

**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 FROM CHILE

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

A. Introduction

In these negotiations, it is necessary to bear in mind at all times that their objective is not to legislate on intellectual property or intellectual property rights but rather to legislate on trade-related aspects of intellectual property rights.

It is therefore trade, or rather the relationship that may exist between intellectual property rights and trade, which forms the basis of our joint negotiating mandate.

We are therefore concerned to see that many of the proposals submitted so far succumb to the temptation to legislate on intellectual property, thus forgetting the very clear mandate mentioned above. In themselves, intellectual property standards and rights are neutral from the trade standpoint. They may or may not be related to trade, depending on the specific circumstances. It is therefore inappropriate to draw up international standards of which any non-application would automatically be interpreted as an infringement of free trade and hence subject to some kind of trade sanction.

In our view, consequently, the whole subject must be approached from the trade standpoint; or at least, this approach must guide the negotiations should we seek to introduce changes in the GATT legal system.

The General Agreement deals only tangentially with the question of intellectual property, and the spirit of the few provisions which refer to the latter clearly indicates that the purpose of the General Agreement is not to foster an abundance of regulations but rather to ensure that intellectual property laws do not become a barrier to trade.

The proper sphere for intellectual property standards is not GATT but the World Intellectual Property Organization. Accordingly, Chile sees no drawback whatsoever in the possibility that the many proposals on standards made in this Negotiating Group be forwarded to that Organization, with a view to WIPO administering these new standards in the form of a new international treaty or an additional protocol to other conventions in this area.

Before concluding this introduction, we should like to make it clear that in using the word "standards" on intellectual property, we have done so in a strictly legal sense. In other words, standards comprise both what is called here "provision of standards" as well as "adequate principles", the "applicability of the basic principles of the GATT", the "provision of effective and appropriate means" and "transitional arrangements".

B. The dispute-settlement system could be a decisive element for reaching a consensus on TRIPs

It is quite clear that for a large group of countries, simply to forward the standards to WIPO does not resolve the problem of the trade sanction they would like to apply to countries which do not apply internationally-accepted intellectual property standards. For in the final analysis, only trade sanctions appear effective.

Furthermore, WIPO does not have trade responsibilities, and hence cannot impose trade sanctions. It is also the case that only GATT has such responsibilities. How can WIPO be linked with GATT in such a way that in specific cases, in the event of the non-application of internationally-accepted trade-related intellectual property standards, GATT could impose trade sanctions?

In our view, a possible WIPO-GATT link may be found through the machinery of the dispute-settlement system. In other words, to put it technically, what cannot be determined by substantive law (standards) can be determined by adjective law (procedural provisions), through jurisdiction (dispute-settlement system) and jurisprudence.

We therefore submit the following ideas for consideration by the Negotiating Group:

- (a) It is common knowledge that WIPO is currently studying the creation of its own dispute-settlement system, for the purpose of resolving issues arising out of the non-application of internationally-accepted intellectual property standards. Obviously, such a system would not deal with trade aspects, but only with legal aspects. We therefore suggest that countries participating in this Negotiating Group undertake to subscribe, in WIPO, to a convention setting up a dispute-settlement system within that Organization for the purpose of ensuring that internationally-accepted intellectual property standards are applied.

- (b) Let us now suppose that the WIPO dispute-settlement system has already been adopted and is in operation. This assumption is necessary for the success of the following proposal.
- (c) Where the panel set up ad hoc in WIPO determines that an internationally-accepted intellectual property standard has not been applied, if the injured party considers that this has had trade consequences it may request a GATT panel.
- (d) The specific task of the panel set up in GATT would be to determine whether the non-application of the internationally-accepted intellectual property standard, as found to exist by the WIPO panel, has or has not had trade consequences. In other words, GATT would only determine whether or not there are "trade-related effects".
- (e) Obviously, in cases where the consultations and conciliation provided for in GATT did not enable a dispute to be resolved satisfactorily, and also in cases where the recommendations and decisions of the CONTRACTING PARTIES were not implemented, then Article XXIII of the General Agreement would be applied. That Article provides for trade sanctions by allowing a contracting party to suspend the application to any other contracting party of such concessions or obligations under the General Agreement as the CONTRACTING PARTIES consider justified.

C. Final remarks

The formula we propose has the following advantages:

- (a) It allays the justified concern that, in the case of intellectual property, trade sanctions may be applied arbitrarily. Under our formula, such sanctions could only be applied exceptionally after a kind of two-tier procedure in WIPO and in GATT.
- (b) It fulfils the Punte del Este and Montreal mandate, in that the negotiations concern not intellectual rights as such but trade-related intellectual property rights.
- (c) It respects the essential functions of WIPO and of GATT. It is WIPO's responsibility to protect intellectual property rights; and it is GATT's responsibility to encourage free trade. Accordingly, any conflict that relates only to the non-application of an internationally-accepted intellectual property standard may be resolved only by WIPO; and any non-application of such a standard that has trade consequences may be sanctioned only by GATT.