Dear Participant,

At the end of the last meeting of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, I said that I would write to participants before the Group's next meeting to share with them some thoughts about points that could be the focus of discussion at the Group's meeting. As agreed, this has been called for the week of 16 May, with the same agenda as for the Group's last meeting (GATT/AIR/2586).

There was, I believe, a general view at the Group's last meeting that in future it would be useful to devote a greater proportion of the time available to the Group to informal discussions. It would thus be my intention to devote the largest part of the time available to the Group at its next meeting to informal discussions and most of the suggestions in this letter concern the informal discussions. The point was also made, and I believe generally accepted, that a summary of the main points made in the informal discussions should be made by the Chair at a formal session of the Group in order to ensure transparency and for the sake of the record.

As indicated in the Airgram, the Group will meet on Monday, 16 May at 11.00 a.m. My intention would be to hold a relatively brief initial formal session, essentially in order to enable participants to put on the table the new elements that they would wish to introduce or to make any statements that they would wish to see reflected in the records.

When this has been done, the Group might then meet informally in order to have a detailed exchange of views about the substance of the issues before it. I hope that the informal context will facilitate a real dialogue between participants, building on that which took place at the Group's last meeting. The Group's informal discussion might have

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three main parts: one each on the basis of two major new documents that will be before the Group, and a third part in which participants might address a number of points which are outlined below. The two documents are: (i) that requested from the WIPO Secretariat to facilitate an understanding of the existence, scope and form of generally internationally accepted and applied standards/norms for the protection of intellectual property (MTN.GNG/NG11/6, paragraph 39 and Annex) and (ii) the secretariat compilation of written submissions and oral statements on trade in counterfeit goods (MTN.GNG/NG11/6, paragraph 37).

In regard to the first document, the Group requested the WIPO Secretariat to make available to it such information as it can prior to the Group's next meeting and to provide the remainder as soon as possible thereafter. I understand that the WIPO Secretariat will be able to make available to us for our next meeting the major part of the information requested. Participants might address this document with a view to indicating their own understanding of the present situation and how it relates to the work of the Group and to identifying points on which further clarification would be useful. The WIPO Secretariat might be invited to be represented at this discussion in order to respond to any questions from participants.

In a second part of the discussion, participants might use the secretariat compilation on trade in counterfeit goods as a basis for a further exchange of views on this matter. I would hope that in this discussion participants would not only come forward with suggestions of their own but also with their reactions to the suggestions of others. To take an example, the compilation will record the quite large number of ideas about ways of ensuring that action to repress trade in counterfeit goods does not lead to barriers to legitimate trade that have been put forward, both under this agenda item and under that on trade-related aspects of intellectual property rights; it would be helpful to have the reactions of a large number of participants to these ideas, so that the Group can be in a better position to assess their likely acceptability and any difficulties that they may entail. I would also urge participants to be as specific as they can be at this stage about the type of commitments that they would wish to see in a multilateral framework. For example, in relation to the ideas that have been put forward for action against the export and transit of counterfeit goods, to what extent could mechanisms or procedures against imports of counterfeit goods also be applicable to exports and goods in transit and would new or adapted procedures be required?

For a third part of the discussions, I would like to suggest a number of points that could be taken up:

(i) The first is the links between intellectual property rights and international trade. Some delegations are clear in their own minds about the problems for international trade arising in connection with intellectual property rights, and point to documents MTN.GNG/NG11/W/7 and Addenda and the sections on "trade effects" in document MTN.GNG/NG11/W/12/Rev.1 in this connection. However, it
was apparent at the Group's last meeting that some other delegations are still unsure about the links between intellectual property rights and international trade and feel the need for further exploration of this matter, particularly because of its relevance to the scope of the Group's Negotiating Objective. The point was made that the material presented in the Group tended to be rather general and lacking in specifics. To attempt to respond to these concerns, individual participants that have pointed to trade problems arising in connection with intellectual property rights might provide concrete examples or case studies (without naming names) illustrating these problems. The aim would be not so much to provide quantitative estimates as to make explicit the mechanisms or links by which practices in the area of intellectual property rights might be giving rise to trade problems.

(ii) Many delegations have indicated a need for clarification of the extent of the obligations that governments might be asked to undertake to repress the infringement of intellectual property rights, whether in connection with "enforcement" or "trade in counterfeit goods". This has partly taken the form of concern about the point at which a government would become internationally responsible, for example in international dispute settlement proceedings, for failure to repress the infringement of intellectual property rights. In examining this issue further, it might be useful to distinguish three categories of obligations to repress the infringement of intellectual property rights:

(a) An obligation on governments to take ex officio action against the infringement of intellectual property rights. This does not appear to be suggested in the proposals before the Group, except perhaps that of Brazil (MTN.GNG/NG11/W/11).

(b) An obligation on governments to make available to intellectual property right owners certain procedures and remedies so that the owners themselves can take action to enforce their rights. The specific suggestions before the Group propose this.

(c) There remains the question of what would be the extent of the obligations on governments to ensure that the competent national bodies (e.g. courts, customs, police) apply effectively these procedures and remedies at the request of intellectual property right owners. For example, if customs were to fail to detain shipments of goods suspected of being counterfeit which they had been duly requested to intercept, to what extent and under what circumstances should there be (i) a liability of the customs authorities vis-à-vis the intellectual property right owner who had requested the detention and (ii) an eventual liability, in international dispute settlement proceedings, of the government of the importing country vis-à-vis that of (a) the country of which the intellectual property right owner is a national and (b) the country in which the genuine good that is being counterfeited is produced (assuming that in each case the
two governments are different and that both are parties to the international agreement in question)? Can we take it that, in any dispute settlement procedures, a common sense assessment would be made of what can be reasonably expected of a party according to its situation in terms of the effective application of procedures and remedies?

(iii) If commitments negotiated in the Group, whatever they may be, are to find a place in the GATT framework, they will of course need to be given a legal form in that framework. I believe that it is not too early to start giving thought to that legal form and to the relationship that commitments resulting from the work of the Group would have to existing GATT commitments.

The topics for informal discussion suggested above are not intended to be exhaustive. No doubt there will be other points that participants will wish to explore. I would expect that, in addition to informal meetings of the Group, there would also be time during the week for informal meetings among smaller numbers of interested participants before the Group reconvenes for a final formal session towards the end of the week.

Participants in preparing for the meeting might also wish to look at the points raised in my letter of 10 February 1988 and the attached checklist of questions. On the question of relevant GATT provisions, I have prepared a fuller summary of what I understand to be the main points that have emerged from the Group's consideration of this matter, a copy of which is attached to this letter.

Yours faithfully,

Lars E. R. Anell
Chairman
Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods
RELEVANT GATT PROVISIONS

There appears to be no problem in the Group with the identification and description of relevant GATT provisions contained in document MTN.GNG/NC11/W/6. The following attempts to summarize the main points emerging from the Group's examination of the relevant GATT provisions:

i) The General Agreement does not put on governments specific obligations to enforce intellectual property rights or to accord any particular level of protection to intellectual property. The only GATT provision that specifically promotes the protection of intellectual property is Article IX:6, which concerns certain geographical indications. This requires contracting parties to co-operate and to be willing to consult with each other and indicates the standard of protection that such cooperation and consultations should aim to promote.

ii) The General Agreement recognizes the right of contracting parties to enforce intellectual property rights and contains a specific "exceptions" provision, Article XX(d), that authorizes contracting parties to take, subject to certain conditions, measures that would normally be inconsistent with the General Agreement for this purpose.

iii) The conditions attached to the use of Article XX(d) are essentially designed to ensure that such measures are not employed as unwarranted restrictions on trade or means of discrimination between contracting parties.

iv) With the same basic aims, the General Agreement also contains a number of general rules that apply to a wide range of governmental measures, both at the border and internally, including when taken in connection with intellectual property rights. Thus Article III on national treatment requires that, in so far as laws, regulations and requirements on intellectual property rights affect the internal sale, offering for sale, purchase, transportation, distribution or use of products, they should not be applied to imported or domestic products so as to afford protection to domestic production or to accord imported products less favourable treatment than like products of national origin. The basic GATT most-favoured-nation rule (Article I) and the GATT provisions on the publication and administration of trade regulations (Article X) also apply widely to intellectual property law as it affects trade.

v) While these GATT rules serve to prevent intellectual property legislation from having certain undesirable effects on trade, the General Agreement also contains two specific requirements that trade measures must not be used in a way that would prevent compliance with intellectual property procedures. The trade measures in question are import restrictions taken to safeguard the balance of payments (Articles XII:3(c)(iii) and XVIII:10).
vi) In addition to the above, some procedural provisions of the General Agreement have a potentially wide-ranging scope and could be invoked in certain situations in connection with intellectual property rights:

- the consultation provisions of Article XXII can be invoked to the extent to which a matter related to intellectual property rights is considered to affect the operation of the General Agreement;

- the dispute settlement provisions of Article XXIII can be invoked to the extent that some measure or situation related to intellectual property rights, whether or not conflicting with GATT obligations, is considered to be a cause of nullification or impairment of benefits under the General Agreement or an impediment to the attainment of any of its objectives;

- under Article XXV:1, the CONTRACTING PARTIES can take joint action on a matter concerning intellectual property rights where this would facilitate the operation and further the objectives of the General Agreement.