

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

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

COMMUNICATION BY THE NORDIC COUNTRIES

The following communication has been received from the Permanent Mission of Norway with the request that it be circulated to members of the Group.

With a view to contributing to the fulfilment of the Negotiating Objective, the Nordic countries hereby submit a set of views and suggestions on the issue of substantive IPR standards/norms in a GATT context.

THE ISSUE OF SUBSTANTIVE IPR STANDARDS/NORMS IN A GATT CONTEXT

1. GATT rules and disciplines in the area of TRIPs must include a reference point to substantive standards/norms for the IPRs to be covered.

Any GATT commitments - be it within the broader framework of trade-related aspects of intellectual property rights (first indent of the mandate) or in the area of trade in counterfeit goods (second indent of mandate) - will inevitably have to include a reference to an IPR, as well as a reference to the types of infringements which such GATT commitments are to address. Thus, GATT commitments must originate from situations in which there exists an infringement of an IPR. As an infringement can never take place in a vacuum, but must be related to the substantive standards/norms applicable for the IPR in question, GATT rules and disciplines in the area of TRIPs must include a reference point to substantive standards/norms for the IPRs to be covered. It is worth noting that this fundamental relationship is equally valid for both of the two first indents of the mandate. As an illustration, trade in counterfeit goods - irrespective of how the concept is to be interpreted for GATT purposes - involves the infringement of an IPR.

2. In order to provide a basis for contractual obligations among governments - i.e. in this context GATT commitments - with respect to enforcement mechanisms, the reference points to substantive standards/norms require a certain level of specification to define the content of the commitments. Such specification is necessary to define commitments aimed at addressing trade problems stemming from lack of or inadequate protection, and excessive or discriminatory protection.

The very purpose of the negotiations is to clarify and/or elaborate GATT commitments in the area of TRIPs. For trade in counterfeit goods, participants shall elaborate such commitments. For TRIPs in a broader (and unspecified) context new GATT rules and disciplines are to be established as appropriate. Based on the view that such new rules and disciplines are appropriate, the commitments to be entered into must be aimed at alleviating trade problems stemming from lack of or inadequate protection, as well as excessive or discriminatory protection. As the level of protection is at the core of trade

problems in the area of intellectual property rights, GATT commitments cannot ignore the fact that this level of protection basically is determined by means of two factors - the enforcement mechanisms and the substantive standards/norms that are to be enforced. No government can be expected to enter into contractual multilateral commitments unless there is a balance of rights and obligations resulting from these commitments. To achieve such a balance there is a need for a certain degree of specification not only in respect of enforcement mechanisms, but - equally important - also of the substantive standards/norms that are to be enforced.

3. The reference points to substantive standards/norms, including, inter alia, their level of specification, the coverage of IPRs to be subject to new GATT rules and disciplines, as well as possible transitional arrangements and provisions, are issues to be negotiated among all participants in the TRIPs Group - with a view to ensuring that the legitimate concerns of the respective participants are appropriately taken into account.

Countries participating in the negotiations have significantly different points of departures in dealing with trade problems in the area of intellectual property rights. In a collective and multilateral effort to address the problems, differences of, inter alia, a legal and economic nature must be adequately incorporated into GATT commitments. While this principle would be in line with the general principles governing the Uruguay Round, the proper balance to be struck - also in the case of the reference points to substantive standards/norms - can only be achieved and operationalized through a broadly-based negotiating process. Such a balance would most likely call for transitional arrangements and provisions, taking into account the different points of departures referred to above.

4. Negotiations on such reference points to substantive standards/norms in GATT would not aim at an overall harmonization of participating countries' IPR laws and legislation, although a certain converging effect would be unavoidable - and desirable.

Based on the recognition that the level of protection (of intellectual property rights) - be it inadequate or excessive - may cause trade problems and distortions, and that this level basically is determined by two factors - enforcement mechanisms and substantive standards/norms - GATT commitments

to be undertaken in respect of the latter factor would unavoidably have a certain converging effect on participating countries' IPR laws and legislation. This would be a desirable effect aimed at curbing trade problems stemming from the protection of intellectual property rights. A clear distinction should be drawn between a certain converging effect, on the one hand, and overall harmonization, on the other hand. Negotiations on reference points to substantive standards/norms in GATT should not be an overall harmonization effort - neither in terms of legal systems and practices nor in terms of the substantive content of the norms - but an effort to achieve the necessary degree of specification to define the content of GATT commitments.

5. The level of specification of the reference points to substantive standards/norms in GATT should be derived from generally internationally accepted and applied standards/norms. The elaboration of these reference points in GATT would therefore not replace or substitute activities elsewhere, but rather be supportive of efforts undertaken in WIPO and in other specialized agencies with a view to promoting the protection of IPRs.

The existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property rights should be the prime source of negotiations on reference points to substantive standards/norms in GATT. The concept of generally internationally accepted and applied standards/norms includes both existing standards and norms provided in international treaties and/or international guidelines, as well as commonly applied national provisions and practices. The WIPO Secretariat has done a highly commendable job in presenting to the negotiating group a comprehensive and well-structured overview of such standards/norms for the respective IPRs. This documentation does not provide any solutions to the issue of reference points to substantive standards/norms in GATT, but it offers - together with documentation on trade problems and distortions in the field of intellectual property rights - a solid factual basis on which to negotiate such reference points. Bearing in mind the sources on which the negotiations would be conducted, the effect on efforts undertaken in WIPO and in other specialized agencies would clearly be supportive, and not replace or substitute these efforts.