

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG11/W/30

31 October 1988

Special Distribution

Original: English

Group of Negotiations on Goods (GATT)
Negotiating Group on Trade-Related
Aspects of Intellectual Property Rights,
including Trade in Counterfeit Goods

SUBMISSION FROM BRAZIL

The Delegation of Brazil has requested that the following paper, dated 21 October 1988, be circulated to members of the Group.

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1. Discussions in the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights have so far been somewhat distant not only from the Group's mandate, but also from the main objectives of the Uruguay Round. Despite the fruitful debate already held in the Group, there still remains room for pertinent discussions.
 2. This paper contains a further contribution from Brazil to the activities of the Negotiating Group. It is an attempt to call the attention of participants to aspects of the first indent of the Group's mandate which has not yet been fully addressed.
 3. Before focusing on specific and substantive questions related to the mandate of the Negotiating Group, it is necessary to recall certain provisions of the said mandate, while reviewing the work already done in the field of intellectual property, both internationally and, more specifically, in Brazil.
 4. It may seem rather repetitive to insist on the discussion on the mandate of the Negotiating Group. This, however, is inescapable since the mandate is the only possible starting point for the discussions. For that same reason, the mandate does not admit interpretations aiming at modifying its contents. Such a practice would not be in keeping with the agreement reached at Punta del Este.
 5. According to the first indent of the mandate, the Negotiating Group has a clear task: to discuss the trade-related aspects of intellectual property rights. This is the specific task of the Group. In order to enable participants to have a clearer view of the Group's contribution to the Uruguay Round, it is indeed imperative to keep in mind the ultimate objective of the Round, that is, the promotion of growth and development. In other words, the Group has been mandated to discuss trade-related aspects of intellectual property rights in the context of the promotion of growth and development.

6. The originality of the Group's work lies, therefore, in the need to keep in view both the trade-related and developmental aspects of IPRs, distinguishing it from more legal discussions being held in other fora.

7. The work conducted by WIPO in this field is of another nature. There, it is the protection of intellectual property rights which has been discussed for quite some time now.

8. In fact, the system of intellectual property protection established by the Paris Convention is of a universal character. The patent system derived therefrom is one which has matured over a very long period of time.

9. Brazil has worked closely with the International Organizations dealing with intellectual property rights. In fact, Brazilian legislation is fully compatible with the dispositions of the Paris Convention. The Brazilian National Code of Industrial Property (Law No. 5772, issued on 21 December 1971) closely aligned with the most advanced principles and disciplines of protection of intellectual property rights. Apart from the National Code, Brazil has adopted over 170 Acts which relate to this subject and to trade in technology. Among these legal instruments, there is sophisticated legislation designed to restrain the abuse of economic power. It also provides mechanisms for compensation in the case of IPK violation.

10. Brazil has thus built up over the years a solid legal tradition in the field of intellectual property. In fact, at the time of the establishment of the Paris Union, Brazil was the only developing country among the original members. Brazil was, moreover, the fourth country to adopt a modern law on patents.

11. This tradition in the field of intellectual property entitles Brazil to participate, in the most constructive way possible, in the discussions being held in the various fora dealing with the subject, including those of the Negotiating Group on TRIPs.

12. In the case of this Negotiating Group, Brazil believes that a number of specific questions should receive priority attention in the discussions. From the Brazilian point of view, some of these questions are:

- (1) The extent to which rigid and excessive protection of IPRs impedes the access to latest technological developments, restricting, therefore, the participation of developing countries to international trade?
- (2) The extent to which abusive use of IPRs gives rise to restrictions and distortions in international trade?
- (3) The risks that a rigid system of IPRs protection implies for international trade.

ACCESS TO TECHNOLOGY

13. For more than 500 years, the main objective of the protection of IPRs has been the promotion of industrial creativity to the benefit of a country's social and economic development. Each State, therefore, recognises IPRs according to well-defined public interests. This basic orientation guides, for instance, the system established by the Paris Convention. It also explains and justifies the differences which naturally exist between various national laws dealing with the subject.

14. When the discussion of the issue is moved to trade fora such as GATT, participants should evidently keep in mind this basic principle of public interest implicit in IPR protection.

15. Discussions in this Negotiating Group seem to be far too much concentrated on the side of owners of IPRs. If we are to have a realistic and balanced analysis of the implications of the subject in connection with the promotion of growth and development, it is fundamental to give due consideration to aspects relevant to the users of IPRs.

16. In this context, when one speaks of "rights" of intellectual property owners, one is automatically bound to deal with the subject of "obligations" of these owners.

17. The objective of such obligations which deserves priority attention is to allow greater access to technological innovation for IPR users. If the whole attention of the discussions is centered on the interests of IPR owners, the balance of the entire IPR system is not taken into account.

18. Presently, only few countries are in a position to take greater advantage of a very strict protection of IPRs. That is so because these countries maintain a monopoly of technical knowledge, dispose of a long tradition in managerial capacity as well as of wide financial resources. Those which are not able to take advantage of the incentives provided by it are obliged to use such protection in a way that ensures the safeguard of domestic technological development.

19. The rigid monopoly situation created by excessive protection of IPRs constitutes, furthermore, a serious restriction to trade, for in such cases, countries granting protection in a way that leads to such a monopoly can neither freely acquire and adapt foreign technology, nor freely import new processes and products from alternative foreign sources.

20. Problems arising from excessive protection of IPRs are indeed multiple. One of them is the artificial increase of production costs and consequently of prices of products in domestic and international markets. Another is the limitation of the variety of products traded among countries. Worst of all, this kind of protection may be responsible for the slowness of scientific and technological progress in developing countries.

21. It goes without saying that specific exclusions of the protection of IPRs constitute a necessary exception to the general principle of recognition of those rights. They are necessary to the extent where they safeguard sensitive technological areas in development. So much so that even highly industrialised countries maintain such exceptions.

22. This flexibility of the system is essential for developing countries in need of new technologies. It is precisely this flexibility that, in many cases, leads to a greater participation of developing countries in international trade.

USE OF IPRs

23. Closely related to the question of technological development is the abusive or anti-competitive use of IPRs. This subject has been pertinently brought to the discussions by another participant. Brazil fully supports the inclusion of the subject among the priority themes to be considered by the Group.

24. If, on the one hand, a more rigid protection might be beneficial to those countries enjoying an advanced stage of technological development, it is also valid that the protection of IPRs needs to be established in such a way so that abuses or restrictive practices are eliminated and punished.

25. Indeed, there are a number of restrictive practices in licensing, for example, and in other transfer of technology agreements that may give rise to abusive practices, restricting competition and international trade and inhibiting technological development of the technology-acquiring country. These practices include, for instance, the imposition of territorial, quantity and price restrictions; the restriction of trade in or exports of patented products to specified areas; the establishment of "tied sales" clauses, etc. In some other cases, the idea of transfer of technology is not even present. An eloquent example of this is to be found in Brazil. Of all patent licensing agreements filed with the Industrial Property National Institute (INPI) seventy per cent do not involve transfer of financial resources, which indicate the intra-enterprise nature of such operations, involving only subsidiaries and their parent companies.

26. Brazil considers that these practices may cause distortions and restrictions to international trade. They should, therefore, be subject to adequate multilateral discipline.

IPRs AND TRADE LIBERALISATION

27. If the main objective of the Uruguay Round is the promotion of growth and development and if trade liberalisation is an important factor to achieve this goal, the Negotiating Group on TRIPs should pay due attention to the discussion of the problems arising from excessive and rigid protection or enforcement of IPRs in connection to international trade.

28. As indicated above, excessive IPR protection may lead to rigid monopoly situations as well as to the abusive or anti-competitive use of IPRs. Besides those already mentioned, some evident trade-restrictive and distorting effects of such situations and practices are restrictions on the exports of certain goods, commitments on the importation of inputs, quantity or price restrictions and clauses limiting competition, imposed by owners of IPRs.

29. Attentive consideration should be given to the cases where IPRs' protection and enforcement become a barrier or harassment to legitimate trade. There have been many cases in the history of international trade where protection of IPRs has been used as an excuse to implement protectionist and discriminatory measures. Developing countries have been particularly harassed by such practices.

30. Brazil is convinced that the aforementioned issues constitute the most relevant questions to be addressed by the Negotiating Group on TRIPs. In trying to provide a satisfactory answer to these questions, Brazil believes the Group will render an invaluable contribution to the Uruguay Round.