

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

**RESTRICTED**

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Group of Negotiations on Goods (GATT)

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

**PROPOSAL BY SWITZERLAND**

The attached communication, dated 21 June 1988, has been received from the delegation of Switzerland.

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A. Introduction

The present communication provides further elaboration of proposals submitted by the Swiss delegation in document MTN.GNG/NG11/W/15 of 22 October 1987. It is based on problems identified in oral statements and analytical documents submitted by delegations to the Group, compiled by the secretariat in MTN.GNG/NG11/W/12 Rev. 1 of 5 February 1988.

The present proposal is based on the premise that rules and disciplines on trade related aspects of intellectual property (TRIPS) are not new to GATT. Additional GATT rules on TRIPS should therefore primarily build on the existing framework and take into account the following considerations:

- Additional regulation of intellectual property issues under GATT should start from the basic premise of trade distortion and the goals of avoiding nullification and impairment of rights and advantages under the General Agreement.
- The amendment should rely upon existing and successful modes of dispute prevention and dispute settlement in GATT.
- A proper answer must be given to the relationship between rules dealing with trade related aspects of intellectual

property under GATT and those on intellectual property in other international instruments. To the utmost possible, GATT rules and disciplines must not lead to "conflicts of laws".

- The results of the negotiations on TRIPS should take into account that the relationship between trade and intellectual property rights is one of great complexity. New GATT tools must therefore allow for a subsequent and continuous process based on a solid legal foundation.

#### B. The Approach

Switzerland suggests to establish within GATT a set of general normative principles to be enforced by GATT procedures.

The first principle would oblige contracting parties to avoid trade distortions, i.e. nullification and impairment of advantages of the General Agreement, caused either by excessive or by insufficient, or lack of protection of intellectual property rights.

The second principle would oblige contracting parties to avoid treatment less favorable of foreign products and of different contracting parties with respect to protection of intellectual property rights. Exemptions are possible in accordance with Article XX of the GATT to the extent necessary in order to realize protection of intellectual property rights consistent with the provisions of the General Agreement. To that end, Article XX (d) of the GATT would be amended to cover all areas of intellectual property rights.

The third principle would relate to procedural obligations of contracting parties. It would oblige them to enforce appropriate protection of intellectual property rights.

These three normative principles should stand as new provisions, amending the General Agreement.

Indicative lists would serve as a concretization of essential elements of the principles, by giving examples of trade distorting effects caused by excessive or insufficient, or lack of protection of intellectual property rights. Constellations described would establish prima facie evidence of nullification and impairment; they would be subject to rebuttal. The indicative lists would be referred to in the new article of GATT on TRIPS.

The normative principles contained in the new GATT article and the lists would exist, though related, independently of other obligations under international law on intellectual property rights. They would not affect them legally. They serve, in the first place, as a legal basis for action in specific trade related disputes. Secondly, they would oblige contracting parties to phase out existing impediments and to prevent future trade distortions. They would also provide a legal basis for prior notification and comments on draft proposals on national legislation and regulations related to TRIPS by interested contracting parties.

The indicative lists can evolve over time. They may be amended by CONTRACTING PARTIES in due course.

The indicative lists could be elaborated in co-operation with other relevant international organizations in order to secure technical advice, and also to promote the adjustment of other international instruments to the needs of international trade. Where such co-operation fails, GATT may seek, if need be, to establish specific legal standards on the protection of intellectual property rights, in addition to the indicative lists.

### C. The Proposal

In more detail, the proposal to be included in the General Agreement reads as follows (proposals marked with (\*) merely recall existing, but relevant obligations under the General Agreement):

1. The Normative Principles

- (i) In light of the close relationship between international trade and intellectual property rights, contracting parties recognize that excessive, insufficient, or lack of protection as well as discriminatory treatment of such rights by contracting parties may cause nullification and impairment of advantages under this Agreement. Such impairment and nullification may be caused both by substantive and procedural deficiencies.
- (ii) Contracting parties shall therefore commit themselves 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. They shall also commit themselves to prevent counterfeiting and piracy.
- (iii) Contracting parties shall preclude treatment less favorable of foreign products and of different contracting parties in domestic law related to protection of intellectual property, both substantive and procedural.
- (iv) Article XX (d) is amended 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.
- (v) Contracting parties shall provide full and prompt application and implementation of domestic laws and regulations related to the protection of intellectual property rights. To that effect, they shall maintain, or institute not later than by the year of (        ) judicial or administrative tribunals or non-discriminatory procedures for the prompt review of trade distorting practices related to such laws and regulations.

2. Concretization of Normative Principles by Way of Indicative Lists

- (i) Indicative lists shall be elaborated, indicating trade distorting effects caused by either excessive, insufficient or lack of protection of intellectual property rights, including practices and procedural deficiencies. They establish prima facie nullification and impairment of advantages and benefits accruing from the General Agreement.
- (ii) CONTRACTING PARTIES shall further develop the indicative lists. To that effect, they may take into account findings and conclusions of panel reports as adopted in accordance with established procedures.

3. Dispute Prevention

- (i) Whenever laws, regulations and practices related to the protection of intellectual property rights and with possible bearing on international trade are under review or intended to be introduced by contracting parties, those shall
  - notify the other contracting parties through the GATT secretariat of the laws and regulations to be introduced, amended or abolished.
  - allow, without discrimination, reasonable time for the other contracting parties to make comments in writing on the basis of the present article and the indicative lists, discuss these comments upon request, and take those written comments and the results of these discussions into account.
- \*(ii) Each contracting party shall take such reasonable measures as may be available to it to ensure that regional and local governments and authorities within its territory undertake similar efforts.

4. The Committee on Trade Related Aspects of Intellectual Property Rights

- (i) CONTRACTING PARTIES shall establish a Committee on Trade Related Aspects of Intellectual Property. The Committee shall seek, upon request of a contracting party, to promote mediation of existing disputes between contracting parties and to make recommendations to the parties concerned.
- (ii) The Committee will further elaborate and develop the indicative lists for adoption by CONTRACTING PARTIES.
- (iii) On the basis of an initial report, and upon request by another contracting party, each contracting party shall submit subsequent reports on laws, regulations and practices related to the protection of intellectual property rights affecting international trade. The Committee shall examine such reports and make recommendations, as appropriate, to the reporting contracting party.
- (iv) The Committee shall cooperate with the World Intellectual Property Organization (WIPO) and other international organizations in particular with a view to develop and adjust international law related to intellectual property to the needs of unimpaired international trade.
- (v) The Committee proposes, if need be, international norms regarding intellectual property related to international trade for adoption by CONTRACTING PARTIES.

\*5. Dispute Settlement

Disputes among contracting parties, if not resolved within the Committee, shall be settled in accordance with articles XXII and XXIII of the General agreement and related instruments.

6. Technical Co-operation

CONTRACTING PARTIES shall provide for technical co-operation by the secretariat in collaboration with the World Intellectual Property Organization. Upon request, such co-operation includes support and advice as to the establishment of reports, the development, the amendment and implementation of national laws, regulations and practices, and assistance in the settlement of disputes between contracting parties.