TOWARDS AN INTELLECTUAL PROPERTY AGREEMENT IN THE GATT: VIEW FROM THE PRIVATE SECTOR

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I. PRIVATE SECTOR PARTICIPATION IN THE URUGUAY ROUND

Developments in the Uruguay Round, more so than in any previous round of multilateral trade negotiations, will affect profoundly the structure and operation of global business, especially in the three areas not addressed in earlier rounds—intellectual property, services, and investment. Given the importance of these "new" issues to the business community, the U.S. private sector has assumed an active role in the Uruguay Round negotiations. In fact, the search for improved international intellectual property protection in the GATT has been driven primarily by the private sector. It is the business community and not the Government that has extensive experience with the economic consequences of inadequate intellectual property protection. Thus, the private sector has sought to share its experience and expertise with U.S. Government negotiators in order to develop a comprehensive agreement that will address the problems faced by U.S. industries.

Through the Intellectual Property Committee, the U.S. private sector has developed a coordinated position on intellectual property issues, has worked closely with U.S. government officials and negotiators to promote business interests, and has marshaled international support for its position. Largely as a result of private sector involvement, the area of intellectual property has evolved in the Uruguay Round from an obscure issue that was not widely recognized as a proper topic for the GATT prior to the September 1986 Punta del Este meeting to one of the most significant and closely watched issues in the Round.

II. THE INTELLECTUAL PROPERTY COMMITTEE

Established in March, 1986, The Intellectual Property Committee ("IPC") is an ad-hoc coalition of twelve major U.S. corporations representing the entire spectrum of industries concerned about intellectual property protection. The members of the IPC are Bristol-

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Myers, DuPont, FMC Corporation, General Electric, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications. The IPC is dedicated to the negotiation of a comprehensive agreement on intellectual property in the current GATT multilateral trade negotiations.

One of the IPC's initial objectives was to ensure the inclusion of intellectual property on the negotiating agenda for the Uruguay Round. In the six months between the IPC's formation and the GATT Ministerial Meeting at Punta del Este where the Uruguay Round was launched, the IPC worked to develop and mobilize an international private sector consensus in support of including intellectual property in the new Round. In the summer of 1986, IPC delegations met with European and Japanese business groups to gain their support and urge them to contact their respective governments. As a result, the Ministerial Declaration that emerged from Punta del Este contains a broad negotiating mandate for intellectual property. In addition, the IPC worked closely with members of Congress and their staffs to ensure that Congress would provide the President with strong and explicit trade negotiating authority for intellectual property. The Omnibus Trade and Competitiveness Act of 1988 mandates as a principal U.S. negotiating objective the improved foreign protection and enforcement of U.S. intellectual property rights.

During the two years following Punta del Este, the IPC worked with European and Japanese business groups to develop an international private sector consensus on what should be included in a GATT intellectual property agreement. Japanese and European industries are motivated by similar concerns, having shared in the billions of dollars of losses experienced by U.S. companies as a result of piracy and counterfeiting. Moreover, the potential for economic harm continues to grow due to the increasing interdependence of the global economy. This cooperative effort culminated in June 1988 in the publication of a trilateral report by the IPC, the Union of Industrial and Employers' Confederations of Europe ("UNICE"), and the Keidanren, the Japan Federation of Economic Organizations. The document sets forth a detailed framework for a GATT agreement on intellectual property. Such unity among the three business communities is unprecedented: as the *Financial Times* noted, "the intellectual property initiative marked the first time that industries from the three blocs have worked closely together on joint proposals to put to governments." Eighteen U.S. trade and intellectual property associations have endorsed the approach set forth in the trilateral report. The trilateral consensus was communicated to the U.S., Jap-

anese, and European Governments and to the EC Commission, whose official negotiating positions track closely the approach advocated in the trilateral document. As a result of concerted private sector pressure, the United States, the EC, and Japan have taken the lead in the GATT intellectual property negotiations.

III. THE NEED FOR A GATT AGREEMENT ON INTELLECTUAL PROPERTY

A. Inadequate Intellectual Property Protection Distorts and Restricts International Trade

The business community's leadership role in the quest for increased intellectual property protection is not surprising in light of the billions of dollars of losses that U.S. industries have suffered as a result of counterfeiting, piracy, and infringement. The U.S. International Trade Commission estimates that in 1986, alone, U.S. industries lost from $43 to $61 billion world-wide due to inadequate intellectual property protection. The loss of export and domestic markets by intellectual property-based industries demonstrates that the lack of intellectual property protection has become a significant barrier to trade. There is a direct link between the protection of intellectual property rights and U.S. international competitiveness. United States companies simply will not have the incentive to invest in research and development unless they can reap the financial benefits of developing new technology. As worldwide infringement increases, it becomes more difficult for industries to achieve an economic return on innovative products and designs. Infringers, who do not have similar development costs, displace legitimately produced goods from international markets. For example, a new generation of semiconductors can cost $100 million or more to design, yet the same chips can be copied for less than $1 million. A popular U.S. software package which costs $500 here, has been copied and sold abroad for $7.50.

B. Adequate and Effective Intellectual Property Protection Will Benefit All Countries

Protecting intellectual property is not an issue that should divide countries based on their levels of development. Adequate and effective intellectual property protection is beneficial to both developed and developing countries alike. Particularly with respect to developing countries, increased protection will encourage and reward innovation by domestic firms, provide incentive for the development of inter-

nationally competitive industries, promote increased foreign investment and transfer of technology, and prevent a "brain drain" by which local inventors and entrepreneurs frustrated by their country's lack of adequate protection migrate to more developed countries. Whatever may be the short-term benefits of imitation and "free-riding" on advances made elsewhere, in the long-term, such a strategy condemns a country to outdated technology and a second-class status. More and more countries are recognizing that the growth and success of their domestic industries is jeopardized by inadequate intellectual property protection. For example, China recently strengthened its domestic intellectual property laws to protect its infant computer software industry. Even in countries where piracy has been a severe problem, such as Indonesia, Taiwan, and Singapore, efforts have been made to improve intellectual property protection.

C. Existing Intellectual Property Regimes Are Not Effective In Addressing Trade Distortions

While there are international intellectual property regimes in place, such as the Berne Convention and the Universal Copyright Convention for copyrights, and the Paris Convention for patents and trademarks, they simply have not been effective in stopping the tremendous losses suffered by industries due to counterfeiting and piracy. Many of these existing conventions fail to provide minimum standards of protection. Often, parties are only required to provide national treatment, which translates into no protection for foreigners when a country's domestic laws do not adequately protect local owners of intellectual property rights. In addition, these conventions do not contain adequate dispute settlement provisions or enforcement mechanisms.

As a result of the deficiencies of existing intellectual property regimes, governments will continue to turn to bilateral and unilateral solutions to the problem. For example, the United States recently denied preferential tariff treatment to Thailand under the Generalized System of Preferences citing Thailand's failure to provide adequate protection of intellectual property. The United States has already used section 301 of the Trade Act of 1974 to combat inadequate intellectual property protection abroad. The Omnibus Trade and Competitiveness Act of 1988 contains special procedures to identify countries that have inadequate intellectual property protection or that deny market access to U.S. products dependent upon intellectual property protection. The new provision authorizes the U.S. Trade Representative to initiate unfair trade practices investigations against those countries that are the worst offenders.

Increased bilateralism is harmful to weaker countries, which rely on the multilateral system to discipline those that are more powerful. Bilateral arrangements do not take into account the interests of those not a party to a particular negotiation or settlement, and such arrangements are likely to lead to barriers to legitimate trade. In contrast, all trading partners, large and small, industrialized and developing, stand to gain from a comprehensive multilateral agreement on intellectual property.

IV. THE TRILATERAL FRAMEWORK FOR A GATT AGREEMENT ON INTELLECTUAL PROPERTY DEVELOPED BY THE IPC, UNICE, AND THE KEIDANREN

The 100-page document agreed to by the three business groups, entitled, *Basic Framework of GATT Provisions on Intellectual Property*, outlines a comprehensive negotiating strategy and a basic framework for a GATT agreement. The *Framework* advocates the negotiation of a separate GATT Code on intellectual property, similar to the Standards and Subsidies Codes negotiated during the last multilateral round of trade talks. A code would establish rights and obligations only among its signatories. Thus, those countries with a common interest in eliminating trade distortions would quickly be able to enter into an agreement, and not be "held hostage" to the demands and stalling tactics of pirates and counterfeiters.

The three essential elements of a GATT agreement on intellectual property are: (1) strong enforcement mechanisms; (2) fundamental substantive principles of intellectual property protection; and (3) multilateral consultation and dispute settlement procedures. Any intellectual property agreement resulting from the Uruguay Round that does not contain these three key elements would not be effective.

A. *Strong Enforcement Mechanisms*

Enforcement is a crucial element of a GATT agreement on intellectual property. The inadequacy of existing intellectual property regimes can be attributed in large part to their lack of enforcement and dispute settlement mechanisms. The trilateral agreement includes a two-tiered system of domestic enforcement: (1) border controls under domestic trade laws and (2) remedies under intellectual property laws. A two-tiered enforcement mechanism would effectively deal with infringers, pirates, and counterfeiters, regardless of the locus of their infringing activities.

1. Border measures.

Border measures provide a remedy to a holder of an intellectual property right against infringing imports. A party to a GATT agreement on intellectual property—that is, a government—would be required to provide effective procedures under which intellectual property holders could request their government to restrict the importation of infringing goods at the border, and these procedures would have to be provided before the goods enter the domestic stream of commerce. Border controls would be particularly effective because they would extend the effects of a GATT agreement to infringing imports from countries that are not parties to the agreement. In other words, by using domestic laws, intellectual property holders would be able to protect domestic markets from infringing imports from any country, regardless of whether or not the source country were a party to the GATT intellectual property agreement. Many countries already have border controls in place to protect their domestic markets from infringing imports (for example, Section 337 of the Tariff Act of 1930 in the United States and Article 21 of the Customs Tariff Law of 1910 in Japan).

2. Domestic intellectual property laws.

A party to a GATT agreement on intellectual property would also be required to provide effective procedures and adequate remedies against infringement under its domestic laws. In the event an owner of an intellectual property right in a signatory country is confronted with an infringing good that has either been produced locally or imported, the owner would be able to use domestic judicial and administrative procedures to stop the infringement. The use of domestic intellectual property laws is generally the most effective way to stop the local production of infringing goods before they enter both the domestic and international streams of commerce and, in the case of infringing imports, to stop the goods after they clear the border.

B. Fundamental Substantive Principles of Intellectual Property Protection

The second key element of a GATT agreement is fundamental substantive principles or minimum standards of intellectual property protection. Fundamental substantive principles would provide a reference point for countries joining the agreement to determine the adequacy of their domestic laws, and they would provide guidelines for consultation and dispute settlement proceedings.

The fundamental principles should be drawn from existing domestic laws and existing international intellectual property agreements to the extent that these agreements provide adequate minimum standards of protection. For example, the Berne Convention is a good model for the fundamental principles of copyright, while the Paris Convention is not a good model for patents.

The establishment of fundamental principles is not an exercise in harmonization. Those national systems that already contain adequate intellectual property protection would not have to change their laws. The objective is to bring the level of protection in those countries that currently have inadequate protection up to the floor established by the fundamental principles. The three business groups worked closely with intellectual property lawyers and other experts to develop a model set of fundamental principles covering six areas: patents, copyrights, semiconductor chip layouts, trademarks, industrial designs, and trade secrets.

C. *Multilateral Consultation and Dispute Settlement Procedures*

The third essential element of a GATT agreement on intellectual property is consultation and dispute settlement procedures. In effect, these procedures would be the third tier of the enforcement system. If an owner of intellectual property in a signatory country is unable to obtain adequate and effective protection because another signatory country fails to carry out its obligations under a GATT agreement on intellectual property, the owner's government would be able to invoke the consultation and dispute settlement mechanism of the agreement. An effective dispute settlement mechanism would subject the parties to an agreement to multilateral scrutiny and would reduce the use of bilateral and unilateral actions to protect intellectual property rights.

This ability to bring other parties before a multilateral institution to resolve disputes distinguishes an intellectual property agreement under the GATT framework from existing international intellectual property agreements administered by the World Intellectual Property Organization ("WIPO"). Agreements such as the Berne Convention and the Paris Convention have no "teeth" because they lack enforcement mechanisms.

D. *Special Considerations for Countries Without Adequate Protection*

Developing countries that become parties to a GATT agreement on intellectual property should be permitted to delay implementation

of the fundamental principles of protection for a reasonable but specifically limited period of time. This period would permit them to bring their national laws into conformity with the fundamental principles and to deal with any economic dislocation directly due to this adherence. While transitional rules may be appropriate, it would be counterproductive to have a different set of fundamental principles of protection for developing countries. This would defeat the purpose of the agreement and establish two separate levels of protection.

In order to encourage developing countries to join, developed countries party to a GATT agreement could pledge to increase their funding for technical assistance to developing countries to expedite the adoption and implementation of minimum standards. A system of consultations could be developed so that parties to the GATT agreement on intellectual property could consult with non-parties and explain the benefits of the improved protection provided by the agreement. Parties to the GATT intellectual property agreement could also develop procedures that would link continued access to their markets to improved protection of intellectual property.

V. FUTURE IPC WORK PROGRAM

Recognizing that nothing will be accomplished in the GATT without, at the least, the support of Japan, the European Community, and the United States, the IPC's efforts have focused primarily on gaining support for its framework in these three countries. One of the most important tasks that lies ahead is to extend the tripartite consensus to private sector groups in other countries, including other developed countries, newly industrialized countries, and developing countries. In order to gain support for the agreement, the IPC will seek to demonstrate to newly industrialized and developing countries the linkage between effective intellectual property protection and economic development and growth. Together with Japanese and European business representatives, the IPC will encourage other business groups to support the trilateral framework agreement and to communicate to their governments their interest in a comprehensive intellectual property agreement in the GATT. As the trilateral experience demonstrates, agreements developed in the private sector can contribute significantly to the impetus for government-to-government negotiation and agreement.

The IPC is optimistic about the outcome of the intellectual property negotiations in the Uruguay Round. Those countries that have an interest in the international trading system and the expansion of world

trade are increasingly recognizing the benefits of a comprehensive multilateral agreement to protect intellectual property rights. Many less developed and newly industrialized countries have upgraded their protection of intellectual property or are in the process of doing so. Failure to reach a consensus on a comprehensive intellectual property agreement will result in the proliferation of bilateral and unilateral actions. As more countries commit themselves to a strong multilateral regime, the costs to those left behind will only increase.

Portions of this statement are based on materials prepared by the Intellectual Property Committee.