mfn/non-discrimination obligation.

12. The Nordic paper stresses the need for particular attention to principles such as non-discrimination and national treatment. It also says that different types of enforcement mechanisms (border measures, administrative arrangements and court procedures) are likely to have different applicability in respect of the various IPRs, in particular that the determination of infringement may require somewhat different procedures and provisions, depending on the IPR in question. The Thai statement urges that the following elements should be incorporated into the enforcement mechanism contemplated:

- The enforcement procedures should lead to further liberalisation. They should not themselves become barriers or means of harassment of legitimate trade or lead to excessive protection that obstructs technology transfer.

- The procedures should reflect the genuine intention and obligations of individual contracting parties to provide due process of law. However, this does not imply that harmonisation of national laws is required.

- The procedures should afford the maximum degree of transparency.

The Brazilian paper suggests that the Group should pay due attention to problems arising from the excessive and rigid enforcement of IPRs, including to cases where enforcement of IPRs becomes a barrier or harassment to legitimate trade.

13. Many participants have, of course, expressed their views orally at meetings of the Group since the April 1989 TNC decision. These views are recorded in documents MTN.GNG/NG11/12, in particular paragraphs 10-22,

and MTN.GNG/NG11/13, in particular paragraphs 16-32. The views expressed at the meeting of 11-13 September will be recorded in MTN.GNG/NG11/15 which will be issued shortly.

14. The following are the full titles of the international treaties referred to in column one of the table:

- Paris Convention for the Protection of Industrial Property (WIPO) (1883, revised 1900, 1911, 1925, 1934, 1958 and 1967, and amended 1979);

- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (WIPO) (1891, revised 1911, 1925, 1934 and 1958; Additional Act 1967);

- Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (WIPO) (1958, revised 1967, and amended 1979);

- Treaty on Intellectual Property in respect of Integrated Circuits (WIPO)(1989);[2].

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[2] Not yet in force.

- Berne Convention for the Protection of Literary and Artistic Works (WIPO) (1886, completed 1896, revised 1908, completed 1914, revised 1928, 1948, 1967 and 1971, and amended 1979);

- Universal Copyright Convention (Unesco) (1952, revised 1971);

- Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (WIPO, in co-operation with ILO and Unesco for matters relating to their respective fields of competence) (1971);

- Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Unesco and WIPO) (1974).

A. GENERAL OBLIGATIONS

(1) OBJECTIVES

Corresponding Provisions of Existing International Treaties	United States (MTN.GNG/NG11/W/14/Rev.1)	European Communities (MTN.GNG/NG11/W/31)	Japan (MTN.GNG/NG11/W/17 and 43)
Article 10ter of the Paris Convention requires member States to assure to nationals of other member States appropriate legal remedies effectively to repress all the acts referred to in Article 9 (concerning trademarks and trade names), Article 10 (concerning false indications of source) and Article 10bis (concerning unfair competition). Under the Berne Convention any party to the Convention undertakes to adopt, in accordance with its constitution, the measuresnecessary to ensure the application of the Convention which defines, in detail the works to be protected, the rights to be granted, etc. At the time when a country deposits its instrument of ratification or accession, it must be in a position under its domestic law to give effect to the provisions of the Convention (Article 36). Under the Universal Copyright Convention,Contracting States undertake to provide for the effective (as well as adequate) protection of the rights of authors and of other copyright proprietors (Article I). The Phonograms Convention requires Contracting States to protect producers of phonograms against the making of duplicates without the consent of the producer and against the importation of such duplicates for the purpose of distribution to the public, and against the distribution of such duplicates to the public. The means by which the Convention is implemented are a matter for the domestic law, but they must include one or more of the following: protection by means of the grant of a copyright or	- Effective economic deterrent to international trade in goods and services infringing IPRs through implementation of internal and border measures that deprive entities trading in infringing goods and services of the benefits of such activity. - Effective means of preventing and deterring infringement of IPRs. - Ensure that measures to enforce IPRs minimize interference with legitimate trade. India (MTN.GNG/NG11/W/40) - There should be provision of simple, effective and adequate internal enforcement procedures to enable expeditious action against infringement and to provide relief to the owners of IPRs.	- Provision of effective procedures to protect IPRs against any act of infringement. - Application of these procedures in such a manner as to avoid the creation of obstacles to legitimate trade. Canada (MTN.GNG/NG11/W/42) - Procedures to enforce IPRs should be effective but should not create unnecessary obstacles to legitimate trade. [Signatories should establish measures and procedures to ensure prompt, effective and non-discriminatory enforcement of IPRs covered by this agreement. Such procedures should minimize interference with legitimate trade.]	- Signatories shall establish procedures for effective and appropriate enforcement of IPRs at domestic and border levels by means of civil law, criminal law, administrative law or a combination thereof. - Enforcement measures shall be ensured by national laws in so much as they meet the requirements of the general rules and disciplines which will be the outcome of this negotiation.- In establishing and implementing enforcement measures, considerations shall be paid to the following points: - differences among various types of IPRs; - need to ensure that measures taken to protect IPRs do not become barriers to legitimate trade.

other specific right; protection by means of the law relating to unfair competition, protection by means of penal sanctions (Articles 2 and 3).

(1) OBJECTIVES (contd.)

Corresponding Provisions of Existing International Treaties

The Brussels Convention (Satellites) requires that the measures undertaken by member States to prevent the distribution on or from their territory of programme-carrying signals be adequate (Article 2(1)).

The Treaty on Intellectual Property in respect of Integrated Circuits requires each Contracting Party to secure adequate measures to ensure the prevention of acts considered unlawful under the provisions of the Treaty and appropriate legal remedies where such acts have been committed (Article 3).

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Administrative, judicial or both types of procedures shall be available to enforce IPRs both internally and at the border.

India
(MTN.GNG/NG11/W/40)
- See A(13) below and introduction, paragraph 9.

European Communities
(MTN.GNG/NG11/W/31)
- Signatories shall protect IPRs by means of civil law, criminal law, administrative law or a combination thereof.

Canada
(MTN.GNG/NG11/W/42)
- See A(13) below.
[Signatories should protect IPRs by means of civil procedures being judicial or administrative or a combination thereof. In appropriate circumstances, criminal procedures should also apply.]

Japan
(MTN.GNG/NG11/W/17 and 43) - See A(1) above.

(2) TYPES OF PROCEDURES TO BE PROVIDED

Corresponding Provisions of ExisitingInternational Treaties

(3) PROCEDURES, GENERAL REQUIREMENTS

Corresponding Provisions of Exisiting International Treaties	United States (MTN.GNG/NG11/W/14/Rev.1)	European Communities (MTN.GNG/NG11/W/31)	Japan (MTN.GNG/NG11/W/17 and 43)
See A(1) above	- Signatories shall designate a competent body and devote sufficient resources to ensure the prompt and effective enforcement of IPRs. India (MTN.GNG/NG11/W/40) - It is only through their normal administrative and judicial systems that governments, particularly of developing countries, are in a position to provide for enforcement of IPRs. It shall not be expected of them to allocate additional resources establishing separate machinery for the enforcement of IPRs. See also A(1) above.	- Procedures concerning the enforcement of IPRs shall not be unnecessarily complicated, costly or time consuming, nor shall they be subject to unreasonable time-limits. - Procedures shall provide adequate opportunities for right holders, including foreign nationals, to make use of them. The term "right holder" means the right holder himself, any other person authorized by him or persons having legal standing under national law to assert such rights. Canada (MTN.GNG/NG11/W/42) See A(1) above.	- Procedures shall not be unnecessarily complicated, costly, or time consuming, nor shall they be subject to unreasonable time-limits.

(4) ASSURANCE OF EQUITABLE PROCEDURES

Corresponding Provisions of Existing International Treaties	United States MTN.GNG/NG11/W/14/Rev.1)	European Communities (MTN.GNG/NG11/W/31)	Japan (MTN.GNG/NG11/W/17 and 43)
information, documents, records and other	- Procedures for the enforcement of IPRs, whether they be administrative or judicial, civil or criminal must ensure due process of law including: (i) the right to receive written notice prior to commencement of proceedings which contains information sufficient to determine the basis of the dispute; (ii) application of the same substantive standards for determining whether an enforceable IPR exists and whether it has been infringed with respect to all products whether imported or locally produced; (iii) prompt, fair, reasonable, and effective means to gain access to and present to relevant judicial or administrative authorities statements of witnesses and Canadaarticles of evidence for the enforcement of IPRs; (iv) determinations in writing relating to the infringement of IPRs which must be reasoned and made in a fair and open manner. India (MTN.GNG/NG11/W/40) - The principles of natural justice and fair play shall be observed in internal enforcement procedure. There should be prior notice to the concerned parties and adequate opportunities for defence.	- Decisions on the merits of a case shall, as a general rule, be in writing and reasoned. They shall be made without undue delay in a fair and open manner. - All parties to civil judicial procedures shall be duly entitled to substantiate their claims and to present the evidence relevant for the establishment of the facts and the determination of the validity and infringement of the IPRs concerned, as well as to exercise their rights of defence. Decisions shall only be based on such facts in respect of which parties were offered the opportunity to be heard. Administrative procedures shall conform to equivalent procedures, inter alia in order to ensure effective equality of opportunities for imported products. Canada (continued) (MTN.GNG/NG11/W/42) - Procedures for enforcement should be fair and equitable to the affected parties and transparent. [Procedures for the enforcement of IPRs should be fair, equitable and transparent. Such procedures should meet the following criteria. Except for ex parte proceedings, parties to a dispute should have a right to receive written notice in sufficient time prior to a hearing on the merits to enable a defence or response to be prepared. Such notice should contain sufficient information to determine the basis of the dispute. Parties to proceedings should be entitled to substantiate their claims and to present evidence relevant for the establishment of the (Continued in next column.)	- A person against whom procedures have been initiated shall be given ample opportunities for defense. A person who is to be subject to substantive argument on the merits of a case shall be given notice before the argument.- Final judicial decision on the merits of a case shall be made in a fair and open manner. They shall be in writing and reasoned.- Final decisions by courts in civil procedures shall be based only on such facts in respect of which parties were offered the opportunity to be heard. Administrative procedures shall be subject to an equivalent requirement. facts and the determination of the validity and infringement of the IPRs concerned either orally or in writing as appropriate, as well as to exercise their rights of defence. Decisions should be based only on such facts in respect of which the parties were offered an opportunity to present their positions. Hearings should be transparent and, unless there are reasonable grounds to the contrary, should be open to the public. Procedures should not be subject to unreasonable time limits or unwarranted delays.Decisions should be in writing and should normally be accompanied by written reasons for decision. Decisions should be made without undue delay and in a fair and open manner. Decisions should be published or otherwise available to the public.]

(5) RIGHTS OF REPRESENTATION/PRESENTATION OF EVIDENCE

Corresponding Provisions of Existing International Treaties	United States (MTN.GNG/NG11/W/14/Rev.1)	European Communities (MTN.GNG/NG11/W/31)	Japan (MTN.GNG/NG11/W/17 and 43)
India (MTN.GNG/NG11/W/40)	- Procedures shall not impose overly		- All parties to civil judicial procedures

burdensome requirements concerning personal appearances by the parties, but shall, to the greatest extent possible, permit the parties to appear through representatives and provide a fair and reasonable opportunity for all parties to present evidence, in writing or orally, or both, for consideration by the authorities. Subject to procedures and conditions to ensure reliability and fairness, such as cross-examination and disclosure of adverse information, signatories shall facilitate the acceptance of evidence, including expert testimony, and technical or test data, in order to assist in expediting and reducing costs of participating in enforcement procedures.

Canada
(MTN.GNG/NG11/W/42)

- As indicated in (4) above, all parties to civil judicial procedures shall be duly entitled to substantiate their claims and to present the evidence relevant for the establishment of the validity and infringement of the IPRs concerned, as well as to exercise their rights of defence. Administrative procedures shall conform to equivalent procedures, inter alia in order to ensure equality of opportunities for imported products.

[Parties may be represented by independent counsel where such representation is customary in the relevant proceedings. Procedures should not impose overly burdensome requirements concerning personal appearances by parties. Subject to procedures and conditions to ensure reliability and fairness, such as cross-examination and disclosure of adverse information, contracting parties should facilitate the acceptance of evidence, including expert testimony, and technical or test data, in order to assist in expediting and reducing costs of participating in enforcement procedures.]

shall be entitled to present relevant evidence. Administrative procedures shall be subject to an equivalent principle.

(6) ACCESS TO INFORMATION

Corresponding Provisions of Existing International Treaties

(7) TREATMENT OF CONFIDENTIAL INFORMATION

Corresponding Provisions of Existing International Treaties

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Relevant authorities shall provide opportunities for the IPR owner, other parties to the proceeding and the governments of the affected countries, to see relevant, non-confidential information that is used by the authorities in a procedure relating to an enforcement action, and to prepare presentations based on this information.

India
(MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Signatories shall provide a means to effectively identify and protect confidential information. Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to

European Communities
(MTN.GNG/NG11/W/31)
- As indicated in (4) above, in civil judicial procedures decisions shall only be based on such facts in respect of which parties were offered the opportunity to be heard. Administrative procedures shall conform to equivalent procedures, inter alia in order to ensure equality of opportunities for imported products.

Canada
(MTN.GNG/NG11/W/42)
[Procedures should provide for the disclosure of relevant information in the possession of the adverse party prior to a hearing on the merits.]

European Communities
(MTN.GNG/NG11/W/31)

Canada

Japan
(MTN.GNG/NG11/W/17 and 43)- As indicated in (4) above, final decision in civil judicial procedures shall be based only on such facts in respect of which parties were offered the opportunity to be heard. Administrative procedures shall be subject to an equivalent requirement.
Japan
(MTN.GNG/NG11/W/17 and 43)

a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information or which is provided on a confidential basis for a procedure relating to an enforcement action) shall, upon cause shown, be treated as such by the authorities. Such information shall not be disclosed without permission of the party submitting it except pursuant to a protective order sufficient to safeguard the interest of such party.

India
(MTN.GNG/NG11/W/40)

(MTN.GNG/NG11/W/42)
[Signatories should provide a means to effectively identify and protect confidential information provided by any of the parties to the dispute or by others required to give evidence.]

(8) FACILITATION OF THE OBTAINING OF EVIDENCE

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Signatories shall facilitate the gathering of evidence needed for an enforcement or related action in the territory of another signatory. Procedures may be carried out in other countries to obtain statements of witnesses and information, documents, records, and other articles of evidence relating to an enforcement action, including the assessment of remedies. Signatories shall facilitate the taking of such statement and production of such materials in their territories by establishing adequate, timely and efficient procedures. Such procedures shall permit such evidence to be taken in any manner not prohibited by national law. A signatory may require prior notification of a competent authority before a statement is taken or materials produced.
- Signatories shall make available ex parte proceecings to preserve evidence and take other actions urgently required provided that the parties shall be provided subsequent notice of the action and the right to participate in an administrative or judicial procedure providing due process of law.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Signatories shall provide for judicial procedures for the adoption, upon request by a right holder, of prompt and effective provisional measures to preserve the relevant evidence with regard to the alleged infringement.
- Unless this would be out of proportion to the importance of the infringement, the right holder shall be entitled, in civil judicial procedures, to be informed by the infringer, upon request, of the identity of the persons involved in the production and the channels of distribution of the infringing goods or services.

[Signatories should provide for ex parte judicial procedures to preserve evidence. Applicants may be required to post security or to provide equivalent assurance before obtaining such an order. Parties adversely affected should promptly be given notice of the subsequent proceedings for which the evidence was obtained.
Generally, such measures should include the following provisions:
Unless there are reasonable grounds to the contrary, the right holder should be entitled in civil proceedings to be informed by the infringer on request, of the identity of the persons involved in

Japan
(MTN.GNG/NG11/W/17 and 43) -
Signatories shall provide for appropriate civil judicial measures to preserve relevant evidence. Notwithstanding the general principles concerning procedure, such measures may, in appropriate cases, be taken without prior notice to an adversary. Administrative procedures shall be subject to equivalent principles.

the production and the channels of distribution of infringing goods or services. A court or tribunal may order that this be treated as confidential information by the party obtaining it but it may be used in proceedings against other infringers.]

(9) CONSEQUENCES OF FAILURE TO PROVIDE INFORMATION

Corresponding Provisions of ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- In cases in which a party to the proceeding or a government refuses to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the procedure relating to an enforcement action, preliminary and final determinations, affirmative or negative, may be made on the basis of evidence presented by the opposing party.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)

[Where a party to a proceeding refuses to provide necessary information within a reasonable period or fails to take the necessary steps required to further the proceedings, preliminary and final determinations, affirmative or negative, may be made on the basis of evidence previously presented.]

Japan
(MTN.GNG/NG11/W/17 and 43)

(10) AVOIDANCE OF BARRIERS TO LEGITIMATE TRADE

Corresponding Provisions of ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Safeguards against arbitrary action or abuse of procedures must be included.
- Signatories shall ensure that procedures to enforce IPRs minimize interference with legitimate trade.
- Parties shall make remedies available to provide indemnification in appropriate cases of persons wrongfully enjoined or restrained.

Canada
(MTN.GNG/NG11/W/42)
- See B(3)(d) below.

European Communities
(MTN.GNG/NG11/W/31)
- Procedures and remedies applied by a signatory for the purpose of enforcing IPRs shall not constitute a means of arbitrary or unjustifiable discrimination between nationals of other signatories, or a disguised restriction to international trade.
- Signatories shall provide for safeguards against the abuse of enforcement procedures and for compensation of the injury suffered by a party which has been subject to such abuse.

[Enforcement procedures should be implemented in a manner to minimize interference with legitimate trade. In particular, any alleged infringement or other violation of an IPR relating to the importation of goods or services originating in the territory of another party should be adjudicated through proceedings no less favourable than those applicable to goods or services in the domestic territory. Complainants in actions where

Japan
(MTN.GNG/NG11/W/17 and 43) - Parties shall be entitled to claim compensation of the damage caused by an abuse of enforcement procedures.- Signatories may provide for that where a government official, while discharging an official duty of the State, causes damage in the course of enforcement procedures related to the IPR protection, the State may be held liable for the compensation.

imported goods are concerned should not have the option to initiate proceedings in judicial or administrative forums if comparable options do not exist for complainants in disputes involving domestically produced goods and services.]
- See also A(11) and A(12) below.

(11) NATIONAL TREATMENT

Corresponding Provisions of ExistingInternational Treaties

The Paris Convention obliges each of its member States to grant to nationals of the other member States, as well as nationals of non-member States who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the other member States, the same legal remedies for infringement of industrial property rights as those it grants to its own nationals, possibly subject to the provisions of national law relating to judicial and administrative procedure and to jurisdiction (Articles 2 and 3).

Provisions requiring contracting parties to grant national treatment to nationals of other contracting parties (and certain other persons) are also contained in the Berne Convention (Articles 3 to 5), Universal Copyright Convention (Article II), Rome Convention (Articles 2, 4, 5 and 6) and Treaty on Intellectual Property in Respect of Integrated Circuits (Article 5). The latter Treaty allows for an exception as far as any obligations to appoint an agent or to designate an address for service are concerned or as far as the special rules applicable to foreigners in court proceedings are concerned.

The General Agreement requires that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of

United States
(MTN.GNG/NG11/W/14/Rev.1)
- The complex question of national treatment will need to be addressed.

India
(MTN.GNG/NG11/W/40) - The procedures for internal enforcement shall provide for national treatment to foreign owners of IPRs.

European Communities
(MTN.GNG/NG11/W/31)
- Without prejudice to the provisions on national treatment provided for in the Paris Convention and the revised Berne Convention, the procedures shall be formulated and applied so as to provide nationals of other signatories with respect to the protection of IPRs the advantages that the respective laws now grant, or may hereafter grant, to nationals, without prejudice to the rights specially provided for by this agreement. Nationals of other countries who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the signatories shall be treated in the same manner as nationals of the signatories. The provisions of the national laws relating to jurisdiction, the language of the proceedings, the designation of an address for service or the appointment of an agent, or to the provision of securities are reserved, provided that they are not applied as a means of arbitrary discrimination between nationals of the signatory in question and those of other signatories.
- The criteria applied in reaching a decision whether an IPR is infringed shall not discriminate between domestic goods and services, and goods and services which are imported or destined for importation. The procedures and remedies applied shall accord treatment to imported goods and services no less favourable than that accorded to domestically produced goods and services. Article XX(d) of the GATT shall

Japan
(MTN.GNG/NG11/W/17 and 43)- It is important that the national treatment principle be applied also to the enforcement of IPRs.

national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use (Article III:4). However, a general exception allows any contracting party to adopt or enforce measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the General Agreement, including those related to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices, subject to the requirements that such measures are not supplied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade (Article XX(d)).

(12) MOST-FAVOURED-NATION TREATMENT/NON-DISCRIMINATION

Corresponding Provisions of ExistingInternational Treaties

The General Agreement requires that with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties (Article I:1). However, a general exception allows any contracting party to adopt or enforce measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the General Agreement, including those related to the protection of patents, trademarks and copyrights, and the prevention of deceptive

United States

(MTN.GNG/NG11/W/14/Rev.1)
- This complex question will need to be addressed.

India

(MTN.GNG/NG11/W/40)

apply accordingly.

Canada

(MTN.GNG/NG11/W/42)
- Procedures and remedies for enforcing IPRs provided to persons, goods and services of all other parties should be no less favourable than those provided to its own persons, goods or services, i.e. national treatment.
[Signatories should provide procedures and remedies for enforcing IPRs to persons, goods or services of the other signatories, no less favourable than those accorded to its own persons, goods or services.]

European Communities

(MTN.GNG/NG11/W/31)
- Procedures and remedies applied by a signatory for the purpose of enforcing intellectual property rights shall not constitute a means of arbitrary or unjustifiable discrimination between nationals of other signatories, or a disguised restriction to international trade.

Canada

(MTN.GNG/NG11/W/42)- Procedures and remedies for enforcing IPRs provided to persons, goods or services of one signatory to a TRIPS agreement, should be equally applicable to the persons, goods or services of any other signatory to the agreement, i.e. unconditional mfn/non-discriminatory treatment.[Signatories should provide procedures and remedies for enforcing IPRs to persons, goods or services of all other parties, equally applicable to the persons, goods or services of any party.]

Japan

(MTN.GNG/NG11/W/17 and 43)- It is important that this principle be applied also to the enforcement of IPRs.

practices, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade (Article XX(d)).

(13) REMEDIES AND SANCTIONS

Corresponding Provisions of ExistingInternational Treaties
See A(1) above.
India(MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Enforcement measures and sanctions must effectively deter infringing activity. Thus, signatories should undertake obligations to provide procedures to enforce rights against entities engaged in infringing activities and to provide appropriate remedies. In appropriate cases, this must include criminal sanctions.
- Sanctions and remedies shall be available against the producer, seller, distributor and in appropriate cases the user of an infringing good or service. Remedies against signatories, however, may be limited to payment of compensation to the owner of the IPR.

Canada
(MTN.GNG/NG11/W/42)
- Relief resulting from internal procedures shall include administrative and civil remedies and, in appropriate cases, penalties under criminal law.

European Communities
(MTN.GNG/NG11/W/31)
- Signatories shall provide for remedies which effectively stop or prevent the infringement of IPRs, entitle the right holder to claim compensation of the injury caused by the infringement, and which consist of other measures which, while corresponding to the importance of the infringement in question, constitute an effective deterrent to further infringements.

- There should be judicial and/or administrative civil remedies which effectively stop or prevent the infringement of IPRs, and entitle the rights holders to claim compensation for the injury caused by the infringement. Criminal sanctions and penalties for trademark counterfeiting and copyright piracy if committed wilfully and for commercial purposes also need to be provided for. [Signatories should provide for remedies whicheffectively stop or prevent the infringement of IPRs, and entitle the right holder to compensation for the injury caused by the infringement. In appropriate cases, damages should be available to deprive the infringer of any profit and to deter further infringement. Signatories should provide criminal remedies at least for trademark counterfeiting and copyright piracy if done in a wilful and commercial manner.]

Japan
(MTN.GNG/NG11/W/17 and 43)- See B(4), B(5) and C(8) below.

(14) RIGHT OF JUDICIAL REVIEW

Corresponding Provisions of ExistingInternational Treaties
India(MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Signatories shall provide the right of judicial review of initial

European Communities
(MTN.GNG/NG11/W/31)
- Final administrative decisions on

Japan
(MTN.GNG/NG11/W/17 and 43)- Final administrative disposition shall be subject to the right of judicial

judicial decisions on the merits of a case and final administrative decisions on the merits of a case in disputes arising in connection with the obtaining, maintaining or enforcing of IPRs.

Canada

(MTN.GNG/NG11/W/42)
- Internal enforcement procedures shall provide for appeal against the initial judicial order and for judicial review of administrative orders.

the merits of a case concerning the protection of an IPR shall be subject to the right of appeal in a court of law.

[Signatories should provide the right of appeal to a court of law of initial judicial decisions on the merits of a case and final administrative decisions on the merits of a case. The court of appeal should be entitled to consider and review all legal issues raised before or considered by the previous court or administrative tribunal and should also be entitled to review issues of procedural fairness.]

review.

B. INTERNAL MEASURES

(1) COVERAGE

Corresponding Provisions of ExistingInternational Treaties

The enforcement provisions of the Paris Convention concern goods unlawfully bearing a trademark or trade name or in connection with which a false indication of the source of the goods or the identity of the producer, manufacturer or merchant has been directly or indirectly used. Remedies are provided for applying within the country as well as on importation. Goods in transit are specifically excluded from any obligation to effect seizure (Articles 9, 10 and 10ter). Acts of unfair competition are also covered byenforcement provisions of the Paris Convention(Articles 10bis and 10ter).

The Madrid Areement (Indications of Source) concerns goods having a false or deceptive indication by which one of the member States, or a place situated therein, isdirectly or indirectly indicated as being the country or place of origin. Remedies are provided for applying within the country as well as on importation; goods in transit are excluded from any obligation to effect seizure(Articles 1 and 2).

The Berne Convention

United States

(MTN.GNG/NG11/W/14/Rev.1)
- Civil procedures to enforce IPRs should apply at the point of production and commercial transactions, e.g., point of sale, offer for sale, lease, distribution, etc. as well as at the border
- Criminal procedures shall be available for at least trademark counterfeiting and copyright infringement which are wilful and commercial.

India

(MTN.GNG/NG11/W/40)
- IPR infringements generally.
- Enforcement internally.

European Communities

(MTN.GNG/NG11/W/31)
- Signatories shall provide for civil judicial procedures concerning the enforcement of any IPR internally and with regard to imports and exports.
- Signatories may provide for administrative procedures concerning the enforcement of IPRs.
- Signatories shall provide for criminal procedures and penalties to be applied in cases of wilful infringements of trademarks and copyright on a commercial scale. Signatories may provide for criminal procedures and penalties to be applied in cases of infringement of any other IPR, in particular where it is committed wilfully and on a commercial scale.

Canada

(MTN.GNG/NG11/W/42)
- See A(1) and A(13) above.

Japan

(MTN.GNG/NG11/W/17 and 43)- Infringements of patents, trademarks, designs, copyright, neighbouring rights and semi-conductor integrated circuits layout rights. - Acts of infringement of these rights shall constitute criminal acts.- Civil judicial procedures shall be provided for the internal enforcement of rights and with regard to imports.- Signatories may establish administrative procedures for the enforcement of IPRs.

provisions on enforcement concern the seizure of infringing copies of protected works. The remedy provided for applies in the country, in respect of infringing copies both produced in the country and imported (including fromcountries where the work is not protected or has ceased to be protected) (Article 16). Musical recordings made under a compulsory licence granted by a member State are liable to seizure if imported without permission into another member State (Article 13(3)).

(2) STANDING TO INITIATE PROCEDURES

Corresponding Provisions of ExistingInternational Treaties

Article 9 of the Paris Convention states that seizure of goods unlawfully bearing a trademark or trade name shall take place at the request of the public prosecutor, or any other competent authority, or any interested party, whether a natural person or a legal entity, in conformity with the domestic legislation of each country. Article 10, which applies the provisions of Article 9 to false indications of source, states that any producer, manufacturer, or merchant, whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated,or in the country falsely indicated, or in thecountry where the false indication of source is used, shall in any case be deemed an interested party. Article 10ter obliges member States to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the

United States

(MTN.GNG/NG11/W/14/Rev.1)

- Procedures must be available to owners of IPRs and other persons authorized by the owner and having legal standing to determine the validity and enforceability of IPRs for the assertion of such rights against any legal or juridical person or governmental entity.
- Governments should initiate procedures ex officio where effective enforcement requires such action.

India

(MTN.GNG/NG11/W/40)

- Seeking recourse to the remedies that may be available under the national law is primarily the responsibility of the owner of IPRs. It is for him to set in motion the enforcement machinery and this responsibility cannot be shifted to the government.

European Communities

(MTN.GNG/NG11/W/31)

- Right holders. The term "right holder" means the right holder himself, any other person authorized by him or persons having legal standing under national law to assert such rights.

Canada

(MTN.GNG/NG11/W/42)

[Procedures should be available to owners of IPRs and to any other person duly authorized by such owner to exercise and enforce such rights.]

Japan

(MTN.GNG/NG11/W/17 and 43)- IPR holders.

administrative authorities, with a view to the repression of the acts referred to in Articles 9 and 10, and also acts of unfair competition referred to in Article 10bis, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

The Berne Convention establishes a presumption of authorship; the author must, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, if his name appears on the work in a usual manner; film producers whose names appear on films enjoy a similar presumption (Article 15).

Under the Lisbon Agreement, legal action required for ensuring the protection of appellations of origin may be taken in each of the member States under the provisions of the national legislation either at the instance of the competent Office or at the request of the public prosecutor, or by any interested party, whether a natural person or a legal entity, whether public or private (Article 8).

For Madrid Agreement (Indications of Source), see Section C(3) below.

(3) PROVISIONAL MEASURES

(a) NATURE AND PURPOSE

Corresponding Provisions of ExistingInternational Treaties

For Madrid Agreement (Indications of Source), see Section C below.

India (MTN.GNG/NG11/W/40)

United States

(MTN.GNG/NG11/W/14/Rev.1)

- Signatories must provide interim relief in the form of preliminary injunctions and other appropriate and prompt procedures to prevent the sale or other disposition of allegedly infringing goods pending a final determination on infringement.
- Signatories shall make available ex parte proceedings to preserve evidence and take other actions urgently required.

Canada

(MTN.GNG/NG11/W/42)

European Communities

(MTN.GNG/NG11/W/31)

- Signatories shall provide for judicial procedures for the adoption, upon request by a right holder, of prompt and effective provisional measures:

to prevent an infringement of any IPR from occurring or being continued, and in particular to prevent the goods from entering commercial channels, including their importation and exportation, and

Japan

(MTN.GNG/NG11/W/17 and 43)- Participants shall provide for procedures for provisional measures with respect to the civil judicial procedures or administrative procedures proposed; such measures shall aim at ensuring future enforcement of or at excluding imminent danger of the infringement of IPRs.- Provisional measures shall be implemented through judicial or administrative procedures.- Provisional measures shall be adopted upon request by a right

- Provisional remedies by way of injunctions should be provided.

to preserve the relevant evidence with regard to the alleged infringement.
- Where appropriate, provisional measures may be adopted inaudita altera parte.
[Signatories should provide prompt and effective provisional measures to prevent or stop an infringement of an IPR. Where appropriate, these measures may be taken ex parte.]

holder. Notwithstanding the general principles concerning procedure, such measures may, in appropriate cases, be adopted without prior notice to the adversary.- See also A(8) above.

(3) PROVISIONAL MEASURES (contd.)

(b) GENERAL CONDITIONS

Corresponding Provisions of ExistingInternational Treaties For
Madrid Agreement (Indications of Source), see Section C below.
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- In order to prevent abuse of interim procedures, signatories may require a rights owner to provide security up to an amount sufficient to hold the authorities and importer harmless from loss or damage resulting from detention where the goods are subsequently determined not to be infringing. However, such securities shall not unreasonably deter recourse to such procedures.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- The applicant shall be required either to provide any reasonably available evidence so as to permit the authority to establish with a sufficient degree of certainty that he is the right holder and that his right is being infringed or that such infringement is imminent, or to provide security sufficient to prevent abuse.
- Provisional measures shall be revoked or lapse where, notwithstanding a request by the defendant, proceedings leading to a decision on the merits of the case are not initiated within a period of one month after the notification of the provisional measures, unless determined otherwise by the court.
- Where provisional measures are to be carried out by customs authorities, the applicant may be required to supply any other information necessary for the identification of the goods concerned.

[The applicant should be required to provide any reasonably available evidence so as to permit the authority to establish with a sufficient degree of certainty that he is the right holder or other authorized person and that there is an arguable case that his right is being infringed. The applicant may be required to provide security to prevent abuse.
Provisional measures should be revoked or lapse where, notwithstanding a request by the

Japan
(MTN.GNG/NG11/W/17 and 43)- The applicant shall provide reasons established to a sufficient degree of certainty when requesting such measures.- Signatories may provide that the applicant furnish sufficient security in place of providing reasons established to a sufficient degree of certainty.

defendant, proceedings leading to a decision on the merits of the case are not commenced within a reasonable period of time. Signatories may also provide that provisional measures may be revoked or lapse where the applicant does not pursue a decision on the merits in an expeditious manner.]

(3) PROVISIONAL MEASURES (contd.)

(c) CONDITIONS ON EX PARTE PROCEEDINGS

Corresponding Provisions of ExistingInternational Treaties

India (MTN.GNG/NG11/W/40)
(d) INDEMNIFICATION OF DEFENDANT AND OTHERS
India (MTN.GNG/NG11/W/40)
provisional orders based

CIVIL REMEDIES FOR INFRINGEMENT
(a) GENERAL

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Parties shall be provided subsequent notice of the action and the right to participate in an administrative or judicial procedure providing due process of law.

Canada
(MTN.GNG/NG11/W/42)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Parties shall make remedies available to provide indemnification in appropriate cases of persons wrongfully enjoined or restrained.

Canada
(MTN.GNG/NG11/W/42)
- Compensation should be provided to persons suffering damage from safeguards against the abuse of enforcement on the assumption that they were infringing IPRs, if the assumption is subsequently found to be wrong.

European Communities
(MTN.GNG/NG11/W/31)
- Where provisional measures are adopted inaudita altera parte, an oral hearing shall take place upon request of the defendant within a reasonable period after the notification of the measures, with a view to deciding whether these measures shall be revoked or confirmed.

[Where provisional measures are adopted ex parte, an oral hearing should take place upon the request of the defendant within a reasonable period after the notification of the measures to decide whether the measures should be revoked, modified, or confirmed.]

European Communities
(MTN.GNG/NG11/W/31)
- Where the provisional measures are revoked or where they lapse due to any action or omission by the applicant or where it is subsequently found that there has been no infringement or threat of infringement of an IPR, the defendant shall be entitled to claim from the applicant adequate compensation of any injury caused by these measures.

[Contracting parties should provide for procedures and for compensation of the injury suffered by a party which has been subject to such abuse. In appropriate cases, contracting parties should provide for indemnification of parties wrongfully enjoined or restrained.]

Japan
(MTN.GNG/NG11/W/17 and 43)- Where provisional measures are adopted without prior notice to the adversary, the decision or the disposition adopted shall be notified to the adversary and he shall be given, upon request, an occasion to be heard so as to decide whether to revoke or confirm the decision or dispostion in question.
Japan
(MTN.GNG/NG11/W/17 and 43)- Parties who have not infringed any IPR but nonetheless have been the subject of provisional measures on the false ground of infringement shall be entitled to claim compensation for the damage caused by such measures. Participants shall provide for the provision of security with a view to compensating such a damage.

ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

(b) INJUNCTIONS

Corresponding Provisions of ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

(MTN.GNG/NG11/W/14/Rev.1)
- See A(13) above.

Canada
(MTN.GNG/NG11/W/42)
- See A(13) above.

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Final injunctions must be available.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- See A(13) above.

- See A(13) above.

European Communities
(MTN.GNG/NG11/W/31)
- Where the judicial authorities are satisfied that an infringement of an IPR has been or is about to be committed they shall be entitled, upon request and irrespective of whether the defendant has acted with intent or negligence, to issue an order that the infringement be refrained from or discontinued.

[Final injunctions should be available.]

(MTN.GNG/NG11/W/17 and 43)- IPR holders shall be provided with at least the following civil judicial remedies. Remedies shall be adequately ensured according to the type of the right and the seriousness of the infringement in question. Administrative procedures shall be subject to equivalent principles.
Japan
(MTN.GNG/NG11/W/17 and 43)- Stopping or preventing of the infringement of IPRs.

(4) CIVIL REMEDIES FOR INFRINGEMENT (contd.)

(c) SEIZURE, FORFEITURE, DESTRUCTION

Corresponding Provisions of ExistingInternational Treaties

Articles 9 and 10 of the Paris Conventionprovide for remedies in respect of goods unlawfully bearing trademarks or trade names or in connection with which a false indicationof source has been directly or indirectly used. Certain of these remedies concern action at the border; for details see Section C (8) below. Other remedies concern action in the country. The goods in question must be seized in the country, whether it is the country in which the unlawful affixation took place or country into which the goods have been imported. If the country's legislation does not permit such seizure, then, until such time as the legislation is modified accordingly, these measures shall be replaced by the actions and remedies available in such cases to nationals under the law of that country.

The Madrid Agreement (Indications of Source) contains a similar hierarchy of remedies, with the additional requirement that, in the absence of special sanctions ensuring the prevention of false

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Remedies for infringement of IPRs shall include seizure, forfeiture, destruction, and removal from commercial channels of infringing goods, or other effective action as may be appropriate.

India
(MTN.GNG/NG11/W/40)

European Communities
(MTN.GNG/NG11/W/31)
- Where an IPR has been found to be infringed, the right holder can, in accordance with the relevant provisions of national law and where this would not be out of proportion to the infringement in question, for example in cases of deliberate and flagrant infringements of an IPR, request that the infringing goods, including materials and implements predominantly used in their creation, be, without compensation of any sort, forfeited, and destroyed or disposed of outside the channels of commerce in such a manner as to minimize any harm caused to him, or that, as applicable, any other measures be taken having the effect of effectively depriving those responsible for the infringement of the economic benefits of their activity and constituting an effective deterrent to further activities of the same kind.

Canada
(MTN.GNG/NG11/W/42)
[Remedies for the infringement of IPRs should include the possibility of seizure, forfeiture, destruction and removal from commercial channels of infringing goods. Remedies should also include the possibility

Japan
(MTN.GNG/NG11/W/17 and 43)- Remedies to stop or prevent the infringement of IPRs shall include such measures as destruction of things which have constituted the infringement and removal of facilities which were used for the infringement.

or misleading indications of source, the sanctions provided by the corresponding stipulations of the laws relating to trademarks or trade names shall be applicable (Article 1).

The remedy provided for in the Berne Convention is liability to seizure (Articles 13(3) and 16).

(4) CIVIL REMEDIES FOR INFRINGEMENT (contd.)

(d) DAMAGES AND RECOVERY OF COSTS

Corresponding Provisions of ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Monetary awards adequate to compensate fully owners of IPRs must be available. In appropriate cases, this should include provision of statutory damages.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- The right holder shall be entitled to obtain from the infringer adequate compensation of the injury he has suffered because of a deliberate or negligent infringement of his IPR and to recover the costs reasonably incurred in the proceedings. The compensation may, in particular, consist of the restitution as far as possible of the situation as it existed prior to the infringement and of the recovery in appropriate cases of the profits resulting from the infringement. In appropriate cases recovery of profits may be granted even where the infringer has not acted intentionally or negligently.
[In addition to the damages provided in A(13), right holders should be entitled to recover costs reasonably incurred in the proceedings involving counterfeiting or piracy or proceedings where the relevant good has been previously held on the merits to infringe an IPR.]

Japan
(MTN.GNG/NG11/W/17 and 43)-
Signatories may provide for provisions in which the amount of profit gained by the infringer shall be presumed to be the amount of damage sustained by the right holder, or in which the right holder may claim the amount of money normally obtainable for the working of the rights, as the amount of such damage.

(5) CRIMINAL SANCTIONS

Corresponding provisions of existinginternational treaties
India (MTN.GNG/NG11/W/40)
(6) INDEMNIFICATION OF DEFENDANT
Corresponding provisions of existing international treaties
India(MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Criminal remedies shall include seizure of infringing goods, materials and implements used in their creation, and forfeiture of such articles, imprisonment, and monetary fines.

Canada
(MTN.GNG/NG11/W/42)
See A(1) above.

United States

European Communities
(MTN.GNG/NG11/W/31)
- Such remedies shall include imprisonment and monetary fines sufficient to provide an effective deterrent.
does not infringe the legitimate interest of a third party, such provision shall provide
[Criminal remedies with respect to counterfeit and pirated goods should

Japan
(MTN.GNG/NG11/W/17 and 43)-
Signatories shall regard the act of the infringement of patents, trademarks, designs, copyright, neighbouring rights, semi-conductor integrated circuit layout right as constituting criminal act and shall establish provisions for criminal sanctions, including imprisonment or fine, against such act. - Where deemed necessary and so long as it

(MTN.GNG/NG11/W/14/Rev.1)
- Parties shall make remedies available to provide indemnification in appropriate cases of persons wrongfully enjoined or restrained.

Canada
(MTN.GNG/NG11/W/42)

include imprisonment and monetary fines. They should also include the possibility of seizure and forfeiture of counterfeit and priated goods and any plate, cast, mold or similar device used in their creation.]

European Communities
(MTN.GNG/NG11/W/31)
- Parties wrongfully enjoined or restrained by any civil judicial measures taken for the purpose of enforcing IPRs shall be entitled to claim adequate compensation of the injury suffered because of an abuse of enforcement procedures and to recover the costs reasonablyincurred in the proceedings. Signatories may provide for the possibility that these parties may in appropriate cases claim compensation from the authorities.

[Parties wrongfully enjoined or restrained should be entitled to claim adequate compensation for the injury suffered and to recover the costs reasonably incurred in the proceedings. Signatories should provide for the possibility that these parties may, in appropriate cases, claim compensation from the authorities where such authorities have initiated the proceedings.]

for a confiscation of goods which have constituted a criminal act infringing intellectual property rights, goods which were used or intended to be used for such an act, goods arising from or acquired by such an act or goods acquired as a reward of such an act.

Japan
(MTN.GNG/NG11/W/17 and 43)- See A(10) above.

C. SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

(1) GENERAL REQUIREMENT

Corresponding Provisions of ExistingInternational Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Signatories shall provide means to initiate procedures to enforce IPRs against imported infringing goods before they are released from the jurisdiction of the customs authorities. It is left to each signatory to determine if the means are judicial or administrative in nature.

Canada
MTN.GNG/NG11/W/42
(See proposal on trade in counterfeit goods (MTN.GNG/NG11/W/41).)

European Communities
(MTN.GNG/NG11/W/31)
- Signatories shall establish procedures according to which a right holder, who has valid grounds for suspecting that the importation of counterfeit goods is contemplated, may lodge an application in writing with the competent authorities for the suspension by the customs authorities of the release into free circulation of such goods.
- For members of a customs union, the term "border" is understood to apply to their border to countries or areas which are not part of the union, and the term "territory" is understood as the customs territory

Japan
(MTN.GNG/NG11/W/17 and 43)- Japan calls for the establishment and implementation of procedures at the domestic and border levels according to the type of IPR. It has indicated its intention to make specific proposals at the 30 October - 3 November meeting of the Group.

of the union.

- There should be interim procedures: (a) to allow the courts to direct customs authorities to detain counterfeit or pirated goods, or (b) to allow interim detention by customs of such items, subject to appropriate safeguards. Such measures should not be applied in a manner which would constitute a disguised restriction on international trade.
[Signatories should provide for interim judicial measures to allow the courts to direct customs authorities to detain counterfeit or pirated goods or they should provide for interim detention by customs as provided by this section.
Signatories may also provide for the detention or prohibition of other types of infringing goods.
Any procedure to allow customs authorities to detain or prohibit any type of infringing good without a court order should conform to the rules set out in this section.
Where signatories allow the right holder to initiate detention, they should establish procedures according to which a right holder may lodge an application in writing with competent authorities for the suspension by the customs of the release into free circulation of suspected counterfeit or pirated goods.]

(2) COVERAGE

(a) OF IPRS

Corresponding Provisions of ExistingInternational Treaties

Paris Convention: Goods unlawfully bearing protected trademarks or trade names or in connection with which a false indication of the source of the goods or the identity of the producer, manufacturer or merchant has been directly or indirectly used (Articles 9(1) and 10(1)).

Madrid Agreement (Indications of Source): Goods having a false or deceptive indication by which one of the member States, or a place

United States

(MTN.GNG/NG11/W/14/Rev.1)
- All IPRs

Canada

(MTN.GNG/NG11/W/42)

European Communities

(MTN.GNG/NG11/W/31)
- Counterfeit goods which for the purpose of this section are understood to be those bearing without authorization a trademark which is identical to a trademark validly registered in respect of such goods in or for the signatory in the territory of which the goods are declared for importation, or which cannot be distinguished in its essential aspects from such a trademark. - Signatories may establish procedures concerning any goods which, prima facie, infringe

Japan

(MTN.GNG/NG11/W/17 and 43)- See C(1) above.

therein, is directly or indirectly indicated as being the country or place of origin (Article 1).
India (MTN.GNG/NG11/W/40)

any other IPR. - As the negotiations progress, the Community will, in addition to its present suggestions, wish to examine the possibility of going beyond the proposed minimum requirement for intervention by customs authorities, in particular in order to explore the possibility of introducing a commitment that parties adopt procedures in accordance with which customs authorities could detain goods infringing any IPR. In implementing such a commitment, allowance would be made for differences in national legal systems, including the relationship between courts and customs, as well as differences between IPRs.

[Counterfeit trademark goods and pirated copyright goods. DefinitionsCOUNTERFEIT GOODS should mean -any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark and which thereby infringes the rights of the owner of the trademark in question under the legislation of the country of importation.PIRATED GOODS should mean -any goods which are copies made without the consent of the rights holder or person duly authorised by him in the country of production and which are made directly or indirectly from an article where the making of that copy constitutes an infringement of a copyright under legislation in the country of importation.]

(2) COVERAGE (contd.)

(b) OF ACTS INVOLVING THOSE IPRS

Corresponding Provisions of ExistingInternational Treaties

The Paris Convention and Madrid Agreement(Indications of Source) provide for the application of measures against importation. Goods in transit are excluded from any obligation to effect seizure.

The Phonograms Convention

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Importation of infringing goods.
- Procedures shall also apply to goods in transit provided that they cover goods infringing an IPR of the country through which the goods were being shipped.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Importation of counterfeit goods.
- Where goods have been put on the domestic market or the market of a third country with the consent of the right holder, the fact that he has not agreed that the goods are imported or reimported, or that they

Japan
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provides for protection against the importation of duplicates of phonograms made without the consent of the producer if it is done for the purpose of distribution to the public (Article 2).
India (MTN.GNG/NG11/W/40)

are imported under conditions other than those agreed by him, shall not be sufficient reason for direct border intervention.
- Signatories may provide for corresponding procedures concerning the suspension by the customs authorities of the release of counterfeit goods destined for exportation from their territory.
- The provisions shall not apply to small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

[Importation of counterfeit trdemark goods or pirated copyright goods. For greater certainty, contracting parties may, but are not required to, have border measures for goods that have been put on the domestic market or the market of a third country with the consent of the right holder.
The provisions should not apply to small quantities of goods of a noncommercial nature contained, for example, in travellers' personal luggage.]

(3) STANDING TO INITIATE PROCEDURES

Corresponding Provisions of ExistingInternational Treaties
For Paris Convention, see Section B (2) above.
Under the Madrid Agreement (Indications of Source), seizure takes place at the instance of the customs authorities, which must immediately inform the interested party, whether an individual person or a legal entity, in order that such party may, if he sodesires, take appropriate steps in connection with the seizure effected as a conservatory measure. However, the public prosecutor or any other competent authority may demand seizure either at the request of the injured party or ex officio; the procedure will then follow its normal course (Article 2(1)).
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Owners of IPRs and other persons authorized by the owner and having legal standing.
- Seizure of goods at the border by competent authorities may be either ex officio, sua sponte or at the request of the rights holder when the competent authorities are satisfied that imported goods infringe an IPR.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Right holder. The term "right holder" means the right holder himself, any other person authorized by him or persons having legal standing under national law to assert such rights.
- Signatories may require customs authorities to act upon their own initiative and to suspend the release of goods falling under (2) above where they have acquired a sufficient degree of certainty that an IPR is being infringed. In this case, the customs authorities may at any time seek from the right holder any information that may assist them to exercise these powers.

[See above, C(1), re. right holders. Signatories may require customs authorities to act upon their own initiative and to suspend the

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release of goods where they have a sufficient degree of certainty that an IPR is being infringed. Such detention should be subject to the same conditions, mutatis mutandis, as set out in C(5) below.]

(4) REQUIREMENTS FOR INITIATION OF PROCEDURES BY IPR OWNERS

(a) APPLICATION

Corresponding Provisions of ExistingInternational Treaties

Articles 9 and 10 of the Paris Conventionprovide for seizure at the request of an interested party. The Madrid Agreement (Indications of Source), while providing that the public prosecutor or any other competent authority may demand seizure either ex officio or at the request of the injured party, does not provide for seizure to take place at the request of an interested party (Article 2(1)).

(b) INFORMATION TO BE PROVIDED

Corresponding Provisions of Existing International Treaties

India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- A party initiating the procedures must address himself to an authority which must be designated for this purpose by each signatory.

India
(MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- The person initiating the procedures shall be required to present adequate evidence of the right to protection in accordance with the relevant laws of the country of importation.

Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- A right holder, who has valid grounds for suspecting that the importation of counterfeit goods is contemplated, may lodge an application in writing with the competent authorities.

Canada
(MTN.GNG/NG11/W/42)
See above, C(1), paragraph 1.

European Communities
(MTN.GNG/NG11/W/31)
- The application must be accompanied by proof that the applicant is the right holder. It must contain all pertinent information available to the applicant to enable the competent authority to act in full knowledge of the facts, and a sufficiently detailed description of the goods to enable them to be recognized by the customs authorities. The applicant may also be required to supply any other information necessary for the identification of the goods concerned. The application must specify the length of period for which the customs authorities are requested to take action.

[The application should be accompanied by proof that the applicant is the right holder or duly authorised person. It should contain all pertinent information available to the applicant to enable the competent authority to act in full knowledge of the facts, and a sufficiently detailed description of the goods to enable these to be recognised by the customs authorities. The applicant may also be required to supply any other

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information available to him necessary for the identification of the goods concerned.]

(4) REQUIREMENTS FOR INITIATION OF PROCEDURES BY IPR OWNERS (contd.)

(c) PROVISION OF SECURITY

Corresponding Provisions of ExistingInternational Treaties

India (MTN.GNG/NG11/W/40)

United States

(MTN.GNG/NG11/W/14/Rev.1)

- In order to prevent abuse of border enforcement measures, signatories may require a rights owner to provide security up to an amount sufficient to hold the authorities and importer harmless from loss or damage resulting from detention where the goods are subsequently determined not to be infringing. However, such securities shall not unreasonably deter recourse to such procedures.

Canada

(MTN.GNG/NG11/W/42)

European Communities

(MTN.GNG/NG11/W/31)

- Signatories may require a right holder who has lodged an application to provide a security. Such a security or equivalent assurance shall be required in the context of procedures other than those relating to counterfeit goods.

[Signatories may require a right holder to provide security up to an amount sufficient to hold the authorities and importer harmless from loss or damage resulting from detention where the goods are subsequently determined not to be infringing or where the right holder, after being informed of the detention, does not promptly inform the customs authorities that he does not intend to refer the matter to the competent authority for a decision on the merits or provisional measures. However, such securities shall not unreasonably deter recourse to such procedures. Right holders should be liable to indemnify importers for goods wrongfully detained at their request regardless of whether the right holder has provided a security.]

Japan

(MTN.GNG/NG11/W/17 and 43)

(5) CONDITIONS ON DETENTION OF GOODS BY CUSTOMS

Corresponding Provisions of ExistingInternational Treaties

The Madrid Agreement (Indications of Source) requires that, where seizure takes place at the instance of customs authorities, they must immediately inform the interested party, whether an individual person or legal entity, in order that such party may, if he so desires, take appropriate steps in connection with the seizure effected as a conservatory

United States

(MTN.GNG/NG11/W/14/Rev.1)

- When the competent authorities have reason to believe imported goods may be infringing, they shall detain such goods pending a determination whether the goods are infringing.

Canada

(MTN.GNG/NG11/W/42)

European Communities

(MTN.GNG/NG11/W/31)

- If, within two weeks following the notification of the suspension of the release of goods in response to an application by a right holder, the customs authorities have not been informed that the matter has been referred to the authority competent to take a decision on the merits of the case, or that the duly empowered authority has taken provisional measures, the goods

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(MTN.GNG/NG11/W/17 and 43)

measure. If seizure is demanded by the public prosecutor or any other competent authority, the Madrid Agreement provides that the procedure will then follow its normal course (Article 2(1)).
India (MTN.GNG/NG11/W/40)

shall be released, provided that all other conditions for importation or exportation have been complied with. In exceptional cases, the above time-limit may be extended by another two weeks.

[If, within a reasonable time as set by legislation following the notification of the suspension of the release of goods in response to an application by a right holder, the customs authorities have not been informed either that the matter has been referred to the authority competent to take a decision on the merits of the case or that the duly empowered authority has taken provisional measures, the goods should be released, provided that all other conditions for importation or exportation have been complied with.
Unless a court of appeal has made a decision affirming detention, seizure or prohibition by customs, goods should be released if any internal court or authority acting upon similar facts decides that the products are not infringing.]

(6) INSPECTION OF DETAINED PRODUCT BY RIGHT HOLDER

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States (MTN.GNG/NG11/W/14/Rev.1)
Canada (MTN.GNG/NG11/W/42)

European Communities (MTN.GNG/NG11/W/17 and 43)
(MTN.GNG/NG11/W/31)
- Without prejudice to the protection of confidential information, the right holder shall be given sufficient opportunity to inspect any product detained by the customs authorities in order to substantiate his claims.

Japan (MTN.GNG/NG11/W/17 and 43)

(7) RELEASE OF INFORMATION CONCERNING OTHER PARTIES TO THE TRANSACTION

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States (MTN.GNG/NG11/W/14/Rev.1)
Canada (MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Unless this would be contrary to provisions of national law, the customs authorities shall inform the right holder, upon request, of the names and addresses of the consignor, importer, consignee and of the quantity of the goods in question.

Japan

(8) REMEDY

Corresponding Provisions of ExistingInternational Treaties

In regard to goods unlawfully bearing protected trademarks or trade names or in connection with which a false indication of source has been directly or indirectly used, the Paris Convention contains an obligation to seize them on importation if a country's legislation permits such seizure. If this is not the case, the country in question must replace this by prohibition of importation or seizure inside the country. However, the Paris Convention allows that even these replacement measures might not exist and, if this is the case, until such time as the legislation of a country is modified accordingly, these replacement measures shall be substituted by the actions and remedies available in such cases to nationals under the law of such country (Articles 9 and 10). The Madrid Agreement (Indications of Source) contains a similar hierarchy of remedies, with the additional requirement that in the absence of any special sanctions ensuring the prevention of false or misleading indications of source, the sanctions provided by the corresponding stipulations of the laws relating to marks or trade names shall be applicable (Article 1).

Canada (MTN.GNG/NG11/W/42)

United States

(MTN.GNG/NG11/W/14/Rev.1)
- See B(4) above.

India

(MTN.GNG/NG11/W/40)

European Communities

(MTN.GNG/NG11/W/31)
- Where the action is initiated by an application from a right holder: Without prejudice to the other rights of action open to the right holder, and subject to the right of the defendant to lodge an appeal to the judicial authorities, the competent authorities shall, as a general rule and in accordance with the relevant provisions of national law, and where this would not be out of proportion to the infringement in question, provide for the forfeiture of the infringing goods and destroy them or dispose of them outside the channels of commerce in such a way as to minimize harm to the right holder without compensation of any sort. They may in respect of such goods take any other measures having the effect of effectively depriving those responsible for the infringement of the economic benefits of their activity and constituting an effective deterrent to further activities of the same kind. Other than in exceptional cases, with regard to counterfeit goods the simple removal of the trademarks affixed without authorization shall not be regarded as having such effect. The authorities shall not order the re-exportation of the goods in an unaltered state or subject them to a different customs procedure.
- Where the action is initiated by customs on their own initiative:Without prejudice to the other rights of action open to the right holder and subject to the right of the defendant to lodge an appeal to the competent judicial authorities, signatories shall, where this would not be out of proportion to the infringement in question, for example in cases of deliberate and flagrant infringements, provide for the forfeiture of the goods thus detained by the customs authorities and for their destruction or disposal outside the channels of commerce in such a manner as to minimize harm to the right holder.
- See B(4) above.

Japan

(MTN.GNG/NG11/W/17 and 43)- See B(4) above.

D. ACQUISITION OF IPRS

(1) DURATION OF PROCEDURE

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Where the acquisition of an IPR covered by this Agreement is subject to the IPR being granted or registered, signatories shall provide for procedures which permit, subject to the substantive conditions for acquiring the IPR being fulfilled, the granting or registration of the right within a reasonable period of time so as to avoid that the period of protection is unduly curtailed.

Japan
(MTN.GNG/NG11/W/17 and 43)

(2) INTER-PARTES PROCEDURES

Corresponding Provisions of Existing International Treaties
Article 6bis of the Paris Convention provides for rules on opposition procedures in regard to well-known marks.
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Where the national law provides for opposition, revocation, cancellation or similar inter-partes procedures, they shall take into account the legitimate interests of the applicant or holder of an IPR, in particular in an expeditious conclusion of such proceedings, as well as the interests of the other party, in particular in presenting its side of the case.

Japan
(MTN.GNG/NG11/W/17 and 43)

(3) RIGHT OF APPEAL

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
- Signatories shall provide the right of judicial review of initial judicial decisions on the merits of a case and final administrative decisions on the merits of a case in disputes arising in connection with the obtaining, maintaining or enforcing of IPRs.
Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Final administrative decisions concerning the acquisition of an IPR shall be subject to the right of appeal in a court of law or quasi-judicial body.

Japan
(MTN.GNG/NG11/W/17 and 43)

(4) OTHER GENERAL PRINCIPLES

Corresponding Provisions of Existing International Treaties
India (MTN.GNG/NG11/W/40)

United States
(MTN.GNG/NG11/W/14/Rev.1)
Canada
(MTN.GNG/NG11/W/42)

European Communities
(MTN.GNG/NG11/W/31)
- Procedures concerning the acquisition of IPRs shall be governed by the general principles set out in Section A at (3), (4) (first indent) and (10) (first indent).

Japan
(MTN.GNG/NG11/W/17 and 43)