

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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AGREEMENT ON THE SANCTIONS TO BE IMPOSED UPON THE IMPORTATION OF COUNTERFEIT MERCHANDISE

The following proposal is being circulated at the request of the
United States delegation.

AGREEMENT ON THE SANCTIONS TO BE IMPOSED UPON THE
IMPORTATION OF COUNTERFEIT MERCHANDISE

The following text sets forth an agreement concerning counterfeit merchandise.

PREAMBLE

The signatories to this Agreement,

Desiring to further the objectives of the General Agreement on Tariffs and Trade;

Desiring to deprive parties to the importation of counterfeit merchandise of the economic benefits of such transactions;

Considering that trade in counterfeit merchandise burdens international commerce, misleads consumers, impairs markets, and prejudices the legitimate interests of trade;

Recognizing that actions to discourage trade in counterfeit merchandise can be made more effective by co-operation among signatories and by strengthening existing sanctions against such practices;

Recognizing that deterring trade in counterfeit merchandise will foster reduction and elimination of the trade restricting or distorting effects of commercial counterfeiting;

Recognizing that variances in the legal systems and customs procedures of the signatories may give rise to different methods consistent with this Agreement, of dealing with counterfeit merchandise;

Desiring to bring commercial counterfeiting under more effective discipline without inhibiting the free flow of legitimate trade; and

Seeking to provide for international notification, consultation, surveillance and dispute settlement procedures with a view to ensuring a fair, prompt, and effective enforcement of the obligations of this Agreement;

Hereby agree as follows:

Article I - Requirements and scope of Agreement

A. The parties to the Agreement agree to act to discourage international trade in counterfeit merchandise, and to deal with imported counterfeit merchandise in a manner that minimizes the risk of consumer deception and

deprives the parties to a transaction involving imported counterfeit merchandise of the economic benefits of the transaction so as to provide an economic sanction which shall serve as an effective economic deterrent to international trade in counterfeit merchandise. To the greatest extent feasible such merchandise should be prevented from entering or re-entering commerce. (Footnote 1: Nominal quantities of articles destined for personal use and not for sale may be excluded from the requirements of this Agreement.)

B. The Agreement covers international trade in counterfeit merchandise. Counterfeit merchandise means any article with a spurious trademark [tradename] [or made in violation of a] [copyright] [design] [or model] entitled to protection under the national law of the country of importation. For purposes of this Agreement a spurious trademark is one which is identical with or substantially indistinguishable from one entitled to legal protection in the country of importation. It is agreed that substantive intellectual property rights shall be governed by the national law of the country of importation. Nothing in this Agreement shall require, or necessarily permit, the parties to the Agreement to consider parallel imports as counterfeit.

Article II - Procedures

1. The law and procedures of the parties to this Agreement shall be made to fulfil the purposes and satisfy the requirements of the Agreement. The provisions of this Agreement shall normally be invoked at the written request of the person having the right to protect an intellectual property right covered by this Agreement. (Footnote 2: once particular merchandise has been determined to be counterfeit pursuant to Article II, paragraph 2, it should not be necessary for the person entitled to the protection of the intellectual property right to make a separate request for action on future importations of merchandise suspected to be counterfeit. Such invoking party shall be required to establish the right to protection of the intellectual property right in question in accordance with the law of the country of importation.

2. Parties to this Agreement agree to afford owners of industrial property rights covered by this Agreement, or their representatives, the opportunity to present information concerning alleged counterfeit merchandise to the appropriate governmental authorities. Such authorities may be administrative, such as the customs authorities, or the trademark office, or the judiciary. When the proper authorities are satisfied that the person invoking this Agreement has reasonable grounds to indicate that merchandise is likely to be counterfeit, it shall act to detain or seize the merchandise and subsequent shipments of such merchandise or require security for its full value from the importer, pending the final determination of whether the merchandise is counterfeit.

3. Prompt notice of arrivals of merchandise suspected of being counterfeit and actions taken pursuant to this Agreement shall be given to the person entitled to protection of the right in question, the importer, or their representative(s).

4. Authorities may require from persons invoking this Agreement, security by bond or deposit of money in an amount sufficient to indemnify the government or to hold importers harmless from loss or damage resulting from the application of proceedings concerning alleged counterfeit merchandise. It is intended by this provision that authorities may require security for loss or damage caused by the invocation of the agreement, but that such expense should not be imposed on the successful complaining party or an importer of legitimate merchandise.

5. Special provisions, such as those involving bonding or other security, may be necessary where perishable goods or merchandise with seasonal markets are involved.

6. Parties shall take appropriate steps to ensure that:

(a) Proceedings involving merchandise alleged to be counterfeit shall be conducted in a manner that minimizes interference with legitimate trade, but ensures that traders in merchandise determined to be counterfeit suffer economic sanctions against that and future shipments of such merchandise equal to the full value of the merchandise.

(b) Determinations concerning counterfeit merchandise shall be reasoned and made in a fair, open, and expeditious manner, and subject to appeal by the invoking person or importer or their representatives to an impartial body, so as to prevent the application of this Agreement from becoming a non-tariff barrier to legitimate trade.

Article III - Disposal of counterfeit merchandise

In the absence of the written consent of the owner of the intellectual property right, or his representative, to some other disposition of the counterfeit merchandise and upon a final determination that such merchandise is counterfeit, it shall be dealt with in a manner that minimizes the risk of consumer deception, deprives the parties to transactions involving counterfeit merchandise of the economic benefits of such transactions, and provides an economic sanction serving as an effective deterrent to such transactions. Such actions may consist of forfeiture of the counterfeit articles, or of forfeiture of security for their full value, but shall in any event provide sanctions of comparable economic effect. Forfeited merchandise should be disposed of outside the channels of commerce in a manner that minimizes harm to the owner of the industrial property rights covered by this

Agreement including specifically requiring obliteration or removal of counterfeit trademarks, where feasible, before disposal. (Footnote 1: Such disposal may include public auctions in accordance with national law. Re-exportation of counterfeit merchandise subject to this Article is not an appropriate method of disposition.)

Article IV - Amendments

Parties to the Agreement agree that future consultations to consider expanding the coverage of the Agreement may be appropriate. To that end parties may indicate other topics they consider appropriate for future consideration at the time of their accession to this Agreement.

Article IV Bis - Amendments

1. Parties to this Agreement agree that future consultations to consider expanding the coverage of the Agreement may be appropriate. To that end parties may indicate, at the time of their accession to the Agreement, other areas of intellectual property rights such as copyrights, patents, designs, models, and appellations of origin which they consider appropriate for future consideration.

2. In determining whether to pursue any such consultations, the signatories shall take into account discussions and negotiations relating to protection of those rights taking place in other fora and shall in addition, as regards appellations of origin and indications of source it shall take into account the problems and difficulties which may arise in this field because of the particular character of the agricultural sector.

Article V - Information and review

1. Any law, regulation, judicial decision, administrative ruling of general application, and any procedures regarding commercial counterfeiting as subject to this Agreement, shall be published promptly by the parties to this Agreement, in such a manner as to enable other parties and traders to become acquainted with them. Parties to this Agreement shall be prepared, upon request, to explain to any other party, or to any trader from a country which is a party to this Agreement, their practices and procedures concerning commercial counterfeiting.

2. Available information concerning individual cases arising under domestic proceedings envisaged by the provisions of this Agreement shall be provided, upon a request, to any other party.

3. Confidential information provided to any party to this Agreement which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, shall not, except as required by domestic law or judicial process, be revealed without formal authorization from the party providing the information.

4. Parties to this Agreement shall collect and provide to the Committee on Commercial Counterfeiting established in Article VI an annual report on the application of its laws and procedures concerning importations of counterfeit merchandise or alleged counterfeit merchandise.. Such reports shall contain the following information:

(a) the number and source of requests for the invocation of procedures concerning counterfeit merchandise or merchandise alleged to be counterfeit indicating the disposition or status of each such request;

(b) the kind, value, source, and disposition of counterfeit merchandise. Kind is intended to include information sufficient to identify the particular product or products in question. Value means the customs value as declared or determined. Source means the country, producer, exporter, importer and ultimate purchaser in the country of importation.

Article VI - Enforcement of obligations

Institutions

1. There shall be established under this Agreement a Committee on Commercial Counterfeiting (referred to in this Agreement as "the Committee") composed of representatives from each of the parties to this Agreement. This Committee shall elect its own Chairman and shall meet as necessary but not less than once a year for the purpose of affording parties the opportunity to consult on any matters relating to the operation of the Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the parties.

2. The Committee may establish ad hoc panels in the manner and for the purposes set out in paragraph 7 of this part and working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

Consultations

3. If any party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of the Agreement is being impeded by another

party or parties, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the party or parties in question. Each party shall afford sympathetic consideration to any request from another party for consultations. The parties concerned shall initiate requested consultations promptly.

4. Parties engaged in consultations on a particular matter affecting the operation of the Agreement shall provide information concerning the matter subject to the provisions of Part VI, paragraph 8, and attempt to conclude such consultations within a reasonably short period of time.

Resolution of disputes

5. If no mutually satisfactory solution has been reached between the parties concerned, the Committee shall meet at the request of any party to the Agreement within thirty days of receipt of such a request, to investigate the matter, with a view to facilitating a mutually satisfactory solution.

6. If no mutually satisfactory solution has been reached after detailed examination by the Committee under paragraph 5 within three months, the Committee shall, at the request of any party to the dispute establish a panel to:

- (a) examine the matter;
- (b) consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;
- (c) make a statement concerning the facts of the matter as they relate to application of the Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

7. In order to facilitate the constitution of panels, the Chairman of the Committee shall maintain an informal indicative list of governmental officials experienced in the field of trade relations. This list may also include persons other than governmental officials. In this connexion, each party to this Agreement shall be invited to indicate at the beginning of every year to the Chairman of the Committee the name(s) of the one or two persons whom the parties to this Agreement would be willing to make available for such work. If a panel is requested, the Chairman, within seven days, shall propose to the parties to the dispute the composition of the panel consisting of three or five members and preferably government officials. The parties directly concerned shall react within seven working days to nominations of panel members by the Chairman and shall not oppose nominations except for compelling reasons.

Citizens of countries whose governments are parties to a dispute shall not be eligible for membership of the panel concerned with that dispute. Panel members shall serve in their individual capacities and not as governmental representatives nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a panel.

8. Each panel shall develop its own working procedures. All parties, having a substantial interest in the matter and having notified this to the Committee, shall have an opportunity to be heard. Each panel may consult with and seek information from any source it deems appropriate. Before a panel seeks such information from a source within the jurisdiction of a party it shall inform the government of that party. Any party to this Agreement shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information provided to the panel shall not be revealed without formal authorization from the government or person providing the information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the government or person providing the information, will be provided.

9. The time required by panels will vary with the particular case. Panels should aim to deliver their findings, and where appropriate, recommendations, to the Committee without undue delay, taking into account the obligation of the Committee to ensure prompt settlement in cases of urgency, normally within a period of four months from the date the panel was established.

Enforcement

10. After the examination is complete or after the report of a panel, working party or other subsidiary body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to these reports, the Committee shall take appropriate action normally within thirty days of receipt of the report, unless extended by the Committee, including:

- (a) a statement concerning the facts of the matter;
- (b) recommendations to one or more parties to the Agreement; or
- (c) any other ruling which it deems appropriate.

Any recommendations by the Committee shall aim at the positive resolution of the matter on the operative provisions of the Agreement on the basis of its objectives.

11. If a party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event, the Committee shall consider what further action may be appropriate.

12. The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

Balance of rights and obligations

13. If the Committee's recommendations are not accepted by a party, or parties, to the dispute, and if the Committee considers that the circumstances are serious enough to justify such action, it may authorize a party or parties to this Agreement to suspend in whole or in part, and for such time as may be necessary, the application of this Agreement to any other party or parties, as is determined to be appropriate in the circumstances.