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APPLICABILITY OF THE BASIC PRINCIPLES OF THE GATT AND OF
RELEVANT INTERNATIONAL INTELLECTUAL PROPERTY AGREEMENTS OR CONVENTIONS

Communication from India

The attached communication has been received from the delegation of India, with the request that it be circulated to members of the Negotiating Group.

**APPLICABILITY OF THE BASIC PRINCIPLES
OF THE GATT AND OF RELEVANT INTERNATIONAL
INTELLECTUAL PROPERTY AGREEMENTS OR CONVENTIONS**

This paper sets out the views of India on the applicability of the basic principles of the GATT and of the relevant international intellectual property agreements or conventions.

2. At the outset, India would like to reiterate that the protection of intellectual property rights has no direct or significant relationship to international trade. As has already been explained in the paper submitted by India on standards and principles concerning intellectual property rights (document MTN/GNG/NG11/W/37 dated 10th July, 1989), it would not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines on intellectual property rights. In our view, therefore, there can be no linkage between the basic principles relating to intellectual property rights and the GATT system. Without prejudice to this position, this paper culls out the basic principles of GATT and of relevant international intellectual property agreements or conventions and examines their applicability.

Part I
Basic principles of the GATT

3. The generally recognised basic principles of GATT are most-favoured-nation treatment, national treatment, protection through tariffs, stable and predictable basis for trade, transparency, and differential and more favourable treatment of developing countries. These are examined below.

4. **Most-Favoured-Nation Treatment (MFN):** The MFN commitment in GATT appears in Article I, Paragraph 1. The scope of application of this MFN clause is the following: customs duties and charges of any kind imposed on importation, exportation and international transfer of payments for imports or exports; the method of levying such duties and charges; all rules and formalities connected with importation and exportation; all matters referred to in Article III, Paragraph 2 and Article III, Paragraph 4 (which cover internal taxes and regulatory laws); and all of these apply only to products. The obligation imposed by the clause (i.e. what is required by the clause) is that 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 or destined for the territories of all other contracting parties. This principle of non-discrimination as between countries applies to international trade in products, while in the case of intellectual property system, we are concerned with the protection of the rights of persons. The one is concerned with border measures pertaining to physical objects, while the other is concerned with the protection of intangible items within national territories. The principle embodied in the MFN clause of GATT is therefore clearly inapplicable to intellectual property rights.

4. National Treatment: The national treatment obligations in GATT are essentially contained in Article III. In essence, national treatment in GATT means that once products have been imported into a country (that is to say, once they have crossed the border and entered the domestic market), the imported products will be accorded the same treatment as "like" products of national origin with respect to matters under government control, such as taxation and regulation. Whether it is tax or non-tax aspects, the national treatment obligations in GATT pertain to international trade in like products, and not to persons or to the protection of intangible rights of persons. The CONTRACTING PARTIES have recognised that "the national treatment obligations of Article III of the General Agreement do not apply to foreign persons or firms but to imported products" (BISD, 30th Supplement, page 140). The principle of national treatment as embodied in GATT is therefore inapplicable to intellectual property rights.

5. Protection through tariffs: A basic principle of GATT is that where protection is to be given to domestic industry, it should be extended essentially through customs tariffs and not through other commercial measures. This is reflected in Article XI which deals with the general elimination of quantitative restrictions. Inherent in this principle is the recognition of the superiority of tariffs as a commercial policy instrument in comparison to quotas, imports or export licences or other measures that prohibit or restrict imports and exports. This important principle of GATT has no relevance for intellectual property rights.

6. A stable basis for trade: Article II of GATT provides for commitments to be undertaken by contracting parties for maintaining tariffs at specified levels. Underlying this provision is the basic principle that rules governing trade should be stable and predictable. This principle as well as the mechanism for implementing it can have no application to intellectual property rights.

7. Transparency: Article X of GATT requires that all laws, regulations, judicial decisions and administrative rulings of general application shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. The basic principle of transparency, that is to say the prompt publication of the relevant laws and regulations, has validity for the intellectual property system as long as it is understood that the principle is confined to the publication only and does not extend to any other obligation.

8.1 Differential and more favourable treatment: The principle of according special treatment to developing countries in order to promote their economic development is clearly recognised in GATT.

8.2 Article XVIII of GATT gives flexibility to developing countries for introducing and maintaining restrictions for safeguarding the external financial position and for promoting the establishment of particular industries. Part IV of the GATT embodies certain commitments by the developed contracting parties and the CONTRACTING PARTIES for stimulating expansion of the export earnings of the developing countries. In the Enabling Clause, it has been provided that notwithstanding the provisions of Article I of the General Agreement, CONTRACTING PARTIES may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

8.3 These provisions rest on the recognition of the following factors:

- (i) there is a wide gap between the standards of living in developed and developing countries;
- (ii) there is greater urgency for promoting the development of the economies of the developing countries;

- (iii) there is need for individual and joint action to bring about rapid advancement in the standards of living of developing countries; and
- (iv) developing countries cannot be required to undertake obligations and make contributions which are inconsistent with their individual economic situation.

8.4 The considerations which underlie the GATT principle of differential and more favourable treatment are also relevant for intellectual property rights. This principle has, therefore, validity for the intellectual property system.

9. To sum up, the generally recognised principles of GATT excepting transparency and differential and more favourable treatment for developing countries, which have their own validity even otherwise, are clearly inapplicable to intellectual property rights. This should not be surprising because GATT is a multilaterally negotiated legal instrument with a carefully defined framework of rights and obligations governing trade in goods as they cross the international borders. The philosophy of GATT is the promotion of free trade and fair competition. On the contrary, the essence of the intellectual property protection system is its monopolistic and restrictive character. While GATT is designed to serve as a negotiating forum for liberalisation of trade in goods, the intellectual property system seeks to confer exclusive rights on their owners.

Part II Relevant international intellectual property agreements or conventions

10. The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Work are the two main international intellectual property agreements. A fundamental principle which informs the provisions of these agreements, particularly the Paris Convention, is that member States should have the freedom to attune their intellectual property protection system to their own needs and conditions. Other basic principles embodied in these conventions are national treatment, balance between the rights and obligations of the

intellectual property owner, primacy of public interest, non-reciprocity and independence of protection. These are examined below.

11.1 Freedom on scope and level of protection: A basic principle of intellectual property conventions is the establishment of a set of common rules which must be observed by all member countries, but subject to which each country has considerable freedom to determine the scope and level of protection of industrial property according to its own interests. To quote one well known commentator, "In the field of patents, for example, the Convention leaves the member States entirely free to establish the criteria for patentability, to decide whether patent applications should or should not be examined in order to determine, before a patent is granted, whether these criteria have been met, whether the patent should be granted to the first inventor or to the first applicant for a patent, or whether patents should be granted for products only, for processes only, or for both, and in which fields of industry and for what term".

11.2 This freedom to the member States to determine the scope and level of protection of industrial property according to their own needs and conditions is in recognition of two fundamental aspects of the intellectual property protection system: first, the system involves the grant of extraordinary rights which has serious implications for the national economy; and second, there is a close correlation between the level of economic, industrial and technological development of a country on the one hand and the nature and extent of intellectual property protection that it may find expedient to provide. Historically also, it has been observed that countries have raised the level of protection granted to intellectual property rights as they attained higher levels of technological and economic development. Prescription of a uniform scope and level of protection has therefore been avoided and each member State has been allowed freedom to exercise its own judgement in this regard. This principle is of considerable importance particularly to developing countries.

12.1 National Treatment: The principle of national treatment embodied in international intellectual property agreements envisages equal treatment of nationals and foreigners. The following features of this principle should be noted:

- (i) It concerns persons, not products;
- (ii) It covers natural as well as legal persons; and
- (iii) It extends only to the protection of intellectual property and not to its use.

12.2 In this context, it must be pointed out that the principle of national treatment in intellectual property right conventions is extended only through the domestic law. Article 2, Paragraph 1 of Paris Convention lays down that "Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals". The question whether private parties may directly claim the application of the provisions of the Convention without further intervention by the national legislation would depend on two factors:

- (a) whether the provisions concerned are so worded as to permit direct application; and
- (b) whether the Constitution or Constitutional system of the member State concerned permits provisions of an international convention to be "self-executing".

12.3 There are countries where the provisions of an international treaty are never applicable to private parties without first having been embodied in the domestic legislation. In view of this position, India has reservation about the categorical statement made in para 11 of the document MTN/GNG/NG 11/W/34 that "where national treatment would result in less protection than the minimum required by the treaty, the treaty rather than the national law must be applied to foreigners.

13. Balance of rights and obligations: The international conventions on intellectual property rights clearly recognise the basic principle that there must be a balance between the rights and obligations of the owner of intellectual property. For example, the Paris Convention recognises the fact that the monopolistic protection given to a patent owner can lead to abuses. Article 5 A (2) of the Paris Convention therefore lays down that "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licences to prevent the abuses which might result from the exercise of the exclusive rights conferred by the

patent, for example, failure to work". Compulsory licensing has also been envisaged in the Berne Convention for being granted by the developing countries in certain circumstances.

14. Primacy of public interest: A principle which is closely related to the balance of rights and obligations is the primacy of public interest. The State has the inherent right to take measures in public interest abridging the rights of the holders of intellectual property rights. One such measure is the grant of compulsory licence on the ground of failure to work or insufficient working. But other measures may also be taken, particularly in respect of patents, in pursuance of such vital concerns as security, public health, nutrition, agricultural development, poverty alleviation and the like.

15. Non-Reciprocity & Independence of Protection: Non-reciprocity and independence of protection are well recognised principles of international intellectual property agreements. These have been adequately described in the paper prepared by the International Bureau of the World Intellectual Property Organization (MTN.GNG/NG 11/W/34).