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

INFORMATION FROM OTHER INTERNATIONAL ORGANIZATIONS

Communication from the Customs Co-operation Council

In accordance with the decisions of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, at its meeting of 25 March 1987, the secretariat has contacted the Secretariats of the World Intellectual Property Organization, UNESCO and the Customs Co-operation Council with a view to seeking information on their activities regarding trade in counterfeit goods and their initiatives relevant to the Negotiating Objective of the Group (MTN.GNG/NG11/1, paragraphs 17 and 18).

The attached communication has been received in response from the Secretariat of the Customs Co-operation Council.

FIGHTING COUNTERFEITING IN INTERNATIONAL TRADE:

INITIATIVES IN THE CUSTOMS CO-OPERATION COUNCIL (CCC)

Introduction

1. The Customs Co-operation Council is an intergovernmental organization with a world-wide membership of currently ninety-eight countries. They include all the EEC countries, the United States, most of the Eastern European countries, and China. About 50 per cent of these are developing countries. The CCC is, therefore, a truly world-wide body, a fact which is very important in considering the influence of the CCC in dealing with the problem of counterfeiting.

2. The CCC works by Committees, two of which are relevant for the purposes of the problem of counterfeiting; these are the Permanent Technical Committee and the Enforcement Committee. In brief, the Permanent Technical Committee is responsible for the simplification and harmonization of Customs procedures for the benefit of international trade. The Enforcement Committee is responsible for developing co-operation and mutual administrative assistance among members in fighting offences against the Customs law and other laws the enforcement of which has been entrusted to the Customs. The work of these two Committees has resulted in the adoption of a number of international agreements (Conventions and Recommendations) by the CCC, the spirit and framework of which, are relevant in considering the question of counterfeiting in international trade.

Why customs should intervene

3. The Secretariat of the Customs Co-operation Council has followed discussions on the question of counterfeiting in various fora since 1981 when it participated for the first time in a worldwide forum organized by the World Intellectual Property Organization (WIPO). In every forum it was pointed out that the Customs could play a vital rôle in the fight against counterfeiting in international trade since the Customs is the government authority responsible for controlling imports and exports. Customs was in a position to prevent counterfeit goods from entering international trade at the point of exportation and could also stop imported counterfeit goods from entering the domestic market.

4. It has also been argued that, as a Government law enforcement authority, the Customs should not be oblivious of counterfeiting and all its harmful effects on the economy, the individual and society. The Customs owed society a duty to intervene in the fight against the international traffic in counterfeit goods.

5. As the intergovernmental organization responsible for all Customs matters of international concern the CCC had to initiate action although it was aware of the limitations of Customs services in this matter.

Obstacles to Customs intervention

6. In the first place there is the problem of legal competence. In every country the competence of the Customs is prescribed by law. And, unfortunately, in most Member countries the Customs has no legal competence in enforcing intellectual property law.

7. The second limitation is that in most countries the Customs has very heavy responsibility but very limited manpower resources. Therefore, even if given legal competence in this field many Customs services would probably give counterfeiting a relatively low priority in view of other pressing problems such as the illicit traffic in drugs.

8. There are two other limitations which are of a technical nature. Even with the right competence and adequate resources, it could still be very difficult for the Customs to take appropriate action since it is very difficult to distinguish a counterfeit product from a genuine one. Furthermore, to determine whether counterfeiting has taken place involves issues of law (rather than fact) which have to be settled only by a court of law or a tribunal.

Work in the CCC

9. For three years now, the question of counterfeiting has been discussed in the CCC Committees

concerned and in the Council which is the general assembly of the organization. On the basis of an extensive study carried out in 1984, the Council gave top priority to this question and instructed the Committees to find solutions to the various issues involved.

Model enabling legislation

10. The CCC has not found a solution to the problem of competence since it is a matter determined by individual governments. However, it has been felt that it would be helpful to some Customs administrations if the CCC were to show what and how appropriate competence can be given to Customs authorities. It is to this end that the Council accepted a proposal by the Permanent Technical Committee to establish a legislation which could serve as a model for countries wishing to enact legislation to give their Customs administrations competence in this field.

11. The model legislation, the draft of which should be finalized by the Permanent Technical Committee early in November 1987, is intended to define an internationally acceptable rôle of the Customs in this field. The concern here is that Customs action should not constitute an obstacle to legitimate trade. The model legislation is therefore designed to lay down the scope and method of Customs intervention. It will also take account of the fact that the resources available to the Customs are limited and that without the collaboration of the owner of the trademark or other intellectual property concerned Customs intervention might not be possible.
12. The model legislation will provide owners of trademarks with alternative systems of obtaining the assistance of the Customs in dealing with counterfeit goods in international trade. It will contain, inter alia, provisions relating to the detention, seizure, forfeiture and disposal of offending goods.

Enforcement work

13. The Enforcement Committee has decided that this question should be placed on its programme of work on a permanent basis so that the Committee can always exchange views on it as it does, for example, with the problem of drugs.

14. Secondly, it has been agreed in the Enforcement Committee that countries whose Customs administrations have competence in the field of intellectual property may use the Enforcement instruments of the CCC as a basis for establishing co-operation and mutual administrative assistance in the fight against counterfeiting. The CCC already has international instruments establishing mutual administrative assistance in the investigation, repression and prosecution of "Customs offences". By definition a Customs offence would include an intellectual-property law offence if the Customs is responsible for enforcing the intellectual property law concerned.

15. Finally, to establish a formal relationship between the CCC and non-governmental organizations representing industry, the Enforcement Committee is considering a proposal that the CCC conclude memoranda of understanding with the organizations representing industry. On the basis of the memoranda, the CCC would work in collaboration with the organizations concerned in carrying out certain enforcement activities as well as in organizing awareness training and establishing guidelines which Customs services might use in tackling the problem of counterfeiting.

Conclusion

16. It will be noted that CCC's rôle in this question is confined to those aspects of Customs concern. The objectives of CCC are to enable Customs administrations to be effective in implementing intellectual property law if they are given appropriate competence and to provide a forum where Customs administrations can continue to exchange views on the practical problems involved in enforcing intellectual property law. It should also be noted that thanks to the Enforcement legal instruments (Conventions and Recommendation of the CCC), there already exists a framework within which to exchange enforcement information and mutual administrative assistance. In this connection the CCC already has the necessary infrastructure for implementing "policy" instruments concerning counterfeiting in international trade which might result from the work of other intergovernmental organizations.