Dear Participant,

I am writing in connection with the informal meeting of interested participants in the Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, that was held on the afternoon of 20 January, in order to discuss the agenda and organisation of the Group’s next meeting. In accordance with the decision of the GNG at its last meeting, this meeting has been called for the period 29 February – 3 March (GATT/HR/2546).

In regard to the agenda, the suggestion to use essentially the same four items as we have used hitherto seemed acceptable and the airgramme convening the meeting accordingly proposes the following agenda:

A Trade-related aspects of intellectual property rights;
B Trade in counterfeit goods;
C Consideration of the relationship between the negotiations in this area and initiatives in other fora;
D Other business, including arrangements for the next meeting of the Group.

As for the organisation of the work at this meeting under the agenda items, there is, I believe, a general view that the Group should have a more structured discussion of the issues before it. In regard to agenda items A, the suggestion I put forward at the informal meeting on 20 January was that this could be done by using the main headings in the secretariat compilation (MTN.GNG/NG11/W/12 and Add.1) as a way of organising our work. (An updated version of the compilation reflecting the additional written submissions and oral statements has been issued as document MTN.GNG/NG11/W/12/Rev.1). These headings are:

- Issues in connection with the enforcement of intellectual property rights;

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

Let/1557

88-0229
- Issues in connection with the availability and scope of intellectual property rights;
- Issues in connection with the use of intellectual property rights;
- Issues in connection with the settlement of disputes between governments on intellectual property rights.

Of course, I would also intend to offer an opportunity for any other matter relevant to this agenda item to be raised. I should make it clear that the intention is not that the work be based on the compilation - the work will be based essentially on the suggestions provided for in the Negotiating Plan - but simply that the Group should use the structure of the document as a way of organising its discussions.

I believe this method would enable the Group to have a more focussed discussion of the suggestions as well as of the questions referred to in my concluding remarks at the Group's November meeting, such as the proper scope of the work of the Group, the relevant GATT provisions, and the relationship between our work and initiatives in other fora.

As I mentioned at the informal meeting, I have been giving some thought to the questions that it might be useful for the Group to ask itself at this stage. Some of these are listed on the attached non-paper that I hope participants may find of some use in preparing themselves for the Group's meeting.

As for agenda item B, trade in counterfeit goods, I would also suggest that the Group plan for a more structured and systematic discussion. There would appear, in effect, to be three basic substantive questions that the Group might wish to focus on at this stage:

- What should be the scope of a multilateral framework on trade in counterfeit goods?
- What should be the mechanisms and remedies provided in such a framework to ensure effective action against trade in counterfeit goods?
- What safeguards should be built in to ensure that procedures and remedies for this purpose do not themselves become barriers to legitimate trade?

The report of the Group of Experts on Trade in Counterfeit Goods (L/5878) contains a somewhat more detailed checklist of questions in the sub-headings to paragraphs 26-34; participants may wish to refer to these questions when preparing themselves for the meeting. They are:

- What should be the basic purpose of any joint action?
What should be the definition of counterfeit goods for the purposes of any joint action?

What should the mechanisms of any joint action be?

Should such mechanisms be the same for goods at the border as for those in domestic circulation?

Who should determine whether suspect imports infringe trademark rights and what should be the criteria for determining infringement?

How would "parallel" imports be treated?

What should be the remedies and sanctions provided for against imports of counterfeit goods?

What is the danger of action to combat counterfeit goods giving rise to obstacles to trade in genuine goods? How can this best be safeguarded against?

Although it is always difficult to foresee in advance how the meeting will develop, I would imagine that a discussion of the sort that I have suggested would take at least the first day of the meeting and probably part of the second day. This will then leave time for informal meetings, both of the Group and among interested delegations. I would hope that in those consultations we can address in particular the organisation of the further work of the Group. In these discussions participants could come forward with their views on the possible structure of commitments that they could envisage negotiating in the Group, including possible links with other relevant organisations in the negotiation and implementation of such commitments. As I mentioned at the informal meeting on 20 January 1987, it would be my intention at the end of the Group's meeting to hold another formal session to ensure transparency.

Yours faithfully,

L. E. R. Anell
Chairman

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

This checklist is not intended in any way to be exhaustive, but simply to list some of the questions which have arisen in the first year of the Group's work.

The Relevant GATT Provisions

There appears to be a large measure of common thinking in the Group about which GATT provisions are relevant to the issues raised and also about their operation — although there are different conclusions drawn from this analysis for what the Group should do. In this regard do participants have any difficulty with the following:

- The identification and description of relevant GATT provisions contained in document MTN.GNG/NG11/W/6?

- The General Agreement contains important principles and rules, for example, in its Articles I, III and XX(d), to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade?

- Apart from Article IX:6 as it relates to certain geographical indications, the General Agreement does not contain obligations specifically obliging contracting parties to enforce intellectual property rights or to accord any specific level of protection to intellectual property?

Certain points which might benefit from further examination in the Group:

- Few countries have given their views on the operation of Article IX:6. It would be useful to hear the views of more participants about how they see this provision.

- A number of issues raised have concerned discrimination in favour of domestic productive or inventive activity, both in the enforcement of intellectual property rights and in the granting or exercise of the basic rights themselves. In this regard, it might be helpful to reflect on the extent to which the existing provisions of the General Agreement already apply to such situations and on the extent to which the general principles that some delegations have suggested should be established, such as mfn or non-discriminatory treatment and national treatment, would constitute a reaffirmation of, or an addition to, what exists already in the General Agreement.

- A further basic issue that might be further examined is the view of some participants that inadequate or ineffective protection of intellectual property undermines the attainment of the objectives of the General Agreement and the value of trade concessions entered into under GATT.
Enforcement of Intellectual Property Rights

The Group's discussions and the suggestions made have raised a considerable number of important points. Without trying to be exhaustive these include:

- To what extent does the existing international law deal with the issues raised? (The Group will have before it a secretariat note on enforcement provisions in international conventions (MTN.GNG/NG11/W/18).)

- To what extent should the Group negotiate commitments to ensure the adequacy of border and internal enforcement mechanisms?

- What implications does the existence of different legal and administrative traditions, practices, and possibilities among countries have for this work of the Group?

- How does the appropriateness of enforcement mechanisms vary according to the type of intellectual property right in question and what are the implications for the work of the Group?

- What, if any, would be the circumstances under which differential procedures and remedies against imported goods might be justifiable?

- How could it be ensured that any such differentiation does not give rise to obstacles to legitimate trade?

- What other safeguards might be necessary to ensure that procedures and measures for the enforcement of intellectual property rights do not themselves become barriers to legitimate trade?

Scope and Availability of Intellectual Property Rights

There are differences of view as to whether, or the extent to which, commitments should be negotiated in the area of norms or standards for intellectual property rights. A further exploration of views in this connection would be helpful.

Participants might wish to consider the existing international law and the activities of other international organizations as they relate to the matters raised in the Group. (Documents on the provisions of conventions administered by WIPO and Unesco and on the activities of other international organizations will be before the Group (MTN.GNG/NG11/W/21, 19 and 20 respectively).)
In the discussion, two main sets of considerations have been advanced: inadequate (or sometimes excessive or discriminatory) and unharmonised levels of protection for intellectual property rights are giving rise to distortions and impediments to international trade; and the appropriate level of protection for intellectual property is determined by each country on the basis of a range of national objectives and therefore legitimately varies from country to country. The Group might wish to examine further these propositions with a view to assessing the implications for the international trading system and for its work.

Use of Intellectual Property Rights

Further elaboration by interested participants of the issues raised, the problems seen to be arising for international trade and the possible solutions would assist the Group to assess the extent to which it should take up matters relating to the use of intellectual property rights. Most of the issues raised in this connection (MTN.GNG/NG11/W/12/Rev.1, Section III) concern the terms of agreements licensing the use of intellectual property rights. The question of the extent to which intellectual property rights should give owners of rights control over international trade in goods incorporating such rights has also been raised, particularly in regard to parallel imports.

In considering these matters, participants might wish to take into account relevant activities in other fora (MTN.GNG/NG11/W/20).

Settlement of Disputes among Governments

What are the respective roles of national enforcement mechanisms and multilateral dispute settlement mechanisms? (Some participants have expressed unease about the possibility that disputes between private parties could be raised to the level of disputes between countries).

What might be the links between (i) any multilateral dispute settlement system concerning the trade-related aspects of intellectual property rights, (ii) the dispute settlement procedures under the General Agreement, and (iii) existing international intellectual property law and institutions? (The Group will have before it, in Section II of document MTN.GNG/NG11/W/18 a description of mechanisms for the settlement of disputes between member States in international agreements on intellectual property rights.)