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Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING

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on 21 and 22 September 2000

Chairperson: Ambassador Chak Mun See (Singapore)

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A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

1. The Chairperson recalled that the Council had before it 15 outstanding requests from intergovernmental organizations for observer status (document IP/C/W/52/Rev.9). He said that, in the informal consultations that he had held on these requests, he had suggested that the Council consider granting ad hoc observer status on the requests of those multilateral organizations which already had observer status elsewhere in the WTO, i.e. the International Plant Genetic Resources Institute (IPGRI), the Secretariat of the Convention on Biological Diversity (CBD) and the United Nations Environments Program (UNEP), and of those organizations which ran regional industrial property offices, i.e. the African Regional Industrial Property Organization (ARIPO) and the Cooperation Council of the Arab States of the Gulf (GCC). However, some delegations had indicated that they were not ready at this stage to accept this proposal.

2. The representative of India expressed his delegation's disappointment and said that the failure to agree on this issue sent a wrong signal. He also said that, if the Council could not take a positive decision on it at its next meeting, this might have implications for observer status granted elsewhere in the WTO and the question of observer status in general.

3. The representative of Brazil agreed with India that, if the Council could not reach a satisfactory solution at its next meeting, this would send a negative signal regarding coherence between the WTO and other organizations. UPOV had made a substantive contribution to discussions at the request of the United States delegation; the CBD Secretariat should have a similar opportunity. Civil society, non-governmental organizations and the CBD itself expected a positive gesture from WTO Members on this issue.

4. The representatives of the European Communities, Norway and Peru also expressed their disappointment with the lack of progress on this issue.

5. The representative of Egypt said that his delegation looked to the General Council to provide guidance on this issue before the next meeting of the Council for TRIPS. A solution within the domain of the General Council would have a positive effect on the work of its subsidiary bodies.

6. The Council took note of the statements made and agreed to revert to the matter at its next meeting.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2

- *Notifications from Members whose transitional periods under Article 65.2 or 65.3 expired on 1 January 2000*

7. The Chairperson said that the Secretariat had updated its note reflecting the status of the notifications received so far from Members whose transitional period under Article 65.2 or 65.3 had expired on 1 January 2000 (JOB(00)/5674 of 20 September 2000). In the distribution of these notifications, the Secretariat was now giving priority to the ones received from those delegations whose legislation was scheduled to be taken up for review in November of this year. Most of the material received from these Members had been distributed. However, as the table concerning these Members in the Secretariat note showed, gaps remained. The note also showed that many of the Members in question had not yet submitted any notification concerning their implementing legislation at all, in particular those whose legislation would be reviewed at a later stage. In this regard, he urged the Members concerned to submit the outstanding material without delay and recalled that Article 63.2 of the Agreement required them to notify the laws and regulations pertaining to the subject-matter of the Agreement applicable as of 1 January 2000. He suggested that, if not all the material to be notified was ready yet, Members submit whatever could be notified now and complement the notification as soon as other parts of the material to be notified were ready for submission. Delegations were also reminded that, under the WTO/WIPO Cooperation Agreement and decisions taken by the WIPO's Governing Bodies, the International Bureau of WIPO was in a position to assist delegations with the translation of their main dedicated intellectual property laws and regulations, as required.

8. The representative of the United States said that his delegation wished to note that the year was three-fourths over but many developing country Members had not notified their laws and regulations as required by Article 63.2. In addition, a number of the notifications that had been received had been incomplete. He commended those developing country Members that had notified their laws and regulations in a timely fashion, thereby making possible the preparation of specific questions for the Council's review of implementation. His delegation had provided questions based on the notifications, when those notifications had been timely. For the reviews of Members that had not notified laws and regulations or that had done so only recently, it had based its questions on the text of the Agreement and on problems that had been brought to its attention. The United States had noted that a number of developing country Members had proposed that the Council for TRIPS pursue work in many areas of interest to them, work that went beyond the built-in agenda, but his delegation would not be in a position to give serious consideration to such proposals at a time when many of the Members making these proposals had failed to fulfil the fundamental obligations they had agreed to when they had become Members of the WTO, including the obligation to notify their laws and regulations.

9. The representative of the European Communities agreed with the United States and underlined that formally notified laws and regulations were obviously the most appropriate basis for the review of a Member's legislation questions. He expressed his delegation's concern about the lack of notifications from many Members and urged these Members to submit, if amendments were still pending, at least the current legislation and preferably also the pending bills. In view of the technical difficulties that some Members had eluded to, he wished to reiterate that resources were available under the European Communities' technical cooperation programmes allowing the Members in question to solve these difficulties.

10. The representative of Guatemala said that her delegation expected to be in a position to notify its TRIPS implementing legislation within the next few days.

11. The Council took note of the statements made.

- *Notifications from other Members*

12. The Chairperson said that, since the last meeting, amendments to legislation notified earlier had been received from Bulgaria, Slovenia and Germany. These would be available in the IP/N/1/- series of documents as soon as possible.

- *Notifications specifically relating to Articles 3, 4 and 5*

13. The Chairperson said that such a notification had been received from Chad and had been distributed in document IP/N/1/TCD/1.

(ii) *Notifications under Article 69*

14. The Chairperson said that, since the last meeting, notifications under Article 69 of the Agreement had been received from Angola, Brunei Darussalam, Bulgaria, Hungary, Indonesia, Suriname and the United Arab Emirates. Notifications on contact points were circulated in the IP/N/3/- series of documents.

C. REVIEW OF LEGISLATION

(i) *Follow-up to review of legislation of the Kyrgyz Republic and Latvia*

15. The Chairperson recalled that, at the last meeting, the United States had requested further information from Latvia concerning the review of its legislation, while the European Communities and their member States had indicated that they were still analysing the responses received from these two Members. Since then, Latvia had supplied further information which had been distributed in document IP/Q2/LVA/1/Add.2. He suggested that the item concerning the review of the legislation of the Kyrgyz Republic and Latvia be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from this review at any time.

16. The Council so agreed.

(ii) *Follow-up to the review of legislation of Belize; Cyprus; El Salvador; Hong Kong, China; Indonesia; Israel; Korea; Macau, China; Malta; Mexico; Poland; Singapore; and Trinidad and Tobago*

17. With regard to the 13 Members whose legislation had been reviewed at the last meeting, the Chairperson recalled that at the end of the meeting answers to some questions posed had remained outstanding. Responses had since been received from Israel; Korea; Macau, China; Malta; Mexico; Singapore; and Trinidad and Tobago. These were in the process of being circulated in the IP/Q/- series of documents. However, some responses remained outstanding from Belize, Cyprus and Mexico. He suggested that the items concerning the review of the legislation of El Salvador; Hong Kong, China; Indonesia; Israel; Korea; Macau, China; Malta; Poland; Singapore; and Trinidad and Tobago be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from this review at any time. Furthermore, the Council might urge those Members who still had responses outstanding to submit these without delay, and agree to revert to the item concerning the review of Belize, Cyprus and Mexico at its next meeting.

18. The representative of Mexico said that, at present, her delegation was preparing its responses to a number of the questions posed to it by the United States. These responses would be submitted as soon as possible in order to conclude the review of Mexico's legislation under this item.

19. The Council took note of the statements made and agreed to proceed as suggested by the Chairperson.

(iii) Review of legislation in November 2000

20. The Chairperson said that, following informal consultations that he had held on the schedule for the reviews of legislation in November 2000 and in the year 2001, it had been agreed that eight Members would have their legislation reviewed at the meeting scheduled for the week of 27 November to 1 December 2000, namely Chile, Colombia, Estonia, Guatemala, Kuwait, Paraguay, Peru and Turkey. He recalled that, at the last meeting, the Council had agreed, in accordance with the agreed procedures for these reviews, that questions for the Members to be reviewed in the week of 27 November to 1 December 2000 were due ten weeks before the meeting, i.e. by 18 September 2000, and the countries concerned should submit their answers in writing to those questions by 30 October 2000.

(iv) Review of legislation in 2001

21. The Chairperson said that, on the assumption that the Council could agree to schedule its first meeting next year for the week of 26 March, questions for the Members to be reviewed at that meeting should be sent in, in accordance with the agreed procedures for these reviews, by 15 January 2001, i.e. ten weeks before the meeting, and the countries concerned should submit their answers in writing to those questions by 26 February 2001.

22. The Council so agreed.

23. The Chairperson said that, following the informal consultations that he had held on the revised schedule for the reviews of legislation in November 2000 and in the year 2001¹, he would issue a further revision in the light of the informal consultations that he had held. He was conscious that it was important to avoid the schedule from becoming too unbalanced, which would cause practical problems and burdens for delegates. He would therefore see whether there was scope for any reviews to be brought forward, taking into account that it was not essential that each and every aspect of a country's legislation be fully in conformity for a review to be nonetheless useful.

24. The representative of Brazil said that, while his delegation was supportive of the Chairperson's efforts to establish a schedule for the review of national implementing legislation, he had not yet received instructions concerning the Chairperson's proposed schedule. He reiterated his delegation's concerns as regards current bilateral constraints related to his country's national legislation. He was not in a position to agree to scheduling the review of his country's national implementing legislation at the first meeting of the Council in 2001.

25. The representative of the United States said, while referring to the concern expressed by the European Communities with regard to the lack of notifications from many Members², that his delegation was particularly concerned about the fact that certain Members had expressed their inability and unwillingness to participate in the schedule of reviews as originally set out. As indicated to these Members bilaterally, his delegation was interested and prepared to help all Members scheduled to be reviewed in any way necessary, so that they could in fact meet their scheduled review.

¹ JOB(00)/4860 of 8 August 2000.

² See under agenda item B above.

He also wished to take the opportunity to urge all Members to participate in the reviews as scheduled, whether or not their implementation process was fully complete. The review exercise was a most valuable exercise to all Members of the Council, both in terms of promoting transparency and in building confidence. He hoped that there would not be further significant modifications to the schedule, so that the goal stated by the Chairperson, i.e. that the Council complete all these reviews in 2001, could in fact be achieved.

26. The representative of Mauritius wished to confirm that his country's legislation could be reviewed as scheduled, i.e. in June or July 2001, notwithstanding the difficulties that his country, like many developing country Members, were facing. His delegation was interested in what the European Communities² had said about assistance with a view to allowing developing countries to participate in the review exercise and might contact them, as it had contacted other delegations in respect of the legislation that his delegation would notify soon.

27. The Council took note of the statements made.

D. SECTION 211 OF THE UNITED STATES OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT OF 1998

28. The Chairperson recalled that this matter had been on the agenda for several meetings. Since the last meeting, the European Communities and their member States had requested the establishment of a panel on this matter (document WT/DS176/2), and their second request was on the agenda of the DSB meeting to be held on 26 September 2000.

29. The representative of Cuba recalled that this matter had been on the agenda of the Council upon a request from his delegation, which was seeking information from the United States regarding the compatibility of Section 211 with the TRIPS Agreement. However, to date, his delegation had not received satisfaction. Since the matter was now the subject of a dispute settlement procedure under the DSU, he requested that the matter be removed from the agenda of the Council. His delegation was awaiting with great interest what would occur in the proceedings of the dispute and reserved its right to exercise its rights at a time it deemed appropriate.

30. The representative of the European Communities confirmed that his delegation had requested the establishment of a panel on the matter and hoped that, after the next DSB meeting, the panel would be constituted swiftly.

31. The representative of Japan said that his delegation had a concern about the compatibility of Section 211 with the relevant TRIPS provisions. He wished to inform the Council that, if a panel would be established on this matter, Japan was prepared to join the panel procedure as a third party.

32. The Chairperson suggested that the Council take note of the statements made and that, if a Panel were to be established to examine this matter, this item be deleted from the agenda of the TRIPS Council, it being understood that any Member could revert to it at any time should it so wish.

33. The Council so agreed.

E. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9

34. The Chairperson said that, since the last meeting, the Council had not received any notifications under this agenda item.

² See under agenda item B above.

F. IMPLEMENTATION OF ARTICLE 66.2

35. The Chairperson recalled that, at its last meeting, the Council had discussed the implementation of Article 66.2 on the basis of the information it had received from developed countries on how that Article was being implemented (documents IP/C/W/132 and addenda and supplements). Since the last meeting, written information had been received from Canada and Norway. The discussion at the last meeting had been based also on a Secretariat note (IP/C/W/169), prepared upon a request by the Council and setting out the types of incentive measures that had been notified, with cross references to where further details could be found. The text of the statement made by the delegation of Zambia at that meeting had been circulated in document IP/C/W/200. In addition, at the request of that delegation, its proposal relating to special and differential treatment in respect of technology transfer made at the Committee on Trade and Development and originally circulated in document WT/COMTD/W/67 had been circulated as a TRIPS Council document (IP/C/W/199). The Council had agreed to revert to the matter at the present meeting.

36. The representative of the United States said that his delegation had carefully studied the paper submitted by the delegation of Zambia and would like to state that it could certainly support the suggestion made by Zambia that the TRIPS Council place a request to various other international intergovernmental organizations to provide information regarding their activities aimed at technological capacity-building for least developed countries, noting that some of that information was already available in reports from these other organizations. The United States might also be willing to provide information regarding the distribution of benefits to least developed countries under certain of the programmes that his delegation had noted in its submission. Some of this information was available on the Internet, but he recognized that it would be more convenient for many Members to receive this information in writing. He cautioned, however, that some of the specifics regarding the activities of private organizations under some of these programmes could not in fact be made available, if these would concern information which was confidential and making them available would violate US laws regarding privacy. This would not seem to apply to most of the information that would be of interest to Members. With regard to the question raised by Zambia concerning the application of MFN to the incentives provided by developed country Members under Article 66.2, he wished to note that Article 4 of the TRIPS Agreement applied "with regard to the protection of intellectual property" and Article 66.2 did not deal with the protection of intellectual property, but with capacity-building for least developed countries. In response to the point made by Zambia that many developed country Members, including the United States, already had in place, at the time they had to apply the provisions of the TRIPS Agreement, significant incentive programmes aimed at encouraging technology transfer to least developed countries in order to enable them to create a sound and viable technological base, he said that, if a Member was already in compliance with particular provisions of the TRIPS Agreement on the date of application of the Agreement for that Member, the TRIPS Agreement did not require that Member to make changes to its legislation.

37. The representative of Zambia thanked the United States for their support and for the relationship that was developing between the United States and his country. He expressed the hope that other developed countries would follow the example of the United States and respond at a future meeting to the points made by his delegation on this matter.

38. The Chairperson suggested that delegations might wish to reflect on the suggestion made by Zambia and supported by the United States that the Council might request other international organizations, such as UNCTAD, WIPO, UNIDO and the World Bank, to provide information on capacity-building as mentioned in Zambia's paper.

39. The Council agreed to revert to the matter at its next meeting, while taking note of the statements made.

G. TECHNICAL COOPERATION

40. The Chairperson recalled that the Council had agreed, at its last meeting, to focus on technical cooperation at today's meeting. In preparation for this annual review, developed country Members had once more been requested to update information on their technical and financial cooperation activities relevant to the implementation of the TRIPS Agreement in time for this meeting. In addition, international intergovernmental organizations observers to the Council as well as the WTO Secretariat had also been invited to do the same. The resulting documentation concerning the technical cooperation activities of developed country Members could be found in documents IP/C/W/203 and addenda, and of intergovernmental organizations in documents IP/C/W/202 and addenda. Updated information on the WTO Secretariat's technical cooperation activities in the TRIPS area could be found in document IP/C/W/201.

41. The representative of the United States drew the attention of delegations to the submission that the United States had made and said that his delegation was proud of its record in providing technical assistance to developing country WTO Members and to countries that were seeking to become Members. The United States had been committed to providing technical cooperation programmes since the early 1980s and that commitment was reflected in the quantity and quality of programmes that it provided and participated in. His delegation stood ready to work with developing country Members in areas of interest to them to the degree that its resources permitted. While expressing his appreciation to the WHO for the submission that it had made, he believed that it would be worth highlighting to the WHO, which Organization was participating for the first time in a meeting of the TRIPS Council, following the recent decision of the Council to grant the WHO observer status, that an issue that had been discussed in the Council on many occasions was what was the appropriate means of interpreting the TRIPS Agreement. The Council had been asked on a number of occasions to provide interpretations of the Agreement, but Members had always been clear that only the Ministerial Conference and the General Council were entrusted with and empowered to interpret the TRIPS Agreement. In certain instances, the Dispute Settlement Body was also empowered to interpret the TRIPS Agreement, when adopting panel and Appellate Body reports in disputes settlement cases under the DSU. He mentioned this, because, as the document submitted by the WHO indicated, the WHO was engaged in a great deal of activity in helping developing countries and other countries to understand the TRIPS Agreement as it related to health issues. He expressed the hope and expectation that the WHO, in all of these activities, would cooperate with the WTO and fully avail themselves of the expertise in the WTO in conducting their activities.

42. The representative of Japan stressed that Japan continued to be committed to technical cooperation and drew the attention of the Council to Japan's submission with information on Japan's technical and financial cooperation activities.

43. The representative of the European Communities said that the EC and their member States had provided technical cooperation for many years and would continue to do so because of their commitment to providing assistance to developing countries. This included assistance to the least developed WTO Members who were preparing themselves for meeting the deadline of 1 January 2006. His delegation also often discussed with representatives of developing countries and international organizations what the best methods were for providing such assistance or adapting it, for example, to make it more effective. Appropriate assistance should be available whenever the countries concerned requested it. His delegation would shortly make an additional notification with supplementary information from some of the EC member States, which had had technical difficulties in providing information on their technical cooperation activities on time. His delegation had noted that the submission received from the WHO was not limited to information about their technical cooperation activities, but also went into policy perspectives and objectives which the WHO pursued. While stressing that the EC and their member States were very active in areas covered by the WHO and their cooperation with the Organization worked well, he did not think that it was appropriate that

such information was provided in this particular context. He also concurred with the United States that advice, assistance and opinions about the TRIPS Agreement should be provided by TRIPS experts and that authoritative interpretations of the provisions of the TRIPS Agreement could only be adopted by the Ministerial Conference or General Council following a recommendation from the TRIPS Council or, in the context of disputes under the DSU, by the Dispute Settlement Body. Therefore, caution was required when advice was provided concerning the application of the provisions of the Agreement.

44. The representative of Jordan expressed his delegation's gratitude to the United States for the technical assistance provided in the preparation of Jordan's intellectual property legislation and the training of officials.

45. The representative of Australia said that his delegation, in the light of the particular focus on the issue of technical cooperation at this meeting, would like to dwell on some aspects of its submission. Australia regarded it as vitally important to have a dialogue on technical assistance. Assistance should be appropriate and it should be avoided to put effort and resources into activities that were not necessarily productive. His delegation had comparatively limited resources and was most concerned to apply them as productively as possible. To that end, for example, during the recent visit of the WIPO's Director General, Dr. Idris, to Australia, a bilateral agreement had been concluded with WIPO, which focused especially on development cooperation in the Asia-Pacific region, with the express intent of greater coordination of effort to the benefit of developing countries in the region. A particular focus of Australia's work had been with its neighbour Indonesia and there had been a number of extensive programmes with that country, not only in relation to the implementation of TRIPS obligations in a formal sense, but also working towards mechanisms for driving the benefits of TRIPS implementation. Furthermore, South Pacific island countries faced a number of challenges in relation to appropriate forms of intellectual property administration and protection and Australia was working through the South Pacific forum to identify appropriate regional approaches so as to alleviate the burden on these small island countries. A growing focus was the need for specific sectoral technical cooperation in relation to intellectual property and a good example thereof concerned the field of biotechnology. There were very widely held concerns about the implications of how intellectual property in this field was administered, enforced and exploited. One response to this was of course to build up specific expertise in this field. This was a focus of the work his delegation, which would shortly release a comprehensive training package, of which all Members would be able to take advantage if they so wished. As regards the broader question of featuring directions for technical cooperation under Article 67 of the TRIPS Agreement, he recalled that the focus so far had rightly been on systemic cooperation, building up intellectual property systems, establishing legal structures, establishing administrative structures, providing the necessary skills for their administration. However, having invested extensive resources in this process, developing countries were naturally looking to reap the benefits of that investment and this involved a new phase of activity, in particular the development of new skills and new capacities, relating more to the management of intellectual property rights and the exploitation of intellectual property rights than to the establishment of the system under which they operated. With that in mind, Australia had been focusing on areas such as public awareness and education programmes and materials as well as the development of specific skills in management of intellectual property rights and the commercialization of research and other intellectual property assets.

46. The representative of Brazil said that his delegation had a great interest in the issue of technical cooperation and also wished to thank WHO for the cooperation provided in the plan of 2000-2001 and through three WHO collaborating centres (WHOCC) and other partners, including a technical programme on the evolution of drug prices such as, for example, aids-related drugs. He also informed the Council that in September, parallel to the General Assembly meeting of WIPO Member States, Brazil was going to sign a cooperation agreement with WIPO, which would be signed between

the Director General of that Organization, Dr. Idris, and the President of the Brazilian National Institute of Industrial Property and which focused mostly on capacity-building.

47. The representative of Paraguay wanted to place on record his delegation's gratitude for the technical cooperation which had been provided to it by WIPO and the personal interest shown by the Director General of that Organization, Dr. Idris, in providing this cooperation, which would enable Paraguay to render a proper account of its intellectual property activities in the course of the review of its national implementing legislation in the Council for TRIPS. Last year, in November, Paraguay had also received useful technical cooperation from the United States. Such technical cooperation was of paramount importance to enable the developing countries to catch up with the other Members of the WTO.

48. The representative of the WIPO said that, as regards the technical cooperation activities of WIPO, including the results of the Joint Initiative, WIPO had submitted an updated document to the TRIPS Council covering the period from January 1996 to June 2000. Since the document was both comprehensive as well as gave a detailed account for each year of the WIPO's technical cooperation activities, it would be taking the Council's time unnecessarily to recount them. However, she would like to state that the document was public and could be obtained from WIPO under the code WIPO/TRIPS/2000/1. In addition, she wished to inform the TRIPS Council that the Directors General of WIPO and the WTO had met twice this year, in March and April, to discuss further the various areas of cooperation between the two Organizations. At the second meeting, the heads of UNCTAD and the ITC had also been present. In order to carry out the intentions expressed by the heads of the four Institutions, two additional meetings had been held at the level of their cabinets. Among the items discussed, one strong desire expressed by the WTO had been to better assist the Members and observers who were not present in Geneva and, in this regard, to hold another Geneva Week this year. Most of the Members and observers involved were small economies, with half of them being least developed countries. WIPO had decided not only to participate in the Geneva Week, but also to make a financial contribution in order to assist those Members and observers, most of whom were also Members of WIPO. She wished to reiterate that WIPO was committed, on all levels, to assisting developing and least developed countries, also beyond the Joint Initiative, on all matters concerning intellectual property.

49. The representative of WHO said that, first and foremost, he would like to thank the Members of the WTO, on behalf of the Director General of the WHO, for having granted observer status to the WHO in the TRIPS Council. This constituted an important step forward in the cooperation between the two Organizations. While it was the first time that the WHO was present at a meeting of the TRIPS Council, the cooperation between the two Organizations dated back many years. In this regard, and also to respond to the comments made by the delegations of the United States and the European Communities, the various activities set out in document IP/C/W/202 had been carried out in close cooperation with the WTO and WIPO. WHO had facilitated the participation of the Secretariats of these two Organizations in meetings in Indonesia and Thailand, for example, and the role played by WHO in this area was limited exclusively to giving the public health perspective in this overall process. Thus, the participating ministries of health had heard not only the strictly legal perspective.

50. The representative of St. Lucia wanted to acknowledge the statement made by the representative of WIPO and thank it for the planned participation in the upcoming Geneva Week. Saint Lucia was both a non-resident and a small economy and acknowledged the WIPO's great technical assistance efforts in intellectual property.

51. The Chairperson urged those Members that had not yet provided updated information to do so early and indicated that it was his intention to provide an opportunity at the next for meeting of the Council to make further comments on the information submitted, as Members might not have had sufficient time to study the material carefully.

52. The Council took note of the statements made and agreed to revert to the matter at its next meeting.

H. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2

53. The Chairperson said that the Secretariat had very recently circulated a preliminary version of the paper that the Council had requested it to prepare summarizing the replies to the Checklist of Questions (IP/C/13 and Add.1) on the implementation of the Section on Geographical Indications (JOB(00)/5619). This paper summarized the information submitted by those Members who had responded to the Checklist. He recalled that one of the ideas under discussion on the occasion of the Council's last meeting had been to invite additional Members to respond to the Checklist. Such responses had just been received from Korea.³ The Council had also received communications from New Zealand and Australia, respectively, on the subject of geographical indications and the Article 24.2 review.⁴

54. The representative of New Zealand, introducing his delegation's paper, said that it set out his delegation's observations on the Article 24.2 review with a view to assisting the Council to ensure that the review was conducted in a structured manner which allowed all Members to have the opportunity to consider the effectiveness of each of the provisions in question through a process in which the way Members had applied these provisions would be thoroughly analysed. To date, the Council had only been able to compile information on how some Members had implemented their obligations and had not as yet been able to engage in any substantive discussions on each of the provisions of Section 3 of Part II of the Agreement. As noted at the outset of the paper, the coverage of geographical indications in the TRIPS Agreement marked a major step forward in the multilateral protection of geographical denominations and it was the first time that a truly international forum attempted to lay down rules and obligations for geographical indications. His delegation also thought it was important to recognize that Article 22.1 of the Agreement made it clear that the provisions of the Agreement covered geographical indications for all goods. This was a point that was still often misunderstood and that fact in itself perhaps demonstrated the need to increase understanding in this area through the sort of information exchange and review that a structured and thorough review would provide. As emphasized in the paper, in view of the very ground-breaking nature of the TRIPS provisions on geographical indications, it was most important for each Member to appreciate how other Members had approached the issues and how important the rôle of the Article 24.2 review was. His delegation had very much welcomed the responses to the Checklist and the compilation of the information contained in these responses that the Secretariat had circulated recently. However, now Members must turn their attention to the substantive details of the review. As proposed by his delegation, the way to conduct these substantive discussions in a structured manner was by going through each of the provisions of Section 3 of Part II and reviewing their application, operation and enforcement, so that all Members with differing legal systems and regimes for the protection of geographical indications could get a better sense of the different systems that had been developed in this regard. Until the Council had reviewed Section 3 of Part II in a systematic and substantive way, it would be premature to consider any changes to this Section of the Agreement.

55. Continuing, he then made some observations on the individual provisions of Section 3, bearing in mind how the Council might go about looking at issues that they raised. Again, Article 22 established the general rule for the protection of geographical indications and covered all products and his delegation's preliminary review of the responses to the Checklist so far highlighted the number of different ways in which this provision had been implemented, in line with the fundamental principle stipulated in Article 1 of the Agreement that Members shall be free to determine the appropriate

³ Distributed as document IP/C/W/117/Add.20.

⁴ Distributed as documents IP/C/W/205 and 211, respectively.

method for implementing the provisions of the Agreement within their own legal system and practice. Therefore, his delegation believed that, looking at this provision, the Article 24.2 review would need to consider in traverse the different ways in which Members had implemented the general rule of Article 22 so as to better appreciate and understand the way in which this provision had been applied. Article 23 laid down special protection for geographical indications for wines and spirits and the most significant distinction in this regard was that, unlike in Article 22, there was no requirement that the public be misled or that use constituted an act of unfair competition. As he believed everyone also realized, the provisions of Article 23 were themselves a compromise made in the context of the Uruguay Round negotiations and therefore reflected a careful balance that had been struck in Section 3 as well as across all other aspects of the TRIPS Agreement. Just as was the case for Article 22, the Article 24.2 review would need to traverse and consider the various ways in which Members had implemented the special rule contained in Article 23 so as to help the Council fully appreciate and understand the way in which these provisions had been applied by Members. Article 24.1, in his delegation's view, confirmed that Members had agreed to enter into negotiations aimed at increasing the protection of individual geographical indications for wines and spirits conferred under Article 23. Given its narrow focus on geographical indications covered by Article 23, his delegation did not agree with the position outlined by Switzerland that Article 24.1 also allowed the possibility of extending the scope of products already covered by Article 23. As his delegation had indicated in its paper (footnote 12), one European academic commentator at least had pointed out that this provision was designed to address cases where additional protection was intended to be explored for the use of certain wine geographical indications that would otherwise fall within the exceptions set out in Article 24. Finally, he drew attention to the opening words of Article 24.2, that the TRIPS Council shall keep under review the application of the provisions of Section 3 and said that, in his delegation's view, the Council, as a first step, needed to analyse and consider all the information it had from Members about how each of these provisions had been applied.

56. The representative of Australia, introducing his delegation's paper, said that this reflected Australia's concern that it was perhaps overdue for the Council to begin to consider the substance of geographical indication protection. Like any form of intellectual property protection, geographical indications were not protected for their own sake but to serve public policy objectives and, in doing so, to accommodate a balance of interests. His delegation believed that the widely held concerns that geographical indication protection be enhanced and serve better the trade interests of Members were well-founded and deserved serious attention. The Article 24.2 review should therefore become more than just a process of filing questions and answers without the information provided staying unanalysed. It was important for the Council to look at this information, to develop a collective sense of what better protection of geographical indications really represented. To that end, his delegation's paper put forward some considerations about the interests and policy objectives taken up in the protection of geographical indications. It was probably a misleading idea to talk about stronger or weaker protection of geographical indications; one had perhaps better talk about better protection and the Council should be using the wealth of information that the Article 24.2 review had already yielded to explore what better protection meant. The paper also recognized the increasing importance in international trade of geographical indications, especially for the benefit of developing countries, which were understandably increasingly looking to geographical indications as potential intellectual property assets that needed to be nurtured and exploited appropriately. Considering the specifics of geographical indication protection, there was a wide range of interests caught up and, just as for any other aspects of intellectual property rights, no one set of interests should be allowed to prevail and the overall level of protection needed to be determined by an appropriate balance. Australia had set out in its paper some of the factors that it suggested were balanced in this approach, as well as what current elements of the TRIPS Agreement were relevant in achieving that balance, looking at all of the provisions of Section 3 of Part II. There was a need to recall that Article 24 had a number of important optional exceptions to geographical indication protection and the way those operated were illustrated by the case-study the paper introduced relating to the word "orange". In this regard, he pointed out that, while this term had been notified by Australia as a geographical indication, the term

happened to be a geographical indication for a number of other countries. However, it was of course much better known as a descriptive term, i.e. a term describing an actual product, or as a surname. This example helped illustrating that no one answer would necessarily apply to individual terms. Terms might also have different signification in different jurisdictions or societies, in translation or simply in different commercial contexts. All these factors needed to be taken into account in finding the appropriate balance of geographical indication protection. How that balance was struck was a public policy matter for each Member to consider at a domestic policy-making level. However, equally, all stood to benefit from learning about the experience of others and this was where his delegation saw a valuable role for the Article 24.2 process. The Council now had a great deal of information before it, which the Secretariat had usefully synthesized. It had to be borne in mind that, when this review began, Members posed over 50 questions of each other concerning geographical indication protection. Australia had noted at the time that this was quite a burdensome, exhaustive process and it had, indeed, required considerable effort for his delegation to produce its answers to these questions. The lack of attention so far to all this information was probably due to the fact that there was no clear framework for moving forward this analysis. Australia would like to suggest such a framework and this was the aim of the questions at the end of his delegation's paper, which related to the provisions of Articles 22 to 24. This was not to suggest that these Articles were necessarily problematic or in need of close textual analysis, but it was to suggest that Members had naturally taken different approaches in their jurisdictions and that these approaches were not well understood. It would perhaps be beneficial if the Council could structure its review of the material produced in the Article 24.2 process based on these sort of general questions. Ultimately, the actual benefits that Members stood to gain from geographical indication protection did not stem from the wording in the TRIPS Agreement, but in the actual protection afforded at a national level. Therefore, it was appropriate to consider the interaction between TRIPS provisions and the actual implementation of these provisions in domestic law and he hoped that this would shed light on approaches of best practice and the most productive models of protection, but also lay the ground work for the other work that would proceed under Section 3 of Part II of the Agreement concerning possible revisions of TRIPS standards.

57. The representative of India said that his delegation wished to take a close look at the Secretariat's summary paper before giving its reaction. The same applied with regard to the paper from Australia, although he wished to put on record already now his delegation's gratitude to Australia for suggesting a way forward and welcome the political thrust of the view expressed by Australia that there was some merit in the demand made by a number of countries, including developing countries, for extending additional protection for geographical indications to products other than wines and spirits. As regards the provisions of Article 24.2, he first wished to emphasize, in particular for those who had expressed the view that Article 24.2 was just about reviewing implementation of obligations, that, in the entire paragraph, the word "implementation" did not figure at all, whereas this word did figure in the rest of Article 24. Article 24.2 concerned a review of the application of the provisions of Section 3 of Part II, which was not the same as a review of their implementation. The term "implementation" had a different meaning, as was clear from its use in various parts of the Agreement. The second point that he would like to make was that the Council's annual report of 1996 made it clear that it was understood that there would be a review of the scope of Section 3 of Part II and that, in this regard, Members' inputs were sought. It was under this provision that India would be making a proposal under Article 24.1. His delegation did not agree with the thrust of New Zealand's paper, which denied that a demand could be made for extending the coverage of Article 23 to products other than wines and spirits. Providing some preliminary comments on the paper, he questioned that, as stated in its paragraphs 17 and 18, the protection under Article 23 was "special"; the protection was "additional". Article 23 had to be read cumulatively with Article 22. Application of Article 23 did not do away with the requirement under Article 22 not to mislead the public as to the true place of origin.

58. The representative of Hungary, providing preliminary observations on New Zealand's paper, first wished to emphasize that Hungary was committed and interested in a substantive and systematic review under Article 24.2. The first sentence of this provision made it clear that the review was about the application of the provisions of Section 3 of Part II. Therefore, the last sentence of paragraph 21 of the paper would seem to be somewhat out of place, where it suggested that the review "would need to contemplate the potential disadvantages of creating property rights to the cost of many WTO Members - and, indeed, the actual disadvantages of the current Article 23 provisions". Noting that Hungary could not share New Zealand's view, in particular with regard to Article 23, his delegation was of the view that this kind of discussion, if there was a need for it, had to be put into the proper context and had perhaps better fit under the upcoming review of the implementation of the Agreement under Article 71.1. Hungary disagreed with New Zealand that it would be premature for the Council to consider any changes to Section 3 of Part II while the review was under way. Negotiations could be started on the extension of Article 23 protection parallel to conducting the review. His delegation believed that the time required for successfully concluding such negotiations was much longer than the time-span for the review. In line with the first sentence of Article 24.2, this review was not a one-off exercise, but only the first of a series of reviews. He would comment on the Secretariat summary and the Australian paper at a future occasion.

59. The representative of Uruguay said that her delegation was awaiting more detailed comments from her authorities on the Australian and New Zealand submissions. She wished to emphasize, as a first reaction, her delegation's interest in the linkage in the Australian paper between international trade in geographical indications and consumer protection.

60. The representative of Switzerland said that he would comment on the Australian paper at the next meeting. As regards the submission from New Zealand, his delegation certainly agreed with New Zealand on the importance of the review of Article 24.2 and also that this review should be carried out in a focused and structured manner. Switzerland also shared New Zealand's opinion that this review played an important role in relation to the work on other built-in agenda items on geographical indications, including the issue of the extension of the product coverage of Article 23. Switzerland would carefully study the analysis in the Secretariat's summary paper, but was convinced that it would provide a good basis for proceeding with the work on the built-in agenda concerning Section 3 of Part II. However, as said by the delegation of Hungary, the work on the Article 24.2 review was not a *conditio sine qua non* for the discussion of the issue of the extension of the product coverage of Article 23. Having said this, it went without saying that Switzerland did not agree with New Zealand's narrow reading of Article 24.1, which reduced the built-in agenda work under the provision calling for a better protection of geographical indications solely to a few specific indications for wines and spirits. First, such a limitation could not be found in the first sentence of Article 24.1. Second, as set out in paragraph 12 of the communication on the issue of extension contained in document IP/C/W/204, co-sponsored by his delegation, it would be illogical to limit the mandated negotiations in such a way. Third, such an approach would add to the imbalances already existing in Section 3 of Part II, which would not be consistent with the spirit and basic objectives of the TRIPS Agreement. Finally, he shared the views expressed by the delegation of India.

61. The representative of Canada noted that the proposals for further study of national regimes under Article 24.2 would help inform the discussion of geographical indications overall. The suggestions from Australia and New Zealand in this regard provided a useful starting-point for how the Council might proceed.

62. The representative of Mexico said that, since the Australian document had just been received, she would come back to it later and limit herself, at this time, to stating that her delegation saw merit in the proposal contained in the paper for a substantive discussion of the provisions under review pursuant to Article 24.2 as well as how Section 3 of Part II had been implemented in practice at the national level within domestic legislations. She did not comment on the compilation prepared by the

Secretariat, since this document had just become available and because of its size and the quantity of information contained in it required a detailed study. Her delegation would certainly check how the Mexican responses to the Checklist had been reflected and make any comments known to the Secretariat for possible modification as necessary. Turning to the communication from New Zealand, she said that the document had the merit of recapitulating the work of the Council in the field of geographical indications and contributed certain useful ideas for the organization of the Council's further work. In particular, her delegation agreed that the Article 24.2 review might be carried out in a more structured and detailed manner, benefiting thus from national experiences as well as from the abundant information garnered by the Council. In this connection, she felt that the document from the Secretariat would be a most useful tool to supplement the Council's review work. Until the review had taken place, it would be premature for the Council to consider other aspects or action within the meaning of the last sentence of Article 24.2. This provision interpreted objectively did not necessarily imply amendments to Section 3 of Part II. Having alluded to the last sentence of Article 24.2, she also wished to point out that there seemed to be a discrepancy between the English version, which used the term "further" in relation to the objectives of Section 3, and the Spanish version, which said "favorecer". The English term "further" seemed to enlarge the scope. When reading the text of this provision in the different official language versions, it occurred to her that delegations might have different ideas about the scope of the various provisions of the Section due to such discrepancies. The provisions of Article 24.2 did not, in her delegation's interpretation, imply in any way negotiations to extend the scope of protection. Consultations could be carried out under these provisions in order to elucidate or clarify problems that had arisen in connection with implementation and/or application of the provisions of Section 3 of Part II. As regards Article 23.4, she wished to emphasize, in relation to the New Zealand paper, that this provision had been agreed during the Uruguay Round by consensus of all participating countries. In her delegation's view, it did not amount to a lack of balance in the Agreement. Consequently, she did not necessarily concur with the comments in paragraphs 17 and 21 of the New Zealand paper.

63. The representative of Japan said that the Article 24.2 review should first examine the various ways of implementation Members had opted for nationally, in order to gain a better understanding of the TRIPS provisions in the area of geographical indications. He said that the summary paper prepared by the Secretariat could form a useful basis for this examination and requested those Members which had not yet done so to provide their responses to the Secretariat. Regarding the proposed expansion of the goods covered by Article 23, he wished to emphasize the importance of a balance of interests. While the extension of covered products would increase the protection of producers in certain sectors, it would raise the costs and burdens in business transactions. Therefore, a careful examination should take place of the appropriateness of an extension of covered products, based on an analysis of the various ways Members were protecting geographical indications while having implemented the Agreement.

64. The representative of New Zealand said that some of the comments made on his delegation's paper underlined the need for more information on the experience of Members and their approach to the different provisions of Section 3 of Part II of the Agreement and, consequently, a thorough and structured analysis of these provisions. Reacting to the comment from India that Article 24.2 did not refer to implementation and therefore might have a broader focus, he said that, while there might be different views among Members as to the focus of the provision, the first sentence clearly indicated that a key task should be to review how the provisions had been applied by Members. Article 24.2 also referred to "any matter affecting the compliance with the obligations under these provisions" being drawn to the attention of the Council, which he believed also indicated a link to how the existing obligations had been applied by Members. Also on the issue raised as to whether protection under Article 23 was "special protection" or "additional protection", he believed Members might have different views. The point made by India concerning paragraph 17 of the New Zealand paper with regard to the last part of Article 23, was one of those on which Members could exchange information in a thorough and structured review. The queries that had been raised in this regard pointed to the

merits of proceeding in an analytical way and addressing questions such as, for example, those outlined in the Australian paper.

65. The representative of the Czech Republic said that her delegation would study the individual elements of the documentation received carefully and come back to the papers at a later stage.

66. The representative of Korea said that it was his delegation's view that the main purpose of the review in this area was to identify or review issues which had emerged in the course of the implementation of provisions on the protection of geographical indications under the TRIPS Agreement. It was evident from the language of Article 24.2 that the review should concern the application of the provisions of Section 3 of Part II, i.e. to clarify what appeared to be uncertain or ambiguous in these provisions or identify shortcomings in their application. Therefore, it would not serve the purpose of Article 24.2 if one were to link the expansion of the product coverage of Article 23.4 to the review under Article 24.2. One possible candidate to be taken up in the review under Article 24.2 was Article 24.6. According to this exception provision, a geographical indication becoming a generic expression and losing its distinctiveness could not be protected as a result. In this regard, it remained an important issue to be settled what criteria should be applied for the determination of whether geographical indications had become generic expressions. Eventually, final judgements on their nature would be determined under domestic law. The lack of clear rules on this issue at the international level warranted a review in the context of Article 24.2. In this connection, it was also necessary to take into account what was being discussed in other international fora, in particular in the WIPO Standing Committee on Trademarks, Industrial Designs and Geographical Indications, where discussions were under way on how to solve the possible conflict between geographical indications and trademarks as well as between homonymous geographical indications. Finally, he stressed the importance of the Secretariat summary paper and commended the efforts made by the Secretariat.

67. The representative of the United States said that his delegation was impressed by the paper submitted by Australia. It made good sense for all delegations to have a clear and full understanding of how the existing provisions of the Agreement on geographical indications had been implemented and what kind of protection was provided through the implementation of these provisions before taking decisions on how to possibly improve them. New Zealand and Australia had given practical suggestions as to how the Council might organize its work on the review under Article 24.2. His delegation would study these suggestions and come back to them at the next meeting. He suggested that all delegations reflect on how the Council, in a practical way, might make use of the information contained in the Secretariat's summary paper. Finally, he said that any further work that the Council might engage in relation to Article 24.1 should not stand in the way of a practical examination of the information that had been collected in the context of Article 24.2.

68. The representative of the European Communities expressed his delegation's appreciation for the Chairperson's efforts in order to find out how the Council might proceed on the various agenda items relating to geographical indications. Although the Secretariat's summary paper and submissions of the delegations of Australia and New Zealand required careful analysis before comments could be provided on their substance, it was already clear that there was now quite a bit of material available to Members and that the Council should dig into these papers in detail. Hence, he wished to suggest that, if the Chairperson would hold informal consultations, late October or early November, the Council might seize that opportunity to also have a substantive, technical discussion, in informal session, on all the papers that were now on the table concerning the various agenda items relating to geographical indications. There was a clear interest in discussing the protection of geographical indications for products other than wines and spirits and it would be useful to include that issue fully in these discussions. It would be useful and appropriate if Members that had not yet responded to the Checklist would still do so. However, this should not be a reason for delaying the discussion on the Secretariat summary.

69. The representative of Chile expressed support for a systematic approach in the review under Article 24.2 as proposed by New Zealand. In its further discussions, the Council should also consider progress made in this area in other international organizations, such as in WIPO, where recently geographical indication issues had been discussed. The format of the discussions in the Council on these matters had to be radically changed, for example as suggested by New Zealand and the European Communities.

70. The representative of Kenya said that his delegation wished to put on record that it would also like to be mentioned as a co-sponsor of the joint paper introduced by Switzerland. He reminded delegations of the proposal that the African Group had tabled last year in the preparations of the Seattle Ministerial Conference. Kenya was developing its laws on the protection of geographical indications in respect of any products of an agricultural or industrial nature. As regards the Australian paper, he wished to emphasize that the Council had only received responses to its Checklist of Questions from 35 Members and that many Members, in particular developing countries, had not submitted any replies as yet. A review of national laws as suggested by Australia and New Zealand should not prejudice the future development of the protection of geographical indications in these countries.

71. The representative of Mauritius said that the African Group had made proposals in the Seattle process in connection with product coverage and could support the joint paper introduced by Switzerland. He also expressed support for the suggestion from the European Communities.

72. The representative of Bulgaria expressed support for the suggestion made by the European Communities, but wished to emphasize in that regard that the suggested review of national legislation under Article 24.2 should not influence the discussions under Article 24.1 on the extension of the additional protection for geographical indications under Article 23 to product areas other than wines and spirits. His delegation was not convinced by Australia and New Zealand that a detailed review of national legislation had to precede a decision on such an extension. In view of the fact that the New Zealand paper stated that Article 24.1 did not lay down a mandate for negotiations on such an extension, he wished to recall that his delegation had suggested in the Special Session of the Committee on Agriculture to address, in that case, also there first the issue of whether each specific proposal made in the negotiations was within the negotiating mandate.

73. The Chairperson, while indicating that he intended to suggest a procedure for moving the work forward after the discussion of the agenda item concerning the implementation of Article 24.1, suggested that the Council take note of the statements made.

74. The Council so agreed.

I. IMPLEMENTATION OF ARTICLE 24.1

75. The Chairperson said that this item had been placed on the agenda on the request of the delegation of Switzerland. A joint paper had been submitted by the delegations of Bulgaria, the Czech Republic, Iceland, India, Liechtenstein, Slovenia, Sri Lanka, Switzerland and Turkey, which outlined the views of those delegations on the implementation of Article 24.1, in particular in regard to the extension of additional protection for geographical indications to products other than wines and spirits. In addition, he drew attention to the papers that had been recently circulated by the delegation of India to the Council for TRIPS in documents IP/C/W/195 and IP/C/W/196, which also addressed this matter.

76. The representative of Switzerland introduced the communication that his delegation had jointly submitted with Bulgaria, the Czech Republic, Iceland, India, Liechtenstein, Slovenia, Sri Lanka and Turkey on the issue of extension of additional protection for geographical indications to products other than wines and spirits. In the meantime, Egypt, Kenya and Pakistan had also become co-sponsors of the paper. He said that, for a considerable time, Members had been discussing in the Council for TRIPS whether the important issue of extension was part of the Council's work to be addressed under Section 3 of Part II of the TRIPS Agreement. For a long time, this debate in the Council had been limited to oral statements of Members declaring or denying that a mandate existed. The purpose of the joint communication was to respond to the Chairperson's request to Members to come forward with legal arguments on this issue and to present such arguments in written submissions. The delegations on behalf of which he spoke were of the view that the issue of extension was, indeed, part of the built-in agenda of the Section on Geographical Indications in the TRIPS Agreement and the paper aimed to show, by conclusive reasoning, that the Council for TRIPS should address, in its work, the imbalance of protection for geographical indications for wines and spirits on the one hand and for other products on the other hand. Some Members might ask why it was so important to have this additional protection also for other products than wines and spirits and whether the current protection for these products was not sufficient. Section 3 of Part II of the TRIPS Agreement provided for two different levels of protection for geographical indications. First, there were the general standards of protection that must be available for all geographical indications against misleading and unfair practices. Such protection, as required by Article 22, shall be applicable against a geographical indication which, even if literally true as to the territory, region or locality in which the goods originate, falsely represented to the public that the goods originated in another territory. Second, there was the additional or "absolute" protection which must be accorded to geographical indications for wines and spirits. Under the provisions of Article 23 laying down enhanced protection for these geographical indications, it was, for example, not necessary to prove that the public was misled or that there was unfair competition. Protection in accordance with Article 23 shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods was indicated or the geographical indication was used in translation or accompanied by expressions such as "kind", "type", "style", "imitation", or the like. An example might illustrate why this additional protection was also needed for geographical indications other than those for wines and spirits. Rice that was sold under the Indian geographical indication "Basmati", but which was clearly marked as originating from another region or country, would not mislead the public as to the place of origin of that product; nevertheless, such use would free-ride on the worldwide famous and therefore commercially valuable geographical indication "Basmati". The same applied with regard to the famous Swiss cheese "Vacherin Mont d'Or", for example. There was no systematic or logical explanation for the distinction made in Section 3 of Part II of the TRIPS Agreement and this distinction ignored that geographical indications for categories of goods other than wines and spirits were equally important for trade. Not all issues relevant to the protection of geographical indications had been settled in the Uruguay Round. Therefore, the built-in agenda of the TRIPS Agreement provided for a basis for further negotiations on increasing the protection of geographical indications. In its report to the Ministerial Conference in Singapore in 1996, the Council for TRIPS had identified three built-in agenda items of the TRIPS Agreement, i.e. Article 23.4, Article 24.1 and Article 24.2. Article 24.1 and 24.2 contained the basis for negotiations to extend the additional protection of Article 23 to products other than wines and spirits. Article 24.1 required that Members enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. Some Members had a very narrow reading of this provision. They claimed that the built-in mandate should only cover an increase or extension of the protection of individual geographical indications for wines and spirits. However, such an interpretation of Article 24.1 was too narrow; it would be illogical to limit the mandated negotiations to an improvement of the protection of geographical indications for wines and spirits, because these already benefitted from the additional protection under Article 23.

Such an approach would add to the imbalances already existing in Section 3 of Part II, which would not be consistent with the spirit and basic objectives of the TRIPS Agreement. In order to address all issues left for further clarification and improvement by the Uruguay Round compromise, the negotiations required by the built-in agenda of Article 24.1 should include not only the question of additional protection for geographical indications for wines and spirits and/or of mitigating the exceptions to protection contained in paragraphs 4 to 8 of Article 24, but should also deal with the issue of increasing the protection of individual geographical indications for products other than wines and spirits. In other words, Article 24.1 was a provision of general application to all products and the reference to Article 23 did not relate to products contained therein but to the level of protection to be provided. An additional argument for this interpretation of Article 24.1 could be found in the inherent structure of Section 3 of Part II. The title of Article 23 clearly denoted that this provision dealt exclusively with geographical indications for wines and spirits. Article 24, however, was not limited to wines and spirits, except where the provisions explicitly mentioned so in the text. Turning to Article 24.2, he said that this provision contained three additional elements which supported the view of taking up an extension of the additional protection of Article 23 to products other than wines and spirits in the built-in negotiations. Firstly, the first sentence of Article 24.2 mandated the Council to review the application of the provisions of Section 3 of Part II. Apart from the fact that any review of the application of provisions might lead to an improvement and an increase of the protection granted by the provisions under review, the Council for TRIPS had reported to the 1996 Ministerial Conference in Singapore explicitly "[...] that a review of the application of the provisions of the Section on Geographical Indications as provided for in Article 24.2 [...] permits inputs from delegations on the issue of scope...". The same statement could be found in a recent Background Paper to the General Council's Special Session on Implementation. Secondly, Article 24.2 provided, in its second sentence, that any matter affecting the compliance with the obligations under these provisions could be drawn to the attention of the Council. Thirdly, the last sentence of Article 24.2 mandated the Council to take such action as might be agreed to facilitate the operation and further the objectives of Section 3 of Part II. The joint communication from the delegations on behalf of which he spoke signalled the importance many Members attached to the issue of an extension of the additional protection for geographical indications to products other than wines and spirits. The communication showed the concerns of these Members regarding the unjustifiable distinction in the level of protection of geographical indications for different categories of products and the imbalance and distortions of trade which resulted therefrom. Switzerland and the Members co-sponsoring and supporting this communication were, therefore, convinced that the Council's work on the built-in agenda in Section 3 of Part II of the TRIPS Agreement for increasing the protection of geographical indications must also include the issue of extension. Only then could an overall satisfactory solution in the field of geographical indications be found in line with the spirit and the objectives of the TRIPS Agreement and to the benefit of all Members. The delegations on behalf of which he spoke presented this communication as a first step. They would like, with a next communication to be presented in one of the following Council for TRIPS meetings, to make further and more detailed proposals on how the future work of the Council on geographical indications, and in particular the issue of extension, could be addressed and organized. He requested the Chairperson to continue his informal consultations on the issue of geographical indications in due time before the next meeting of the Council.

77. The representative of Egypt wished to thank the delegation of Switzerland and other co-sponsoring countries for their submission. His delegation agreed and supported the analysis and conclusions reached in the paper. It was in the interest of all Members to improve the quality of the protection of geographical indications for all goods, by providing additional protection as stipulated in the Agreement without discrimination between goods. This would be in line with the provisions of the Agreement in general, which aimed at promoting effective and adequate protection for intellectual property rights, as stated in the Preamble of the Agreement. The review and amendment provisions of the Agreement called for adjusting to higher levels of protection of intellectual property rights.

Therefore, his delegation would like to be mentioned as a co-sponsor of the joint paper introduced by Switzerland.

78. The representative of Hong Kong, China said that his delegation supported the global approach set out in paragraph 17 of the joint paper and was planning to put forward, in the near future, a non-paper fleshing out, to some extent, the basket approach referred to in the joint paper.

79. The representative of India said that, in addition to the introductory remarks made by Switzerland on the joint paper, his delegation would like to underline, as co-sponsor of the paper, its view that there was a political, legal and economic basis for this proposal. The political basis was that the time had come for developing countries to derive benefits from the TRIPS Agreement. Balance was required and there was no reason why some products, which were of interest to developed countries, alone should be protected in a particular way and other products, whether of interest to developing countries, to transition economies or to developed countries, should not get that protection. The legal basis could be found in both Article 24.1 and 24.2. He had already dwelt on the interpretation of Article 24.2 under the previous agenda item. As regards Article 24.1, many possible interpretations of the first sentence had been advanced. The New Zealand interpretation advanced under the previous agenda item was just one such possible interpretation. One point on which his delegation would take issue with New Zealand was that the words "wines and spirits" did not occur in the first sentence of Article 24.1. As for the economic basis for the proposal, if a country saw names of products it considered its intellectual property and its heritage being appropriated by others for selling products, obviously there was an economic reason for doing so. It was not a coincidence that, for example, Basmati rice or Darjeeling tea were being used by others; it was clear that there had to be a sound trade and economic reason for doing so. Consequently, his country would like to derive the economic benefits of those products whose appellation of origin or geographical indication rightfully belonged to it. It was the duty of this Council to look not only at the legal questions involved, but also at the political, economic and trade factors involved; and to take into account the demand made by a group of countries, including a large group of developing countries in particular, who would like to see this fundamental imbalance in the TRIPS Agreement rectified.

80. The representative of Turkey fully associated his delegation with the interventions made by the other co-sponsors of the joint paper introduced by Switzerland. He wished to emphasize one point, i.e. that the issue of the extension of geographical indication protection was neither an implementation issue nor a negotiation issue; it was part of the built-in agenda. In his delegation's view, the mandate stipulated in the TRIPS Agreement was clear enough to enable the Council to discuss this issue. Looking at the list of the co-sponsors of the joint paper and the Members that had given their support to it, one could see that it represented the common view of countries with different economic backgrounds and with different levels of development; and that the countries in question were not producing similar products and had different economic policy objectives. This point required more attention. The fact that there were so many countries seeing an urgent need to increase geographical indication protection under the TRIPS Agreement for such a wide range of products was an indication of the imbalance of the TRIPS Agreement and made the distinction between certain products and others difficult to explain. If one tended to interpret the provisions of the Agreement too narrowly, there was a risk of excluding many products and their producers from strong protection under the multilateral trading system while providing such benefits to others. Members should not fail to notice the legitimate concerns of the producers which were seeking protection for the geographical indications of their products, in particular since many were small and medium-sized enterprises trying to enter other markets. If the WTO's aim was to ensure their participation and integration in the global economy, Members had to show them that they had their place in it as well. If these producers had a reputation for a product or a production method they had developed over the years, it was their legitimate right to benefit from such reputation. The issue of geographical indications was not only an issue for producers; it had a consumer dimension as well. One of the basic principles of a market-oriented economy was the consumers' right to choose with proper

knowledge enabling them to know exactly what to consume. It was also their right to enjoy the particular characteristics of a product they wished to consume.

81. The representative of Sri Lanka also endorsed the views expressed by other co-sponsors of the joint paper in relation to Article 24.1 and 24.2. Sri Lanka attached significant importance to the issue of geographical indications, as these had, in the global market, become invaluable marketing tools in business. Their role in identifying commercial national, regional or local characteristics was an asset for all countries. Accordingly, the economic and political significance of geographical indications was growing, as increasing quality awareness and higher quality requirements promoted the demands for such products. While referring to the explanation given by the delegation of India to the different importance that countries attached to geographical indications, she said that Sri Lanka did not wish to be in a position not to be able to benefit from the inherent qualities of the products to which it had attributed geographical indications. The TRIPS Agreement required geographical indications in general to be protected, at least with a view to avoiding unfair competition and consumers being misled. In the context of this definition, it was her delegation's view that general standards of protection accorded or available under Article 22 were not adequate to protect the exclusive rights right holders should enjoy under the Agreement, as the general protection granted therein could not prevent the use of a geographical indication identifying a specific product not originating in the place indicated by the geographical indication. Article 23 did provide for the additional protection required for geographical indications attributed to products, since it provided protection even where their true origin was indicated or the geographical indication was used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like. The General Council had agreed that mandated reviews should address the impact of the TRIPS Agreement on the trade and development prospects of developing countries and, in the context of geographical indications, it could hardly be denied that a large number of developing countries and transition economies attached tremendous importance to extending the scope of protection under Article 23 to products other than wines and spirits. She said that her delegation was planning to enlighten the Council at the next informal session on the subject with specific details justifying why the group of countries sponsoring the joint paper needed the additional protection under Article 23 to be extended to other product areas.

82. The representative of Slovenia said that his delegation, as a co-sponsor of the joint paper introduced by Switzerland, would like to stress the importance of geographical indications and their protection in the globalization of trade, in order to show the urgent need to work on this built-in agenda item. His delegation was convinced that this work could be carried out in parallel to the mandated work under Article 24.2. He also expressed support for the proposal made by the European Communities, to have informal consultations on matters of substance in this area before the next meeting of the Council.

83. The representative of Australia wished to express his delegation's eagerness to see a rich substantive discussion in the Council concerning geographical indication protection and hoped that, by saying so, this might help dispel a slight misunderstanding that had developed. Australia was not questioning, in its paper concerning the review under Article 24.2, the value of geographical indication protection, but wondered whether the balance struck in various jurisdictions was necessarily the best way to achieve such protection. Referring to the notion of "absolute protection" used in the joint paper introduced by Switzerland, he believed that one should be cautious in applying absolute protection to any form of intellectual property. Australia was suggesting through its discussion paper that the rather simplistic pasting of the words "everything made by man under the sun" into Article 23 would not necessarily in itself confer any significant economic or trade benefits and that there should be a strong focus on the need for a look at the practical reality of geographical indication protection. In that regard, he wished to clarify that it was his delegation's understanding that Article 24.1 provided a basis for negotiations on eliminating balancing exceptions to geographical indication protection as applied in accordance with the exceptions provisions of Article 24, for

example exceptions based on prior use in good faith, use of generic descriptive terms or pre-existing trademarks. It concerned negotiations along these issues in relation to geographical indications already protected under Article 23. Not that his delegation believed that this was a palatable prospect, because it seemed to concern a process that threatened the balance of interests and, in some instances, the fair use of the English language in his country. If delegations were to consider that Article 24.1 in fact covered the re-writing of Article 23.1, to introduce new product lines, he would suggest that, in the context of forthcoming informal consultations, one would look at individual geographical indications, because it was unquestionable that Article 24.1 was about individual geographical indications rather than about product classes or industrial sectors. It might be helpful, before one did consider the exact nature of this mandate, to consider the individual geographical indications that were of interest or concern. In that context, one might also consider how these were protected in existing systems or find out if some of them were, in some jurisdictions, regarded as not being geographical indications at all. Referring again to the joint paper introduced by Switzerland, he said that there seemed to be some lack of clarity. If this Council was indeed mandated to undertake negotiations on product extension, it seemed to be unclear whether that mandate was intended to fall under Article 24.1 or 24.2. From his delegation's point of view, this underscored the need for greater clarity of the nature of geographical indication protection.

84. Continuing, he wished to clarify that it was not his delegation's intention to suggest that discussions under Article 24.1 should begin after terminating the review under Article 24.2, nor had he suggested any other prioritization in terms of timing. Australia had been engaged in negotiations under Article 24.1 on a bilateral basis and intensively since the TRIPS Agreement had come into effect. All that his delegation had been suggesting in terms of an effective organization of the Council's work had been that any outcome on how to go about Article 24.1 would serve the interests of Members better if it would involve a more informed process and an extraordinarily good source of information would be the review under Article 24.2. Thus, genuinely enhanced protection of geographical indications might be achieved and unexpected disappointments could be avoided. It would also be useful if the Council would get an update from WIPO concerning the practical issues that were currently being addressed in the context of the Lisbon Agreement with a view to improving the multilateral registration system under that Agreement. It was important for the Council's work under Article 23.4 to get such an update, now that the only existing analog internationally was undergoing some form of review building on experience gained in its operation. Finally, he expressed support for the suggestion made by the European Communities for a stand-alone informal session of the Council to look in-depth at geographical indication issues and recalled his delegation's earlier suggestion that these issues might be of sufficient importance for the Council to consider the establishment of a subsidiary body in accordance with Article IV of the WTO Agreement.

85. The representative of Bolivia thanked Switzerland and its co-sponsors for presenting the joint paper, for which his delegation wished to express its support. His delegation had already made known its position at sessions of the General Council in the preparatory work for last year's Ministerial Conference and fully concurred with the position voiced by India. It could not be so that the higher level of protection would only be available in respect of a limited number of products, leaving unprotected a large number of products of interest to Members, including developing country Members.

86. The representative of the Czech Republic wished to subscribe fully the introductory remarks of Switzerland concerning the joint paper of which her delegation was a co-sponsor. Having listened to some of the other interventions made, she believed that some further explanation on the nature and objectives of the joint paper was needed. First, the paper was an attempt to put into effect the respective commitments under Section 3 of Part II of the Agreement. Moreover, in her delegation's understanding, it was fair and balanced; it had been carefully crafted to strike a balance between the various interests of all WTO Members. Second, the objective of the paper was to offer a method allowing the Council to proceed constructively and in a result-oriented manner, and to achieve

progress on both fronts, i.e. on the issue of the notification and registration system and on the issue of the extension of the coverage of Article 23. The method proposed was to treat all relevant issues together, i.e. a basket approach. In her delegation's view, it was now high time to stop discussing issues of mandates and procedure and to launch a substantive debate on Section 3 of Part II: This method could meet all interests of WTO Members. She also expressed support for the suggestion to have informal consultations on the issue of geographical indications ahead of the next meeting of the TRIPS Council, when the agenda items concerning Article 23.4, Article 24.1 and Article 24.2 should be discussed in a basket approach.

87. The representative of the European Communities said that he had refrained so far from participating in a linguistic or legalistic debate, because he did not think that such a debate was helpful. However, for those who had concerns about the discussions or the basis for discussions on additional protection of geographical indications to products other than wines and spirits, he would like to highlight paragraph 14 of the joint paper introduced by Switzerland, which stated "that the TRIPS Council reported to the 1996 Ministerial Conference in Singapore explicitly 'that a review of the application of the provisions of the Section on Geographical Indications, as provided for in Article 24.2, permits inputs from delegations on the issue of scope'. The same statement can be found in the background paper to the General Council's Special Session on Implementation".

88. The representative of Hungary wished to join others in welcoming the joint paper introduced by Switzerland and also put on record that, similarly to the sponsors of this paper, Hungary attached great importance to the improvement of geographical indication protection under the TRIPS Agreement. His delegation shared, in particular, the salient points in paragraph 2 of the paper. It did not only believe that geographical indications were invaluable marketing tools on the global market, but also that, by identifying goods as originating in a certain territory and showing the consumer the presence of a given quality, reputation or other characteristics of the goods, which was or were essentially attributable to this geographical origin, geographical indications had in fact become elements or attributes of the goods themselves. Hungary was convinced that geographical indications had considerable potential for commercial use and could be assets for all countries. It believed that liberalization efforts, in particular in the area of agriculture, should be accompanied by an improvement of geographical indication protection. In its view, the composition of the group of sponsors of the joint paper and the enormous interest from many others during the preparatory process leading up to the Seattle Ministerial Conference convincingly showed that extension of Article 23 protection to products other than wines and spirits was in the interest of many WTO Members from various regions of the world and at different levels of economic development. The proposal to start negotiations on the extension of the product coverage of Article 23, in his delegation's view, would be a clear step forward in improving the TRIPS Agreement. He wished to add that, if Members took seriously that one was now in a confidence-building mode after Seattle, the launching of negotiations on this extension could be a good candidate for prompt action. Against this background, he stressed that Hungary took a pragmatic approach and was ready to start such negotiations. As first steps, he could support what Switzerland had suggested. His delegation slightly differed in view from the sponsors of the joint paper as to the need for the establishment of a strict link between the negotiations under Article 23.4 and those on the extension of Article 23 protection. A strict link might unduly slow down the setting up of the notification and registration system under Article 23.4 and would make Members mostly interested in the latter hesitant in their support for an extension of the Article 23 protection.

89. The representative of New Zealand said that his delegation was of the view that Article 24.1 was not intended to be used to add other product sectors to those covered by Article 23. New Zealand believed that this was clear from the first sentence of the provision. As also mentioned by Australia, the real intention in the wording of Article 24.1 was to allow for negotiations to limit the application of the exceptions set out in Article 24.4 and following with respect to geographical indications covered by Article 23, i.e. those for wines and spirits. Looking at some of the comments made and

the questions raised, his delegation believed that Members really needed to use the review under Article 24.2 to allow an opportunity for Members, who felt that there were specific issues raised in relation to the protection provided by Article 22, to come forward and discuss particular issues that they might have identified in relation to their own domestic application and implementation. He endorsed the comments made by Australia about the misleading nature of statements on the absolute protection already provided for particular terms. In order to get to the bottom of this issue, it would be necessary to take a rigorous approach to the review of all the provisions of Section 3 of Part II.

90. The representative of Venezuela said that there was obviously no consensus regarding the scope of the negotiations under Article 24.1 or the review under Article 24.2 of the application of the provisions of Section 3 of Part II. Her delegation would like the record to show that Venezuela concurred with the interpretation given by Switzerland and its co-sponsors in the joint paper and considered paragraph 17 of this paper of great interest, pointing out the need to discuss all matters relating to Section 3 of Part II in a global and balanced manner.

91. The representative of Cuba similarly highlighted paragraph 17 of the joint paper. She also expressed support for the comments made to the effect that the coverage of products should be borne in mind as an indispensable part of the multilateral nature of the negotiations, if Members wished to correct any imbalances which existed in the treatment of different products. Section 3 of Part II did not cater across the board to the interests of all Members.

92. The representative of Canada said that, during the informal consultations held on the matter, the idea of a special meeting on geographical indications had been raised. Her delegation wished to support the idea of initiating a discussion on the range of issues in this area. This would provide an opportunity to delve further into an analysis of national geographical indication regimes as allowed for in Article 24.2 as well as to educate and inform the Council's discussion of geographical indications and, most importantly, to increase Members' mutual understanding of the considerable protection afforded to all geographical indications under Article 22. Her delegation would like to note, however, that the question of the meaning of Article 24.1 and the mandate it provided to the Council for TRIPS would remain an issue where Members would continue to have different views. Canada believed that the meaning and intent of Article 24.1 was straightforward; it explicitly referred to increasing the protection of individual geographical indications under Article 23, namely wines and spirits alone. Her delegation was, therefore, not in a position, at this time, to agree to begin negotiations or exploratory talks aimed at expanding the enhanced protection afforded to wines and spirits to any other products. Article 24.1 did not provide a mandate to do this.

93. The representative of Mexico said that her delegation respected the political and economic reasons mentioned by certain delegations as justifying their wish to enter into negotiations to extend the protection of geographical indications under Article 23 to products other than wines and spirits and recognized the right of delegations to submit proposals as they saw fit and to have these discussed by delegations that wished to discuss. These were all "inputs from delegations on the issue of scope" of the review under Article 24.2, as referred to in paragraph 34 of the TRIPS Council's 1996 annual report, which had been endorsed by the Singapore Ministerial Conference. However, Mexico could not accept legal interpretations of Article 24.1 as had been put forward to justify why this Council should get involved in negotiations to extend the additional protection of Article 23 to products other than wines and spirits. In her delegation's view, an objective reading of Article 24.1 made it clear that the negotiations referred to therein were to improve the protection of the individual geographical indications already covered by Article 23. There was no need to get into legal hair-splitting or terminological considerations in that regard. However, having seen the legal reasoning in the joint paper introduced by Switzerland, it should be pointed out that this paper seemed to lack precision in some respects regarding the interpretation of Article 24.1 and her delegation was not prepared to accept the interpretation advanced. The WTO was a rules-based Organization and that was why her delegation was of the view that a legal analysis had to be carried out of the provisions in trying to find

solutions. At present, Members were clearly far from a consensus as regards interpretation. Inputs in the form of proposals were being made and could be made, but that did not mean that Members had also achieved a consensus on the issue of whether an extension of the product coverage of Article 23 could be negotiated. For that reason, and because the various elements of the basket did not have the same legal standing, paragraph 17 of the joint paper, which was asking for a basket approach, was therefore not acceptable to her delegation. She expressed support for what had been proposed by Australia and New Zealand to the effect that there be a detailed study of how each of the provisions of Section 3 of Part II might be interpreted and were being applied in practice.

94. The representative of Chile expressed his delegation's gratitude for the joint paper introduced by Switzerland. Although it was true that this paper did not necessarily lead to a consensus, as the discussion had shown, it had served the purpose of providing a basis for a discussion which had in fact enabled assessment of the different views Members had in this Council. As far as he remembered, the first text which had been analysed during the TRIPS negotiations had been based on five proposals from delegations, namely the European Communities, the United States, a group of developing countries, Switzerland and Japan. None of these five proposals contained any provision of the sort that was the subject of the present agenda item. Nor did the Chairperson's report of 23 July 1990, summing up the different proposals presented and certain elements on which at that time consensus had been reached following discussions on these proposals, reflect something even closely resembling the provisions of Article 24.1. The text sent to the Brussels Ministerial in December 1990 did not contain any such provision either. Article 24.1 appeared for the first time in the Draft Final Act of December 1991, which showed that the provision was rather the result of political compromises reached than of technical discussions, for the purpose of ensuring that the Uruguay Round might be successfully concluded. In his delegation's view, it was important to recall the history of this provision and to maintain the balance struck at the time the provision had been adopted. Historically speaking, Article 24.1 was possibly representative of one of the most substantive changes the TRIPS draft had undergone after the Brussels Ministerial of December 1990. Another point that he would like to mention was that his delegation supported the view that the negotiations referred to in Article 24.1 only concerned what was covered by Article 23, which in its title and in its paragraphs 1 and 2 referred to additional protection for wines and spirits and in its paragraphs 3 and 4 only to wines. This showed that there were three different categories of products in the Agreement and not just two, as had been suggested in the joint paper. Therefore, his delegation would see some difficulties, in the light of the provisions of the Agreement as it was at present, in negotiating an increase in the scope of products that would come under additional protection. In conclusion, as a developing country, it seemed to Chile that the solution to the problems which developing countries might come up against in Section 3 of Part II went far beyond a simple of increasing or not the scope of protection. A far more systemic consideration of this Section was required.

95. The representative of Bulgaria thanked Australia for its important clarifications, in particular that the Australian delegation did not see any impediment to work under Article 24.2 and work under Article 24.1 proceeding in parallel. In fact, that was also what India had been suggesting and his delegation had supported. However, work on the issue of the extension of the additional protection under Article 23 to other product areas in the context of Article 24.1 should not be held hostage to the review under Article 24.2. Both Article 24.1 and 24.2 established built-in agenda items and neither required consensus for the initiation and continuation of work under them. Work under one of these items should not depend on the work on the other. If, as the United States had said, there was no consensus on what Article 24.1 mandated, his delegation would maintain the view that there was no consensus on the mandate of the Special Session of the Committee on Agriculture either. Moreover, he would have difficulties in accepting to have a detailed review and analysis of national systems for the protection of geographical indications under Article 24.2, if there would not be a clear understanding that the Council would also proceed under Article 24.1 in dealing with the issue of the extension of the additional protection under Article 23 to other product areas.

96. The representative of Norway said that it was going to be difficult to reconcile the different views on what was in the built-in agenda, including the interpretation of Article 24.1. Nevertheless, his delegation believed that it would be possible to accommodate views by placing on the agenda what Australia and New Zealand had said, namely broadening the review of national implementation, and, at the same time, also looking at other products which might merit extension of protection. These elements could be addressed under different agenda items so as to allow the Council to get a better understanding of the needs of various Members. His delegation, therefore, concurred with the European Communities that an informal meeting should be convened some time between now and the next meeting of the TRIPS Council, in order to proceed on the procedural issues and improve an understanding of substantive issues.

97. The representative of Jamaica would like to underscore the importance her delegation attached to this issue, in particular the extension of the additional protection under Article 23 to products other than wines and spirits. Her delegation shared the views expressed by the sponsors of the paper introduced by Switzerland and was considering to become a co-sponsor.

98. The Chairperson suggested that he hold informal consultations prior to the next meeting of the Council at which Members would discuss proposals on how to carry forward the work of the Council for TRIPS on geographical indications, including documents IP/C/W/204, IP/C/W/205 and IP/C/W/211, and initiate a more structured and detailed process of examination of experience with regard to the operation of the provisions of Section 3 of Part II of the Agreement.

99. The representative of Argentina said that, with regard to the Chairperson's proposal, Argentina was not opposed to the holding of informal consultations concerning the relevant provisions for geographical indications. In fact, until now, the Council had always held such consultations before each meeting. However, her delegation was concerned over the content of the Chairperson's proposal, which covered the handling of two items, one regarding the discussion of document IP/C/W/204 and the other regarding the initiation of a structured review process of national experiences with regard to the operation of the provisions of Section 3 of Part II of the Agreement. The documents submitted by Australia and New Zealand, which had been submitted under Article 24.2 and not under Article 24.1, had been included under the first item of the proposal together with document IP/C/W/204 without an indication of substantial differences in the underlying matter they addressed. In Argentina's view, this proposal favoured a conception of the structure of the discussion not supported by all Members. Differing views on this matter had repeatedly been expressed in successive Council meetings and informal consultations. Moreover, it was not clear under which provisions these items would be discussed. In her delegation's view, this was not irrelevant. Further, Article 23.4 had been conspicuously ignored. Her delegation therefore reserved its right to prepare its comments on document IP/C/W/204 and other documents submitted for the consideration of the Council which had not been circulated sufficiently in advance for her delegation to be able to analyse them carefully and prepare its comments in time for this meeting. With regard to Article 23.4, she wondered whether it should be understood that the discussions under this provision had been postponed and, if so, whether a consensus had been reached on this. Her delegation would be grateful for clarification of the reasons for the omission of Article 23.4 in the Chairperson's proposal. In the light of these considerations, she requested that, if it was agreed that official consultations should be held, this be done pursuant to the structured method of working followed until now in the meetings of the Council, i.e. on the basis of each of the built-in agenda provisions relating to geographical indications as reflected in the formal agenda of the Council. She pointed out that, despite the fact that several delegations had requested at the previous Council meeting that the usual agenda structure be retained, the agenda of the informal consultations which had been conducted before this Council meeting had been designed according to different parameters. In view of the differences of opinion on this issue which had existed until now and which, in her delegation's view, had not been resolved in the current meeting, Argentina believed that a decision should not be taken in advance as to the content of eventual consultations. Neither should the content of the discussions,

irrespective of whether they took place immediately before or some time prior to the Council's meetings, be steered in any particular direction, since it was clear that a consensus had yet to be reached on what that direction should be. She associated her delegation with the statements made by, for example, Mexico, Chile, Canada and New Zealand. She expressed her delegation's surprise at comments made calling for a "pragmatic approach" and against "narrow or legalistic interpretations". Her delegation shared the concern of developing countries with regard to the existing imbalances in the WTO Agreements, but was of the opinion that the subsidiary bodies did not have the authority to redress such imbalances within their own areas of responsibility. Argentina believed that there were two ways of rectifying the existing imbalances: either by recourse to the specific provisions concerning the amendment of WTO Agreements, or by a new round of negotiations. For all of these reasons, and as her delegation had already pointed out in the informal consultations, Argentina would like to see the Council concentrate its efforts on fulfilling its existing and outstanding obligations, i.e. the negotiations concerning a multilateral system of notification and registration for wines and the review of how Members had implemented their obligations under Section 3 of Part II of the Agreement. Her delegation would ask Members to refrain from distracting the attention of the Council to issues outside its express terms of reference under Articles 23.4, 24.1 and 24.2, by trying to include new obligations into the system or new products into certain existing obligations. Argentina believed that the Council did not have the mandate to negotiate on broadening the protection under Article 23 for geographical indications in respect of wines and spirits to other products, or to include other products in the Council's negotiations under Article 23.4.

100. The representatives of Bulgaria, Egypt, the European Communities, Hungary and Switzerland expressed support for the Chairperson's proposal. The representatives of Bulgaria wished to inform the Council in this connection of the statement by his delegation at the last Special Session of the Committee on Agriculture, where he had said that it was the right of Members to make proposals for the mandated negotiations, which included those on agriculture, those on services and those on geographical indications. If Members were here to discuss mandates, then necessarily mandates also had to be discussed at the Special Session of the Committee on Agriculture scheduled for next week. His delegation had reserved its right to raise this matter at the moment of the adoption of the agenda of that Special Session and would do so if his delegation's understanding of the situation would be challenged. The representative of Egypt believed that the informal consultations should not be conducted in parallel or back to back with the next meeting of the Council. The representative of the European Communities wished to stress the need that the work under Article 23.4 should be addressed as well if further informal consultations were called as proposed by the Chairperson, given the interests of his delegation in that item.

101. The representative of the United States said that the discussion had made it clear that several delegations needed further instructions before they might be in a position to support the scheduling of such informal consultations. The representative of Mexico said that her delegation shared some of the comments made by Argentina as regards the content of the Chairperson's proposal, in particular as regards the structure of the discussions. In this regard, she expressed concern about the absence of a reference to Article 23.4 in the proposal. The representative of New Zealand said that some of the comments that had been made suggested that there might be a need to consult further on exactly how informal consultations were to be proceeded with.

102. The Chairperson did not sense any opposition for him holding informal consultations. There were differences of view as to how and on what he should consult. He should, in any case, consult Members on how to carry forward the work of the TRIPS Council on geographical indications. Bearing in mind that some delegations had to consult their capitals, he would check with delegations after the meeting as to what precisely would be taken up in these informal consultations.

103. The representative of Bulgaria said that it would be important if the Chairperson could provide more clarity before the next Special Session of the Committee on Agriculture, which would take place within a week from the present meeting.

104. The representative of India had no problems with the Chairperson's proposal, but wished to air some systemic concerns his delegation had about some of the comments made. In his delegation's view, the Chairperson's statement was one he had made on his own responsibility, for which he had the full authority under the rules of procedure. The Chairperson did not need any permission from any delegation to conduct informal consultations on a subject, such as the protection of geographical indications, that fell within the scope of the TRIPS Agreement. If the consent of each and every delegation would be required for Chairpersons of WTO bodies holding informal consultations on any single subject, would there be any chance of moving forward at all? He emphasized that, in its annual report of 1996, the Council for TRIPS had stated that Members could provide inputs on the issue of scope. The joint paper introduced by Switzerland was no more than such an input.

105. The Chairperson said that, while he had the authority to conduct his own informal consultations, it was his responsibility to make sure that such informal consultations would be constructive and fruitful, taking into account the views of delegations. Thus, he would proceed with informal consultations, as suggested by delegations, after having checked with delegations as to how best to conduct these informal consultations. Finally, he also urged Members to provide further responses to the Checklist as suggested by the European Communities, so that the Secretariat could update its summary paper in a more comprehensive manner.

J. IMPLEMENTATION OF ARTICLE 23.4

106. The Chairperson said that, before the last meeting, the Council had received a revision of the proposal of the European Communities (IP/C/W/107/Rev.1) as well as a paper from New Zealand (IP/C/W/189), on which Members had made preliminary comments. He invited WIPO to brief the Council on the work that had recently commenced in that Organization in relation to the Lisbon Agreement.

107. The representative of WIPO said that, pursuant to the programme and budget of WIPO for the biennium 2000-2001, a working group had been convened to review the implementing regulations of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, in order to propose modifications thereto during the ordinary session of the Assembly of the Lisbon Union in the autumn of 2001. The first meeting of this working group, to which the member states of the Lisbon Union and all other member states of the Paris Union had been invited as well as a number of intergovernmental and non-governmental organizations, had taken place from 10 to 13 July 2000. The relevant documentation, including the report of the meeting, were available on the WIPO's website under the symbol LI/GT/1. Discussions had taken place on the basis of document LI/GT/1/2, in which the International Bureau had laid forth the main difficulties in application or interpretation it had come across in administering the Lisbon system and had given, where possible, possible solutions and means of application thereof. The matters under discussion related to: the advisability of including into the implementing regulations a certain number of definitions; the national authority or authorities competent for the purposes of the international procedure; the entitlement to the protection of appellations of origin and their international registration; the contents of the international application; the treatment of irregularities associated therewith; the content of the declaration stipulated in Article 5(3) of the Lisbon Agreement through which a member state of the Agreement made it known that it was not in a position to protect an appellation of origin whose registration had been notified to it; the different time-limits and how these were calculated; the starting-point for the international protection to be granted; modifications which required a new international registration; corrections to be made to the international register; and, finally, the inscription in the international register of the invalidation, in a contracting party, of

the effects of the international registration of an appellation of origin which had not been the subject of a refusal of protection by the administration of that contracting party pursuant to Article 5(3) of the Lisbon Agreement. The terms of reference for the International Bureau and the working group were limited to the examination of the implementing regulations of the Lisbon Agreement. The WIPO's programme and budget for the biennium 2000-2001 did not include any project for a review of the Lisbon Agreement itself. Nevertheless, to the extent that the implementing regulations were intended to complete and implement the Lisbon Agreement, an examination thereof would necessarily lead to commenting on or spelling out the scope of certain provisions in the Agreement itself. Thus, the proposal to provide in the implementing regulations that, when a refusal to protect an appellation of origin was based on the existence of a prior trademark with which the appellation of origin was in conflict, the basic data concerning the prior trademark shall be contained or indicated in the declaration of refusal. Another example concerned a proposal to include in the implementing regulations a provision for inscription in the international register, and publication thereof, of an invalidation by a contracting party of the effects of an international registration. On the basis of the discussions that had taken place during the first session of the working party, as contained in the report thereof (document LI/GT/1/3), the International Bureau would draw up proposals for the modification of the implementing regulations, which would be submitted to a second session of the working party planned to take place in March 2001.

108. The representative of Hungary said that Hungary was in favour of a strong and effective multilateral system for the notification and registration of geographical indications. Such a system was to be established under Article 23.4 and to go beyond a mere collection of information; it had to include an adequate registration mechanism as well. His delegation believed that among the approaches put forward so far only the proposal from the European Communities was in line with Article 23.4 in this respect. As his delegation had stressed repeatedly, for Hungary the opposition procedure was a most important element of the system to be set up. Hungary, especially as a smaller Member having limited bargaining power in a bilateral context, was in favour of including a multilateral mechanism for settling disputes regarding opposed geographical indications that the parties to the dispute were not able to settle bilaterally. His delegation had serious doubts whether a case could be brought under the DSU citing the registration of an individual geographical indication. Therefore, in its view, it seemed that there was a need for a multilateral dispute settlement mechanism outside of the DSU specifically dealing with such cases. Another compelling reason for having a multilateral mechanism was the need to ensure the prevention of abuse. It should be up to a multilateral mechanism and not be left to individual Members to decide whether challenges were justified or not. When discussing the possible forms of such a multilateral mechanism, the options that could be looked at would include an experts committee, mediation committees, some kind of arbitration or a combination of these. Hungary believed that all these possibilities deserved in-depth discussion in the Council. At present, his delegation felt especially attracted to the option of binding arbitration. Such a procedure was not alien to the settlement of intellectual property related disputes. By way of example, he referred to the arbitration center in WIPO, which currently only dealt with disputes between private parties.

109. The representative of the European Communities first wished to recall that, in his delegation's view, the elements of the Lisbon Agreement on which the Council required information for its work on geographical indications were fully covered in the excellent background note of November 1997 prepared by the Secretariat (document IP/C/W/85). Responding to a number of issues and questions that had been raised during the last meeting of the Council for TRIPS on the revised proposal submitted by his delegation, he first turned to a point raised by the United States and said that paragraph B.3 of the proposal had, indeed, been elaborated upon in order to accommodate the different existing national systems. It would, for example, allow a geographical indication which had been recognized by a judicial decision to be notified in the system. In that respect, he did not think that, contrary to what had been said at the last meeting of the Council, WTO Members who protected geographical indications through unfair competition law or other laws, would be at a considerable

disadvantage. As far as the possible use of an objection was concerned, WTO Members were or should be aware that the exceptions which could be used as the basis of an objection were clearly defined. Referring to claims that his delegation's revised proposal could create additional burdens and obligations, emphasized that the Agreement provided for the creation of a multilateral system of notification and registration and not only for an exchange of information on existing national systems or databases. This did not mean, of course, that the European Communities wanted to promote a system that would create unnecessary burdens. However, paragraph B.3 of the proposal was flexible enough to permit that unnecessary documents were not notified. He would not have difficulties with references to existing information under notifications and obligations already established by the Agreement. Referring to criticisms with regard to the establishment of a body for the resolution of conflicts above the national level, he insisted that the two levels were not incompatible, but recourse to the national jurisdiction was always possible. However, it also seemed useful to have a possibility to discuss conflicts at a bilateral or multilateral level, in particular when conflicts arose on the basis of an exception pursuant to Article 24 of the Agreement. The revised proposal now provided that conflicts were solved by direct negotiations between the Members concerned. This avoided the creation of a new administrative burden and respected the provisions of Article 24.1 and 24.2 of the TRIPS Agreement, which provided for such negotiations and consultations. Responding to Chile, Hungary and Japan, he would like to underline that careful attention had been given when drafting the revised proposal to ensure that it would not go beyond what the TRIPS Agreement itself had established. He noted in this regard, in particular, that paragraph D.4 had to be read together with paragraph C.2. He thanked Venezuela for the comments made at the last meeting of the TRIPS Council, which had shown how a simple interpretation of the Agreement could be used to design a multilateral register. If it would not be possible to have a consistent interpretation of these terms only for the multilateral register, it could have effects on the rest of the Agreement. He hoped that the revised proposal of the European Communities and their member States would help the progress in this debate.

110. The representative of Chile said that the statements that he had heard forced him to go on record as follows. As far as his delegation know, Chile had never been obliged to have a register for geographical indications with international scope and certainly not to have a dispute settlement mechanism to deal with geographical indications. His delegation did not wish to enter into details at this stage, but would await the results of the Chairperson's informal consultations.

111. The representative of India wished to emphasize that his delegation saw a concomitance between the mandate on the establishment of a multilateral register for wines and the extension of the scope of additional protection for geographical indications to products other than wines and spirits. India was also of the view that, when the negotiations for a register were conducted and one would actually get down to the process of making a register, in order to avoid duplication, the register should be constructed in such a way that it was extendable to products other than wines and spirits.

112. The representative of New Zealand reiterated his delegation's view that the collective proposal tabled by Canada, Chile, Japan and the United States seemed to be the most workable approach consistent with the provisions of Article 23.4, in particular in view of its ability to accommodate different national approaches to the protection of geographical indications. Having looked at the revised proposal put forward by the European Communities, his delegation continued to have a number of questions about the consistency of that proposal with the provisions of Article 23.4. It did seem to his delegation that the proposal had the character of adding in additional obligations to those envisaged at the time Article 23.4 had been concluded. He looked forward to hearing further views from delegations on these issues.

113. The representative of Switzerland said that his delegation considered that, in order to ensure true protection of geographical indications in respect of wines and spirits by setting up a register, one should provide for a registration system which was binding on all WTO Members. Were there to be a

voluntary system, one would be running the risk of ending up with a plurilateral agreement which would just be yet another agreement such as the Lisbon Agreement, i.e. without the worldwide scope which the TRIPS Agreement would give it. Clarification was required as to what would be the legal impact of the registration of a geographical indication in the register. It was indispensable that a specific dispute settlement mechanism, irrespective of its form or structure, be provided for. In this regard, he could support what the delegation of Hungary had said with reference to mediation and arbitration in WIPO. He suggested that discussions be resumed on the basis of the proposal from the European Communities and go into more depth on the points that he had raised.

114. The representative of the United States associated his delegation with the intervention made by New Zealand. He also wished to express appreciation for the European Communities' effort to respond to the comments that had been made at the last meeting of the Council, although his delegation continued to have concerns about the approach contained in their proposal. He would come back to the revised proposal in more detail at the next meeting.

115. The representative of Korea reiterated his delegation's basic position that the protection of geographical indications should be left to national authorities in each Member, in view of the different regimes Members were employing in this area. As the summary paper prepared by the Secretariat in the context of the review under Article 24.2 showed, some Members were protecting geographical indications through laws dealing with false designations of origin, unfair competition or passing off, while others had adopted formal procedures requiring the notification or registration of a geographical indication before protection was available. His delegation's position seemed to be in conformity with Article 1 of the TRIPS Agreement, which clearly stipulated that Members shall be free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. The fear that a system that provided for unilateral and binding protection of geographical indications would create additional burdens on those Members operating disparate and voluntary protection systems, would only weaken the will of Members to participate in the anticipated multilateral notification and registration system to be established under Article 23.4. A multilateral system of a binding nature would rather undermine the facilitation of protection of geographical indications. In order to ensure wider participation, information available in each Member on this subject should be shared and utilised.

116. The representative of Australia thanked WIPO for its update on the current work concerning the Lisbon Agreement. In his delegation's view, the information provided was most pertinent to the issues under discussion in the Council under this agenda item. Some of the alive issues discussed in WIPO at the moment deserved the TRIPS Council's consideration as well, for a better understanding of how an international registration system for geographical indications would operate. As examples of such issues, he referred to the grounds, procedures and evidence required for refusal of protection under an international system; the legal status of registrations; issues of amendments; and the implications of amendments to geographical indications notified. Along with other delegations, he thanked the European Communities for their responsiveness to comments made at earlier Council meetings and for their willingness to enrich the debate on these issues. His delegation was also in favour of a detailed debate, not merely on specific proposals but on the issues behind them, because it saw this as the most productive way of resolving these negotiations. To that end, he drew attention to the paper his delegation had submitted under the agenda item concerning Article 24.2. Some of the broader public policy issues and intellectual property policy issues raised in that paper would need to be borne in mind as one worked towards the conclusion of these negotiations. For example, one issue was whether there was to be a form of global right for an individual geographical indication or was the trend rather towards determining this jurisdiction by jurisdiction. Another question concerned what was the nature of the presumption concerning the notification of a geographical indication. Was it to be presumed that, because a geographical indication had been notified, the burden of proof was on others to demonstrate that it had another signification in their jurisdictions? Was there to be some form of dispute settlement mechanism to resolve issues concerning the signification of individual

words for consumers in each and every WTO Member? What would be the implications of such a mechanism for all? Another issue raised concerned the voluntary nature of the mechanism to be established. There was a need to come to some understanding about the options that Members had in relation to these systems. For some Members, the wines and spirits sectors was not of great economic significance and these might have some reluctance to invest considerable resources in this area. This was not the case for Australia, but his delegation had systemic concerns on this matter. The costs involved were also a relevant issue, especially at the national level. Probably the main systemic issue was whether, in taking part in the system to be established, an individual Member was expected to have some form of pre-emptive decision-making process, i.e. a registration process or another administrative or judicial process. This ran two ways. If a Member would be obliged, when a geographical indication had been notified by another Member, to take a decision as to whether that geographical indication was already protected in some form in its jurisdiction, how could one do this in the absence of a registration system or another form of pre-emptive decision-making process? If a Member only provided protection through unfair competition law or similar consumer protection laws, would it be necessary to go to court in order to get a finding as to whether or not the term in question was to be protected and, if so, under what conditions? In order to illustrate the complexity of the matter, he referred to the example concerning the term "Orange" in his delegation's paper submitted in the context of the review under Article 24.2.

117. The representative of Mexico reiterated that her delegation attached great importance to the establishment of a multilateral system for the notification and registration of geographical indications for wines and spirits. She welcomed the proposal from the European Communities and was grateful for the additional explanation given to the Council at the present meeting. Nevertheless, her delegation saw that the text of the proposal itself omitted specifying what would be the coverage of the proposed register which, it seemed, would mean that it would be open to any product. As regards paragraph B.2 of the proposal, she said that, if a geographical indication met the definition of Article 22.1, this did not automatically mean that that geographical indication would also be entitled to the additional protection of Article 23. Her delegation would appreciate a further explanation from the European Communities as to the legal effects of the proposed register, in particular if objections had been raised to protection and bilateral negotiations were ongoing, i.e. for Members that had not raised an objection and for those not participating in the system. It might be worthwhile to consider also other proposals that had been made in this regard, such as by the delegation of Hungary at the present meeting. Finally, she said that the term "eligibility" used in the European Communities' proposal was not clear to her delegation either.

118. The representative of Japan reiterated his delegation's view that the system to be established under Article 23.4 should not create new obligations. The legal effect to be generated by the multilateral register should be determined by the national law of each Member in accordance with the TRIPS Agreement's provisions. The administrative burden and cost to be imposed by the multilateral system should be minimal. If examination and opposition were associated with the multilateral system, such a system would be costly and burdensome. Finally, he thanked the European Communities for their comments, which his delegation would carefully study and revert to, if necessary.

119. The representative of Turkey said that his delegation saw a relation between the issue of the extension of the additional protection of geographical indications under Article 23 to products other than wines and spirits and the establishment of a multilateral system of notification and registration of geographical indications under Article 23.4. In his delegation's view, the provisions of Section 3 of Part II of the TRIPS Agreement had a number of cross-references. Consequently, it saw merit in a comprehensive approach to discuss these issues together and this should be taken into account during the Council's future work. Both matters were important and, in this connection, his delegation welcomed the proposal from the European Communities. The multilateral system to be established under Article 23.4 should also apply to products other than wines and spirits.

120. The representative of the Czech Republic supported for the view that the multilateral register to be created under Article 23.4 should be non-discriminatory and allow extension of the scope of registered geographical indications to products other than wines and spirits. In this context, the proposal for a basket approach on the various issues concerning geographical indications was relevant. Furthermore, her delegation remained of the view that the register to be established must have clear legal implications and clear provisions for opposition procedures.

121. The Chairperson suggested, while indicating that there seemed to be a need for him to hold informal consultations on how to proceed on this matter, that the Council take note of the statements made and revert to the matter at the next meeting.

122. The Council so agreed.

K. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

123. The Chairperson recalled that, at the Council's last meeting, Members had had an extensive discussion on how the Council should handle its work. The issues addressed included those of seeking additional information on how this provision was being implemented by way of responses to the illustrative lists of questions⁵; requesting various other intergovernmental organizations, including WIPO, FAO, CBD and UPOV to provide updated information; and considering ways of organizing the topics that had been raised in the discussions so far. Since that meeting, the Council had received communications from India (documents IP/C/W/195, IP/C/W/196, IP/C/W/198 and Corr.1, as well as a non-paper entitled "Issues for Discussion under the Review of the Provisions of Article 27.3(b)"); from Mauritius on behalf of the African Group (document IP/C/W/206); and from the United States (document IP/C/W/209). Finally, responses to the illustrative lists of questions had been received from Iceland and circulated in document IP/C/W/125/Add.19.

124. The representative of India recalled that documents IP/C/W/195 and 196 contained proposals which had been circulating for a while and focused his intervention on document IP/C/W/198, which set out the Indian experience with the protection of biological diversity and traditional knowledge. The submission gave, in its introductory part, facts and figures explaining why India attached importance to the protection of traditional knowledge. The second part gave details on the Biological Diversity Bill 2000 which had been introduced in Parliament. The third part demonstrated that, as far as the interface with the TRIPS Agreement was concerned, the practice of disclosure of the source of origin and the prior informed consent were important steps necessary in order to protect traditional knowledge. The submission underlined that India had indeed taken a number of steps to protect traditional knowledge associated with biological resources, which could be a model for several other countries. On the issue of documentation of traditional knowledge, the submission described, *inter alia*, the concept of "Community Diversity Registers", which had been implemented by a number of States in India and documented all knowledge, innovations and practices; the setting up of a "Traditional Knowledge Digital Library"; as well as the existence of the "HoneyBee Network", which also covered traditional knowledge. The submission was a counter to those in developed countries who were claiming that the onus of protecting traditional knowledge was basically on developing countries. It was also an attempt to stress that, whilst India was doing its own part, traditional knowledge, more than any other area, could not be tackled by India alone or any country wishing to have such protection alone, but required that developed countries should undertake obligations too. New in the submission was that it listed in some detail attempts that had been made by India to do its part to protect traditional knowledge. It also hinted that, just as there was a *sui generis* system for the protection of plant varieties, it might be possible to contemplate a *sui generis* system for the protection of traditional knowledge. In terms of international action, India

⁵ A compilation of responses received was prepared by the Secretariat, upon a request from the Council, and distributed in Job No. 2689 of 7 May 1999.

suggested that patent applications should disclose the source of knowledge and biological material, and that prevalent laws and practices of the country of origin should be fully respected.

125. With regard to his delegation's non-paper (JOB(00)/6091), he recalled that, at the previous meeting of the Council, a general view had appeared to be developing that the Council should move on to a more focused discussion. Even though Members had been unable to agree to do this on the basis of a checklist of issues, it would appear to be helpful for the Council's further work to have comments made in a structured manner. In that spirit, the non-paper addressed the relationship of Article 27.3(b) with development, an issue on which the Council for TRIPS had also received a mandate from the General Council. It did so focusing on three distinct aspects. The first one concerned the flexibility to deny patents to life forms. The development aspect in this regard was the manner in which rights over life forms was customarily addressed in developing countries. Plants and animals were closely intertwined with the lives of local communities; they provided the communities with means of livelihood. These communities worked on these plants and animals in a sustainable manner; they acquired knowledge on their uses and put them into practice in their day-to-day lives, without having any legal rights accruing to these communities on this knowledge. What accrued was a customary right, which these communities could use and trade with other communities in various ways such as local remedies for diseases, use in agriculture and industry, etc. India held the view that, even if the national laws applicable to these communities did not allow patents on inventions based on such knowledge, patents in other countries would reduce the economic value of this knowledge and put constraints on development. The second aspect of development concerned the obligation under Article 27.3(b) to grant patents to certain inventions. The non-paper made the point that local communities in developing countries would not have the knowledge nor the capacity to protect their rights under a patent system. Many a time, local communities would not even realize that their knowledge of a micro-organism, for example, could be eligible for rights under the TRIPS Agreement; they would not have the education or dare at all to get a patent even though they wished to. Based on customary practices, they would therefore readily part their knowledge to those who would ask and thereby render it into the public domain without getting any benefit. The third aspect relating to development concerned plant variety protection. In many developing countries, agriculture constituted a most significant portion of the economy and land holdings were very small; often neighbouring farmers would have a cooperative relationship. Farmers in developing countries would neither feel the need to get legal protection through the plant variety protection system nor would they have the capacity or the education required to seek for such protection. The institution of plant variety protection systems, unknown to the traditional practice, would therefore not only act as a disincentive for innovations but would also make the farmers change their age-old practices to avoid infringement of breeders' rights. It would therefore be impractical to expect these local communities and farmers to suddenly start adopting practices of industrial societies. Any constraint on the farmers' right to disseminate their innovations could be a cause of worries for developing countries in the context of food and livelihood security.

126. With regard to the technical issues relating to patent protection under Article 27.3(b), the non-paper drew the attention to the trend regarding the grant of patents in recent times, which might not be entirely in consonance with the intent behind the concept of intellectual property protection. The reason behind the grant of intellectual property rights and behind the emergence of the TRIPS Agreement was, among other things, to motivate innovators so as to allow them to recoup the investments they had made for R&D. What was happening on the ground was, however, different. Patents were not only a means to prevent the use of inventions without a patent owner's authorization. Biotech companies sometimes would use patents for boosting their share prices or limit competition as in the case of gene use restriction technologies (GURTs). There was also a tendency to seek very broad patents. The practices in patent offices also raised important technical issues. Some patent offices did not have appropriate procedures, thereby giving an unintended head-start to persons who had the means to approach them *vis-à-vis* those who did not. Other patent offices often paid their examiners on the basis of the number of patent applications handled, thereby encouraging examiners

to be less than careful in granting patents rather than in rejecting patent applications. Another problem concerned the immense cost and time involved in opposing a patent application or getting a patent invalidated, as India had experienced. Moreover, some patent offices did not recognize oral prior art or prior art which was not documented in their country or jurisdiction. This encouraged piracy. The problems arising out of the practices in different patent offices could be exemplified by the patents granted on the basis of the traditional knowledge of the use of biological material held by indigenous communities. In the United States, for example, a patent granted on the healing properties of turmeric, had been revoked following an opposition claim from an Indian research organization. A European patent granted for a fungicide extracted from the neem tree had recently been revoked by the European Patent Office on the basis of an opposition procedure initiated by an Indian NGO. His delegation's non-paper made the point that mistakes made by patent offices should not involve so much effort on the part of developing countries to correct the situation. India would therefore urge the Council to find a systemic means to address these problems.

127. With regard to ethical issues in connection with the patentability of life forms, he said that the non-paper made the point that patents entailed the danger of economic motives superseding ecological or ethical ones. While Article 27.2 contained certain exceptions considered as adequate to deal with ethical or moral issues, India held the view that these exceptions would need to be examined more fully. On the issue of the conservation and sustainable use of genetic material, he said that the non-paper examined to some extent the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). The letter that the Director-General of the WTO had received from the Executive Secretary of the CBD Secretariat in July 2000 made to some extent the same point. The non-paper also addressed the relationship between intellectual property rights and traditional knowledge and farmers' rights. It reached the conclusion that such relationship was complex and multifaceted. The concept of intellectual property rights as understood in the developed world, its appropriateness in the face of a larger dimension of rights and knowledge, their knowledge and its use were, according to the delegation of India, an important component of the review of Article 27.3(b). The non-paper further made the point that, in societies such as India, there was also a cultural component which created an additional problem in as much as the systems of traditional knowledge were not reward-oriented like the TRIPS Agreement. The tribal knowledge of the benefits of a herb, for example, travelled within a community by word of mouth or by practice. No property right was sought on it. Therefore such knowledge, at least in that context, was alien to the existing intellectual property regimes. India urged that the review under Article 27.3(b) be substantive. For some issues, India had hinted solutions, for others it was still trying to find solutions.

128. Turning to the intervention made by Japan at the previous meeting of the TRIPS Council (document IP/C/M/27, paragraph 131), he said that his delegation agreed with Japan that a more organized and systematic debate on the review under Article 27.3 (b) would facilitate discussion. In this context, the Chairperson's checklist of issues, as mentioned in footnote 5 on page 12 of document IP/C/M/26, would enable a focused discussion without prejudice to Members' position on the review. It was not clear to his delegation to which proposals Japan was referring when saying that it was opposed to proposals which would lead to the reduction of the existing level of protection under Article 27. Article 27 was a complex provision and had to be seen in the context of its negotiating history and its actual text. The first paragraph of the provision mandated the grant of patents for inventions that met the three criteria of patentability, viz. novelty, inventive step and industrial applicability. The scope of these criteria had not been negotiated, nor how they should be interpreted, because patents were granted under national laws and had territorial application. Therefore, the level of protection, as far as these criteria were concerned, was entirely in the national domain. Latest developments in other intellectual property fora also showed the importance of the examination at the national level of matters of substantive protection. Thus, the "existing level of protection" mentioned by Japan would depend, to a large measure, on national laws and practices. What the TRIPS Agreement had done only was that it had obliged the application of such national laws and practices to all fields of technology and the availability of rights without discrimination as to the place of

invention, the field of technology and whether products were imported or locally produced. In his delegation's view, Article 27.2, Article 27.3(a) and the first sentence of Article 27.3(b) related to the "scope" of protection and not to the "level" of protection. The second sentence of Article 27.3(b), however, related both to the "scope" and the "level of protection", and dealt only with plant varieties. It was clear from this sentence that there was no agreement amongst Members as to whether plant varieties should be included in the scope of patentable subject-matter. What was clear only was that Members were desirous of rewarding innovations in plant varieties in some way. Flexibility had been given to Members to grant patents or reward such innovations in some other way, which could even be *sui generis* or "one of its own kind". Any interpretation to harmonize the "level of protection" for plant varieties, or to characterize it as patentable subject-matter, would militate against the concept of *sui generis*. Further, the last sentence of Article 27.3(b) called for a review of "this subparagraph", which included the "scope" issues in respect of life forms (i.e. the flexibility to exclude plants and animals and essentially biological processes from patentable subject-matter, and the lack of flexibility to exclude micro-organisms and non-biological and microbiological processes from patentable subject-matter) and the "scope" as well as the "level" issues in respect of plant varieties. Proposals on any of the above issues would form legitimate parts of this review. Proposals that would suggest solutions to these "scope" and "level" issues could not be said to lead to a reduction of the existing level of protection prescribed by Article 27. To say otherwise would be to render the review redundant. India agreed with Japan in that the concept of traditional knowledge and its relationship with existing intellectual property rights systems were not clear. It was precisely for this reason that the issue had to be discussed. Traditional knowledge had economic value and was often owned by local and indigenous communities who did not have the wherewithal or the capacity to exploit this knowledge in the same manner as large multinational enterprises of industrialized countries. Certainly, the TRIPS Agreement or the intellectual property rights system as such was not introduced to serve only the mighty. It was the responsibility of the international community to create an egalitarian system for the availability, acquisition, maintenance and enforcement of intellectual property rights, which did not a priori exclude any section of the society. This responsibility was being discharged through various fora and the Council for TRIPS should closely follow the developments there. To the extent that the TRIPS Agreement could sub-serve this egalitarian purpose, this would be a positive effort to give a human face to globalization. The connection made by Japan between the obligation of non-discrimination as to the field of technology under Article 27.1 and the proposal that applicants should disclose the source of origin of any biological resource used in an invention was not clear to India. Such a disclosure provision did not mean that a particular field of technology (e.g. biotechnology) was denied protection. It was only a transparency measure, providing additional information that might be necessary to test an invention on the criterion of novelty. Revocation of patents in some patent offices on the ground that prior art had not been checked by the examiner showed the importance of the disclosure provision. India held the view that the connection, instead, was with Article 29. Article 29.1 provided for a mandatory condition on patent applicants to disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, and an optional condition to indicate the best mode known to the inventor for carrying out the invention. Individual patent offices could seek the disclosure of the source of origin of biological material or associated traditional knowledge as a part of the patent description already, both because Article 29.1 would allow the seeking of such information and because Article 29 was inclusive in nature. The problem arose only where the patent office chose not to seek such a disclosure. In biotechnological inventions, such disclosure was necessary to test the invention on the novelty criteria. This had been proven in the turmeric patent case in the Patent and Trademarks Office in the United States (USPTO) and the neem patent case in the European Patent Office (EPO). Hence, the disclosure provision, if made mandatory, would resolve the problem of the grant of bad patents *ab initio* rather than going through the complicated, costly and time-consuming opposition proceedings in individual patent offices. On the other hand, there was virtually no additional cost to the patent applicant. In conclusion, the disclosure provision did not change the substantive level of protection; it was only to be a transparency measure and would facilitate better grant of patents involving lesser time and cost, particularly for developing countries.

129. The representative of Mauritius, speaking on behalf of the African Group, recalled that at the meeting of the Council for TRIPS on 21 March 2000, the Chairperson had set out, on the basis of the discussions, a list of issues: the link between the provisions of Article 27.3(b) and development; technical issues relating to patent protection under Article 27.3(b); technical issues relating to *sui generis* protection of plant varieties; ethical issues related to the patentability of life forms; the relationship to the conservation and sustainable use of genetic material; and the relationship with the concepts of traditional knowledge and farmers' rights. The African Group recognized that these issues were of fundamental importance and had proceeded with a detailed examination thereof. He emphasized that the proposals contained in document IP/C/W/206 were supplementary to those already made by the African Group during the preparation of the Seattle Ministerial Conference (document WT/GC/W/302). It was a considered view of the Group that some issues continued to be in an evolutionary stage and would need to be re-visited in due course. The proposals were made without prejudice to the positions of any of the members of the Group, who reserved the right to revert in due course to the special and differential treatment provisions of the TRIPS Agreement as well as those embodied in Articles 7 and 8 and to the need for an effective operationalization of these provisions so as to meaningfully address the socio-economic and technological developmental needs of the African countries and other developing countries. In particular, this would need to be done so as to contribute to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. There would also be a need to ensure that the necessary flexibility would be retained in favour of the members of the African Group and other developing countries.

130. The representative of the United States, while noting India's interest in a structured and organized systematic review of Article 27.3(b), recalled that a great deal of information had been gathered in 1999 on the way Members, mostly developed countries, had implemented that provision. Moreover, views had been expressed both orally and in writing on a wide variety of topics. Some of them were directly related to the implementation of Article 27.3(b), while a great number of them were, in his delegation's view, beyond the scope of the review under that provision. The information submitted in response to a questionnaire was reflected in synoptic tables prepared by the Secretariat, whilst the views expressed orally by Members were reflected in the minutes of the Council's four meetings in 1999. It was true that the information contained in these synoptic tables mostly described the laws and practices of developed countries, since responses to the questionnaire had mainly been received from developed countries. This situation could be remedied if developing countries which were obligated to fulfil the obligations of Article 27.3(b) would also provide information on their implementation of that provision. In this perspective, his delegation would urge delegations to complete the synoptic tables in view of a more organized discussion of the implementation of Article 27.3(b).

131. Continuing, he introduced document IP/C/W/209, which was a second paper from his delegation on Article 27.3(b) and aimed to respond to comments made at earlier meetings of the Council, including on issues that his delegation would view as falling beyond the scope of the actual review. For the benefit of the discussions in the Council, he wanted to provide his delegation's perspective on any issue that any delegation felt warranted bringing to the attention of the Council. The presentation which had just been made by India addressed a number of issues to which the United States had already responded in its previous paper. He expressed his delegation's regret that the presentation made by India did not contain a direct response or reaction to the perspectives his delegation had set out previously. Highlighting a few points of the new communication, he said that the term "micro-organism" was not in fact defined in the TRIPS Agreement nor in relevant multilateral treaties such as the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedures. This was because experts had recognized that any definition that would be agreed upon today would have to be updated later due to the rapid evolution of research in this field. The ordinary meaning of "micro-organism" was any organism that

was not visible to the naked eye, i.e. a microscopic organism. This definition should be sufficient to distinguish micro-organisms from plants and animals for the purposes of the discussions in the Council for TRIPS. The submission also reiterated the points made earlier, that a patent could not be granted for a micro-organism as it existed in nature because it would not meet the standards of patentability, i.e. it would not be new. Only if it were altered in a manner that constituted an inventive step and only if the resulting micro-organism were useful, a patent would need to be granted when applied for. The submission also outlined his delegation's view of the characteristics that a *sui generis* system of protection for plant varieties must have in order to be considered effective. The paper also discussed more "peripheral" issues that had been raised in the context of the discussions relating to Article 27.3(b), such as ethical questions, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) as well as the importance of examining benefit-sharing in relation to genetic resources and traditional knowledge. He expressed the hope that Members would consider carefully the points made and would welcome reactions.

132. The representative of Uruguay said that her country was a member state of UPOV as were a large number of other countries. Her delegation was convinced that the *sui generis* system for the protection of plant varieties under the UPOV Convention was capable of ensuring effective protection of plant varieties. She called the Council's attention to an important drafting discrepancy between the Spanish and English versions of the TRIPS Agreement regarding the *sui generis* protection for plant varieties addressed in the second sentence of Article 27.3(b). The Spanish text contained, unlike the English text, the word "all", reading "Sin embargo, los Miembros otorgarán a todas las variedades vegetales". It had been argued in certain Members that, since the TRIPS Agreement was negotiated in English, Article 27.3(b) did not oblige Members to give protection to "all" plant varieties meeting the conditions for protection. Uruguay was of the opinion that the English, French and Spanish texts of the Agreement were all equally authentic and, on the basis of this principle, her delegation's understanding was that protection must be granted to "all" plant varieties meeting the conditions for protection. A Member not doing so would not provide "effective" protection to plant varieties under Article 27.3(b).

133. The representative of Brazil said that the submissions from India, the United States and Mauritius, on behalf of the African Group, were adding new breath to the discussions in the Council for TRIPS on this matter. In Brazil's view, the variety of issues raised by Members in the context of the review of Article 27.3(b) had demonstrated the necessity of establishing a more structured discussion. For example, on the basis of the issues raised, as listed by the Chairperson at the meeting of the Council in March 2000, Brazil considered that the first item of that list ("The links between the provisions of Article 27.3(b) and development") related to cross-cutting issues that would be discussed in more detail under the further items. The generic nature of this item should serve to ensure that the progress in the review would take into account the needs of developing countries. Concerning the future discussions under this item, Brazil suggested that the results of UNCTAD's Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices (30 October-1 November 2000) would be circulated in the Council.

134. As regards technical issues relating to patent protection under Article 27.3(b), Brazil considered that WTO Members should preserve the existing flexibility to exclude plants and animals and parts thereof from patentability. Brazil was also open to discuss issues previously raised by other delegations. As noted by a developed country Member at the last meeting of the Council for TRIPS (document IP/C/M/27, paragraph 119), a definition of "micro-organisms", for instance, would be helpful to limit the scope of patentability under Article 27.3(b). Clarification that naturally occurring plant material, including genes, were not subject to any intellectual property protection would also be necessary.

135. An item of great importance to Brazil, the relationship to the conservation and sustainable use of genetic material, enshrined several issues concerning the relationship between the Convention on Biological Diversity and the TRIPS Agreement that demanded clarification by the Council for TRIPS. As stated on several previous occasions, Brazil considered that the TRIPS Agreement and the CBD were not in inherent conflict. It would, however, be necessary to ensure that implementation of both Agreements was done in a mutually supportive way. Failure to clarify such relationship might turn out to be detrimental to the implementation of both instruments. In order to explore a mutually beneficial relationship, one important step would be to debate ways of ensuring that patenting of genetic resources would not run counter to the principles of benefit-sharing and prior informed consent of the CBD. Several countries currently had to tackle the problem of unauthorized bio-prospecting and patenting of genetic resources over which they had sovereign rights. In its paper on the "Protection of Biodiversity and Traditional Knowledge", India, for instance, had reported its experience in this regard with reference to the cases concerning turmeric, karela, basmati and the neem tree. On the other hand, in a biodiversity-rich country like the United States, for instance, awareness against bio-piracy in the public opinion seemed to have increased after a coalition of environmental and scientific groups had filed a suit against the Yellowstone Park service to challenge a bio-prospecting agreement between the Park and a biotech company. The agreement aimed at researching thermophiles, which were micro-organisms capable of surviving extremely high temperatures in geysers. The lawsuit was based on environmental and intellectual property laws, on the grounds of inadequate benefit-sharing. Bio-piracy, therefore, should not be mostly perceived as a problem confined to developing countries nor to CBD Members exclusively. Some countries might argue that bio-piracy was a concept that lacked a formal definition. Although other organizations might be the adequate fora to provide a broad definition of that concept, it might be useful that the Council for TRIPS would also consider the establishment of a definition of bio-piracy, for the purposes of intellectual property, as well as the remedies against it. In order to implement the CBD, several countries were currently putting in place legislation that might contain intellectual property related provisions, in line with Article 16 of the CBD. For example, in Brazil a piece of legislation had entered into force in June 2000 to regulate the access to genetic resources, the protection of and access to the related traditional knowledge, benefit-sharing and access to and transfer of technology. Such legislation provided protection for traditional knowledge against its illegal or unauthorized use or exploitation. It also recognized the rights of indigenous and local communities to decide upon the use of their knowledge related to national genetic resources. Brazil fully agreed with India as regards the cost-effectiveness of establishing benefit-sharing schemes in the patent system, either nationally or internationally, compared to using resources in expensive judicial processes for the revocation of patents that included genetic resources illegally. Developing countries did not have the resources to follow each and every patent issued outside their territories on the use of their resources.

136. With regard to the relationship with the concepts of traditional knowledge and farmers' rights, he said that discussions in the context of the review of Article 27.3(b) had already demonstrated that traditional knowledge might bring significant benefits to several industrial sectors, in particular the pharmaceutical sector. India had provided a useful contribution regarding the issue of documentation of traditional knowledge. Brazil also understood that the paper of the United States, in the section on "Patents Related to Knowledge and Practices of Indigenous Peoples", was supportive of the issue of the creation of databases, taking on a proposal by Switzerland. Brazil considered that the rich experience of India, as laid down in its paper, could be a constructive contribution to provide a more concrete basis for discussion on the different possibilities to protect traditional knowledge. Brazil agreed with India that the establishment of databases would have the clear benefit of providing documentation for patent offices to check against patent applications that would be filed without the consent of the community concerned. It should go without saying that information that belonged to traditional and indigenous communities should never be disclosed in those databases without their prior informed consent, in accordance with the CBD. There was a need for further consideration, however, of the best ways to determine the final use of information contained in such databases, in order to avoid that they facilitated bio-piracy. In previous debates, some countries had mentioned that

the *status quo* already provided for different means of protecting such knowledge. For instance, companies could currently establish *inter partes* contracts with traditional or indigenous communities. Such contractual modalities of protection, however, were not easily enforceable and were subject to the direct negotiations between the parties involved. There was no way to ensure, that the prior consent obtained from these communities would actually be an *informed* one. There was no way to ensure either that the benefit-sharing between a company and a community would actually be *fair and equitable*. Brazil also fully endorsed the conclusion of the Indian paper (IP/C/W/198) on the need to go beyond the national level to provide adequate protection to traditional knowledge. However useful it might be to explore options within conventional intellectual property right regimes, such as the so-called "petty patents", they might not be sufficient to provide adequate protection to traditional knowledge. Thinking prospectively on the comments in paragraph 32 of the Indian paper (document IP/C/W/198), Brazil was open to envisage the possibility that, after the Council for TRIPS had concluded the review on Article 27.3(b), Members might realize that the best way to protect traditional knowledge under the intellectual property system might be to establish minimum standards of protection at the multilateral level. Some countries might argue that so far relatively few countries had already established legislation on the issue, which would make it difficult to establish an internationally recognized regime to secure benefits arising out of the use of traditional knowledge. It should be recalled, however, that the majority of countries that had negotiated the minimum standards for intellectual property rights in the TRIPS Agreement had not yet incorporated such minimum standards at their national levels. In other words, the absence of protection at the national level had not deterred, in the past, WTO Members from negotiating and establishing one of the most ambitious international treaties on intellectual property rights.

137. Brazil wished to reiterate the importance of establishing a list of issues as a means of facilitating the discussions and moving forward the review under Article 27.3(b). Such a list should not be exhaustive and should be without prejudice to the positions of individual Members on such issues. While recognizing that it might be useful for the review to take into account the information provided by Members on *sui generis* systems for the protection of plant varieties in response to the questionnaire (IP/C/W/122), it should be noted that several developing country Members were still covered by the transitional period of Article 65.4 of the TRIPS Agreement and might therefore be in the process of passing legislation in this area. Moreover, Brazil held the view that it would not make sense to consider the responses to the questionnaire as a necessary condition for the progress of the review exercise under Article 27.3(b). At this juncture, Brazil felt that a checklist of issues would allow for a more balanced and representative exchange of information concerning national experiences.

138. Finally, he suggested that the Secretariat circulate documents from other international intergovernmental organizations which were of relevance to the Council's work regarding the review of Article 27.3(b), in particular: Decision V/16 on *Article 8(j) and Related Provisions* and Decision V/26 on *Access to Genetic Resources*, both taken at the Fifth Conference of the Parties of the Convention on Biological Diversity (Nairobi, 15-26 May 2000); document WIPO/IPTK/RT/99/2 on the "*Protection of Traditional Knowledge: A Global Intellectual Property Issue*", prepared by the International Bureau of WIPO for the Roundtable on Intellectual Property and Traditional Knowledge (Geneva, 1-2 November 1999); document WIPO/IP/GR/00/2 on "*Intellectual Property and Genetic Resources - An Overview*", prepared by the International Bureau for the WIPO Meeting on Intellectual Property and Genetic Resources (Geneva, 17-18 April 2000). He also suggested that document WT/CTE/W/50 ("*The CBD and the TRIPS Agreement - Note by the Secretariat*") be circulated as a TRIPS Council document as well and that other future documents to be circulated in the Committee on Trade and Environment in relation to item 8 of the work programme of that Committee concerning "the Relevant Provisions of the TRIPS Agreement" be circulated jointly in the

Committee on Trade and Environment and the Council for TRIPS.⁶ The Council agreed to these and the earlier suggestions of Brazil (see paragraph 133 above).

139. The representative of Kenya said that the submission presented by Mauritius on behalf of the African Group was a further development of the proposal made by the same group on the same subject in the run up to the Seattle Ministerial Conference (document WT/GC/W/302). The list of issues set out by the Chairperson at the meeting of the Council for TRIPS of 21 March 2000 addressed various concerns arising from Article 27.3(b). One of the questions raised, when considering whether the TRIPS Agreement in its current state would promote the economic development of developing countries, was whether the conditions of patentability in this area had struck the correct balance between rights holders and society. Considering these conditions of patentability also concerned ethical issues. Whether a right balance had been reached would also depend on whether the provisions would promote or might undermine the conservation and sustainable use of biological diversity; as well as on whether essential domestic goals, such as ensuring food security and equity for local and farming communities, were properly reflected in the provisions. He suggested that the Council discuss the various aspects under clear headings that would facilitate the consideration of concrete proposals and not engage in a discussion on the question of which of the issues raised fell under Article 27.3(b), which might result in the consideration of the various aspects under a limited number of issues and confuse the discussion.

140. With regard to the link between Article 27.3(b) and development, he recalled that the General Council had agreed at its meeting on 7 and 8 February 2000 that mandated reviews should address the impact of the agreements concerned on the trade and development prospects of developing countries (paragraph 39 of document WT/GC/M/53). This decision or agreement could serve as a basis for the first issue listed by the Chairperson of the Council for TRIPS in March 2000. During the Uruguay Round negotiations, developing countries had been led to accept the TRIPS Agreement primarily on the grounds that the Agreement would promote inward foreign direct investment and the transfer of technology as well as innovation, and in this way would promote their economic development. Experience so far in the overwhelming majority of developing countries showed that strong intellectual property regimes, on the scale required by the TRIPS Agreement, did not by themselves lead to foreign direct investments, neither encouraged technology transfer nor local innovation. The Human Development Report 2000 (p. 84) showed that developed countries hold 97 per cent of intellectual property rights and that global corporations hold 90 per cent. Other studies also confirmed that a few top multinational enterprises held patent portfolios far in excess of the number held by the developing world as a whole. Besides, developed countries, and to some extent the WTO, held the view that the WTO was not a development agency and that provisions in the WTO Agreement for special and differential treatment for developing countries were not enforceable. This raised fundamental questions on whether the provisions of the TRIPS Agreement were consistent with its objectives and principles, and with the negotiated deal among the Members. According to Kenya, therefore, this review must be the occasion to redress this fundamental imbalance and to firmly take on board the development concerns of developing countries.

141. With regard to technical issues relating to patent protection under Article 27.3(b), Kenya held the view that patentability had at least two aspects: the conditions and the exceptions. The TRIPS Agreement left it to Members to define many of the conditions for patentability, such as what would amount to an invention and what would be novel. Kenya welcomed this, as it afforded Members with some flexibility. Nonetheless, some Members had defined novelty in a manner that did not recognize information available to the public through use or oral traditions outside their domestic jurisdictions. This had induced or led to the piracy of this information for patents within these jurisdictions. Also, some Members had defined inventions to include discovery or isolation of naturally occurring matter.

⁶ The documents specified were distributed following the meeting as IP/C/W/213, 217, 218 and 216, respectively.

This had led to patents on life forms and on research materials. Patents on life forms were unethical and patents on research materials restricted further research, thereby reducing welfare gains to humankind. These conditions must be revisited to deal with the wrongs they had facilitated. Article 27 set out the requirement of patentability for all technological inventions and proceeded to deal with exceptions in a very limited manner, that did not reflect the balance of rights and obligations reached in other WTO agreements such as the GATT (Articles XX and XXI) and the GATS (Articles XIV and XIVbis). In these other agreements, the exceptions took the form of general and security exceptions. The language used in these other agreements ("Nothing in this Agreement shall prevent any Member from taking measures to [...]") recognized and catered to important public policy concerns, such as the public interest and important domestic goals. Such exceptions were even more vital in the TRIPS Agreement, for it dealt essentially with private rights, unlike the other agreements; and, traditionally, intellectual property laws had contained provisions for striking a balance between rights holders and society. The TRIPS Agreement, however, circumscribed any limited exceptions it attempted so exceedingly as to prevent the taking of measures of important public policy. Kenya therefore proposed that the exceptions in Article 27 be amended along the model of the general and security exceptions in the other WTO agreements, using similar language, in order to redress the imbalance between the private rights protected, on the one hand, and important public policy and development goals, on the other. The current language used undermined the existing exceptions in Article 27.2 and 27.3. Further, the distinction made in respect of micro-organisms and in respect of non-biological and micro-biological processes for the production of plants or animals should be done away with, as unwarranted.

142. With regard to technical issues related to the *sui generis* protection of plant varieties, Kenya held the view that the obligation on Members under Article 27.3(b), in respect of plant varieties, was to protect plant varieties. Unlike other provisions on the protection of intellectual property rights, such as those setting out the rights to be protected and their duration, the requirement to protect plant varieties left it to Members to determine the suitable way to do so, i.e. according to an effective *sui generis* system. What was "effective" was left to Members to determine. Indeed, the meaning of "*sui generis*" (i.e. "of its own kind") was inconsistent with a prescription of rights and duration or even models to be imposed on all WTO Members. It was up to individual Members to come up with what *sui generis* systems they would consider effective for purposes of protecting plant varieties and they would do so on the basis of important domestic goals related to plant varieties. Plant varieties provided food and medicine for local and farming communities and they were a tested means of conserving, and sustainably using, biological diversity. In protecting plant varieties, governments would seek to adopt laws and measures that would promote the food security of these communities and of the country at large; that would ensure equity to these communities where the staple or medicinal knowledge in the plants was used as a basis for intellectual property rights to be protected, for example, by patents abroad; and that would ensure biodiversity. Such laws and measures would provide for and protect farmers' rights, as recognized in Annex II of the FAO International Undertaking on Plant Genetic Resources. These rights included the right to save, share, sell and re-use propagating material such as seeds. The laws and measures would also protect the breeders' exemption, to freely innovate around protected varieties. The laws and measures might ensure biodiversity in accordance with the Convention on Biological Diversity. Consequently, the obligation to protect plant varieties entailed more than protecting the rights of commercial breeders. Intellectual property rights in the TRIPS Agreement already included geographical indications, that were more or less regional rights rather than the traditionally individual rights. He said that the Organization of African Unity had adopted a model law ("the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources") for its member states, which duly took all these various aspects into account, and indicated that the African Group members would be guided by this model law, which had been developed bearing in mind their public policy and development concerns as well as their international obligations.

143. With regard to ethical issues relating to the patentability of life forms, he expressed his delegation's strong support for the position of the African Group that the patenting of life forms was unethical and should be unconditionally prohibited. Article 27.2 provided for a "morality" exception to patent protection. However, the exception was available only if the prevention within their territory of the commercial exploitation of the invention was necessary to protect *ordre public* or morality and provided that such exclusion was not made merely because the exploitation was prohibited by the Member's law. Both these conditions were unnecessary and cumbersome. The protection of *ordre public* and morality extended to activities outside commercial exploitation. Laws served these purposes and, if they prohibited certain patents, that should suffice for the grounds. Ethical or moral matters were not always matters for commercial calculation and their force, or the conviction of people, would not be affected by reasoned commercial concerns. The Universal Declaration of Human Rights, in recognizing that the conscience of people was a legitimate concern to be protected, did so without qualifications of the kind imposed in Article 27.2. The qualifications included in Article 27.2 amounted to redefining morality for Members. Cultural or social values of societies the world over could not countenance the appropriation or marketing of life in any form or at any stage. The preponderance of such inherent values in particular countries were matters for the democratic or domestic law-making processes to determine and not for the WTO, whose trade mandate was narrow and insufficient to make it arbiter over these matters. The compulsion to include micro-organisms as well as non-biological and microbiological processes for the production of plants or animals was therefore overly inappropriate. There could be no doubt that patents over life forms would lead to horrendous abuses associated with cloning, whether privately or commercially, and with the taking of resources away from public health needs, especially the development and adequate production of essential drugs. Without departing from statements already made, it might be emphasized that any development and production of cures for human ailments, that arose from research related to life forms, did not necessarily require patents or any form of intellectual property protection, as existing mechanisms under the auspices of the WHO and the FAO showed.

144. With regard to the relationship to the conservation and sustainable use of genetic material, he said that the conservation and sustainable use of biological diversity carried considerable moral and legal force at the entire global level, as humankind was acutely aware of the imperative to care for the environment, not only in self-interest but also for its intrinsic value. The first recital to the WTO Agreement recognized the need for sustainable resource use. The Committee on Trade and Environment was mandated to develop the means of fully containing trade within environmental considerations. WTO jurisprudence developed under the dispute settlement mechanism systematically interpreted WTO agreements consistently with environmental considerations and envisaged contributions from and participation by civil society. However, within the individual agreements, certain provisions touching on the environment might not explicitly address the concerns. One example was Article 27.3(b), which required protection of plant varieties without recognizing the CBD, i.e. the principal international instrument, at least for its 177 member states, on the conservation and sustainable use of biological diversity. As indicated in the submission of the African Group, Africa was rich in biological diversity, which was a resource Africa and other developing countries would like to develop to their advantage and to the advantage of the entire humankind. The CBD duly recognize and protected this interest. Among other things, the CBD required prior informed consent, benefit-sharing, authorization from the host government and technology transfer. The obligations in Article 27.3(b) of the TRIPS Agreement did not recognize and protect these requirements. Article 27.3(b) therefore was a means of defeating the CBD, if a Member were to merely protect the rights of commercial breeders as the way of implementing the requirement to protect plant varieties by patents, a *sui generis* system or a combination thereof. Indeed, some Members had intimated they would do precisely this, using the 1991 Act of UPOV. It was vital that Article 27 of the TRIPS Agreement incorporate the requirements under the CBD, if not on the basis of the first recital to the WTO Agreement concerning sustainable resource use as well as of WTO decisions and jurisprudence, then on the basis of the objectives and authority of the CBD.

145. With regard to the relationship with the concepts of traditional knowledge and farmers' rights, he said that the recognition and protection of farmers' rights, especially to save, share, sell and re-use propagating material such as seeds, was affected by the manner in which plant varieties were protected. For instance, under the 1991 Act of UPOV, any exception to allow the exercise of farmers' rights was subject to "reasonable restrictions" and the "legitimate interests" of the breeder. The exception did not extend to the sharing of propagating material. It only applied to saved material harvested on the same holdings. In Kenya's view, the so-called "terminator technology" and persistent poverty in developing countries rendered this exception meaningless for all practical purposes. The dire consequences would be in terms of food insecurity and intolerable dependence of the country on probably unreliable foreign commercial breeders for seeds. Besides, the ravages of bio-patenting abroad were that it became illegal to save and use certain seeds for staple foods long known and used by farming communities; and that traditional varieties might be killed off by genetically modified varieties, causing a depletion of biodiversity apart from the implications of food insecurity. The identification and conservation of staple or medicinal plants were traditional knowledge. Long usage and knowledge, however, did not qualify the plants as varieties for the purposes of UPOV. The CBD, on the other hand, recognized this knowledge and went further to require benefit-sharing and authorization as conditions for access to genetic material (including these plants and the associated knowledge) of other countries. He said that the OAU Model Law recognized and protected farmers' rights and traditional knowledge. If a model was needed for purposes of *sui generis* systems under Article 27.3(b) of the TRIPS Agreement, members of the African Group would have this model law. It would be the source for their domestic laws on protecting plant varieties by effective *sui generis* systems.

146. Against this background, Kenya proposed that Article 27.3(b) of the TRIPS Agreement be amended to duly take into account the concerns raised in the submission of the African Group, including the proposals made in August 1999 (document WT/GC/W/302). First, there should be an amendment with the effect of prohibiting or excluding the patentability of all biological and living organisms, including plants, animals, micro-organisms and parts thereof such as cells, cell lines, genes and genomes, as well as of any processes making use of, or relating to, such biological and living organisms. This prohibition or exclusion would be justifiable on legal, scientific, developmental, moral and ethical grounds. Second, such a prohibition or exclusion would also do away with the artificial distinction that currently existed in Article 27.3(b) between plants and animals, on the one hand, and micro-organisms, on the other hand; as well as the artificial distinction between essentially biological processes for the production of plants and animals, on the one hand, and microbiological and non-biological processes, on the other. Third, the exclusion of plants from patentability would mean that there would be no patents on plant varieties. Therefore, the amendment might only require *sui generis* systems for the protection of plant varieties. In this regard, it must also be clarified that such *sui generis* systems could, and indeed should, include the effective protection and promotion of the rights of farmers, indigenous and local communities over their genetic resources and their knowledge relating to the use of such resources. This would also be consistent with the CBD and the FAO International Undertaking on Plant Genetic Resources.

147. The representative of Zambia expressed his delegation's support for the statement made by the delegation of Mauritius on behalf of the African Group. Commenting on the items relating to the *sui generis* protection of plant varieties, indigenous knowledge and farmers' rights, and referring to the information provided by his delegation and circulated in document IP/C/W/125/Add.3, he said that Article 27.3(b) was a provision which would make developing countries lose control over their own biodiversity and the benefits they derived therefrom. His delegation held the view that developing countries were rich in biodiversity and giving monopolies over these resources would curtail the enjoyment of these resources by communities. Opting to extend the patent laws to plant varieties would be setting up a system of private rights over individuals to prevent others from making, using or selling the protected variety or any product that might have patented genetic information. Consequently, farmers would not be able to freely access or re-use seed, nor would they

be able to save and/or exchange seed. Patenting of plant varieties would not provide for benefit-sharing, as a patent was regarded as a private right to the exclusion of anybody else than the right owner. Major companies would have monopolies and secure ownership of plant varieties which contained genetic information obtained from the farmer's own field in the developing countries, which would then be sold back to them with a royalty charged in addition. A *sui generis* system under Article 27.3(b) would provide for the protection of plant varieties, but the expression "*sui generis*" had not been defined sufficiently. It was difficult to determine what effective an *sui generis* system for plant varieties would entail. Some might suggest that it should be along the lines of the UPOV system. This should not be so. In Zambia's view, legislation on the protection of plant varieties should be developed which would accord recognition to innovations of indigenous peoples and local communities. Such a statute should define innovation to include any inventive input done collectively, accretionally, intergenerationally and over time in relation to genetic resources. Such a system would effectively protect ownership rights of farmers and indigenous peoples over their plant varieties and seeds. Consequently, in the review of Article 27.3(b), a provision should be considered for a clear understanding within the provisions of Articles 27.3(b) on the conservation and sustainable use of biological materials as well as for a clear understanding of the coverage of a *sui generis* system. As most least developed countries depended much on farming, there was a need to recognize the contribution of farming and indigenous communities to genetic resource conservation and enhancement. The plant variety protection route should not deprive farmers of their own rights and, therefore, whatever *sui generis* system was adopted, it should include provisions to either protect the farmer's privilege or provide wider space in the plant variety protection law for farmers as breeders and/or conservers.

148. The representative of Peru, offering preliminary comments on the submissions from India and from Mauritius on behalf of the African Group, said that her delegation in general agreed with the points described in these documents. Peru held the view that, in reviewing Article 27.3(b), it would be necessary to take into consideration the relationship with development as well as the impact of the provision on food security, health and the conservation of biodiversity, in particular in developing countries. On the one hand, large parts of the population in Peru and of other developing countries were dependent on traditional culture and medicines, which were generally not protectable by existing intellectual property regimes, and, on the other hand, a limitation of the access to seeds or high costs thereof would have devastating effects on the capacity of developing countries to produce basic food. Therefore, in protecting plant varieties, account should be taken not only of the breeder's rights but also of farmers' rights. For medicinal plants, which were being used by large sectors of the poor in developing countries, it would be necessary to ensure that they were adequately protected against illicit appropriation or commercial exploitation without authorization. Her delegation held the view that it would be indispensable to recognize the value of traditional knowledge of indigenous and local communities in the conservation and sustainable development of biodiversity, as well as the contribution of such knowledge to scientific and technological developments. This would also require ensuring a fair and equitable sharing of the benefits derived therefrom. As regards the submission from the United States, while she disagreed with many of the ideas expressed, she appreciated that the document also addressed, as issues raised in the context of the review of Article 27.3(b), questions relating to traditional knowledge and practices of local communities, access to genetic resources and benefit-sharing.

149. The representative of Egypt, recalling that his country was one of the co-sponsors of the submission presented by Mauritius, commended the Indian delegation and agreed largely with the analysis and conclusions advanced, which were complementary to the African Group's paper. His delegation would give careful attention to the communication from the United States, to which he would comment at the next meeting of the Council.

150. The representative of Australia expressed his delegation's appreciation for the many substantive contributions made, singling out the interventions made by the delegations of India and Brazil which his delegation found very thoughtful and thought-provoking and said that his delegation shared with many delegations the fundamental interests that had been described. Australia had concerns about the protection of traditional knowledge; it had a rich indigenous cultural heritage, which it would like to see appropriately preserved and protected. Similarly, because of its rich biodiversity, it had an interest in appropriate benefit-sharing of the use of genetic resources. Equally, at a policy-making level, there were, in Australia, concerns about the appropriate balance of interests in the protection of intellectual property in the field of biotechnology. These concerns were that biotechnology research should serve the broader interests of the community and how the intellectual property system could be more effectively used in a balanced way to achieve such objectives. Australia was also deeply attuned to the concerns of developing countries in this area. It was a priority in its technical cooperation activities to provide the necessary tools to build up the sort of capacity mentioned by India to make more effective use of the system in the area of biotechnology. Australia therefore welcomed the prospect of a wide-ranging discussion on the issues that had been advanced, mirroring the considerable debate and policy analysis that was being conducted on each of these issues in Australia and many other countries. It was Australia's belief that the Council for TRIPS had a valuable role to play in shedding light on these issues and in looking for practical and equitable responses to the concerns raised. The six clusters of issues identified by the Chairman in March 2000 were all highly topical and of keen interest to Australia and many other Members.

151. Australia supported the development of a comprehensive, inclusive debate about the interaction between the TRIPS Agreement and the vital topics raised. Rather than leave these issues, which touched on the TRIPS Agreement, to other international fora and international commentators to consider, Australia would suggest that the Council for TRIPS take a more active role in considering these interactions. However, to make this process more productive and inclusive, the Council might need to come to a clearer idea of how the review under Article 27.3(b) would interact with the broader review under Article 71.1. For the convenience of delegations and to save time, he would respond to the broader issues that had been raised under the present agenda item, even though his delegation held the view that the range and importance of these issues were too extensive to be productively managed under this agenda item alone; some more productive division of labour would need to be considered between the review of Article 27.3(b) and the broader review under Article 71.1. One possible approach would be to distinguish between the "technical" issues of Article 27.3(b), including the subject-matter already covered by the questionnaire (IP/C/W/122), and the broader issues that had been raised.

152. Continuing, he said that Article 27.3(b) concerned an optional exception to the scope of patentable subject-matter, an option exercised to various extents by Members, and an optional requirement, very generally expressed, for an effective *sui generis* form of plant variety protection. The issues and concerns raised under the present agenda item clearly went far beyond that limited scope and related to a wide range of TRIPS provisions, including those not relating to patents. For example, the debate about the interaction between biotechnology, genetic resources and intellectual property rights concerned the definition of an invention, including the distinction between an invention and a mere discovery and the application of the criteria of novelty, non-obviousness and industrial applicability in the biotechnology sector. In this connection, the degree of inventiveness called for in the extraction of genetic information was, for example, a matter that aroused concerns about misappropriation of material in the public domain; about the nature of the novelty criterion in the field of biotechnology; about the tendency to seek patents that were too broad in scope; and about the application of Article 27.1. The concerns expressed about ethical exceptions to patent protection or exceptions relating to environment and health raised questions related to the interpretation and application of Article 27.2. Other concerns expressed involved the rights conferred upon patent owners as stipulated in Article 28, in particular in the light of claims of ownership of genetic material; the obligation for adequate disclosure of inventions as required under Article 29;

and the exceptions to patent protection foreseen under Article 30, in particular those research, education or prior use. These were all important aspects to be taken into account in balancing the interests in the area of biotechnology. Beyond the patent system, there were calls for a specific protection of traditional knowledge which, in Australia's experience, involved a wide range of elements of the TRIPS Agreement, such as the application of copyright and related rights, or the use of trademarks and certification marks, for example in relation to geographical indications. There were also calls going beyond what was currently contained in the TRIPS Agreement, such as those for the creation of an entirely new form of intellectual property right, to be enshrined in international law.

153. In connection with the application of Article 27.3(b), he emphasized the importance of Article 67. For Australia, this was a priority area in its technical cooperation programmes in the Asia-Pacific region. A modular training package relating to intellectual property in the field of biotechnology would shortly be made available to Australia's partners in the Asia-Pacific region; other Members would be most welcome to make use of it, if it were of interest to them. With regard to the concerns that patents might be used to withhold access to important technologies, he referred to the possibility to adopt measures as addressed in Article 40 or under Article 31 of the TRIPS Agreement. Commenting on the concern raised about the time and costs involved in opposing a patent application, he referred to the obligation under Article 62.4, which laid down obligations in respect of these matters in administrative procedures, such as opposition procedures. Calls had also been made that the protection of intellectual property should serve the purposes set out in of Article 7 and that there was, within the TRIPS framework, scope for measures to protect public health and nutrition, in particular in Article 8.

154. On the linkage between the TRIPS Agreement and the CBD with regard to the issue of benefit-sharing, he recalled that his delegation had submitted a paper on Article 71.1, in which it was suggesting that the Council for TRIPS might take a more active role in exploring a best practice model for implementation that took into account these concerns. National experiences might shed some light on these broader issues. He referred to a recent report, drawn up under the authority of the Australian Ministry of Environment, on a regime on access to biological resources. It made recommendations related to Article 71. As a key element, the report envisaged a plan that would regulate access to genetic material, plants and animals and would deliver substantial benefits to industry, to the environment and above all, to indigenous communities. In announcing the results of an enquiry, the Minister of Environment had made a special note concerning the important role played by indigenous communities. As regards the issue of biological resources, he noted that, if knowledge of biological resources was used by others for commercial benefit, then any future access regime would need to ensure that the benefits arising from the use of indigenous knowledge be shared with the relevant indigenous communities. The proposed scheme would set out an elaborate system concerning the way this might operate. Concerns about primary producer access to gene technology and appropriate use of biotechnology had been the subject of another Parliamentary report, which also contained detailed recommendations on how the various interests and concerns of the users and producers of technology could be balanced. This might help to shed light on how the implementation of the TRIPS Agreement could be carried out. Another point of possible interest to the Council for TRIPS was the active role taken by Australia in relation to the WIPO program on traditional knowledge: Australia was one of the three countries chosen as a subject of case studies, because of the number of its existing programs and activities as well as recent legal developments that could help to shed light on how traditional knowledge might be protected. The case study concerning Australia covered a wide range of issues, in particular the extension of copyright and related rights to traditional knowledge; the use of the tort of passing off in that area; forms of licensing; and recent developments of copyright law which allowed for punitive damages to apply in case of offensive misuse or culturally insensitive misuse of indigenous knowledge. Australia was not only taking into account economic factors but also potential cultural offences. Other elements of the case-study included the use of design law or the use of the trademark system. In this connection, he referred to the national label of indigenous authenticity registered as a certification mark by the national

indigenous artist association of Australia for indigenous arts and other products. Australia wished to stress the urgency for Members to explore how these issues could be more effectively addressed at the national level and was of the view that it would be appropriate for the Council for TRIPS to do so as well but, given their wide-ranging nature, under Article 71.1.

155. The representative of Pakistan said that, as far as methodology was concerned, the need for a more structured debate was becoming more and more evident. Many delegations had flagged a wide range of issues and there also seemed to be differences of opinion as to whether all these issues fell within the ambit of Article 27.3(b). The idea to continue the discussion under broad headings as suggested by the Chairperson in March 2000 would seem to be a sensible approach. Since some issues would not yet seem to be ripe for discussion in the Council for TRIPS, a certain prioritization might be considered. His delegation would urge the Chairperson to hold informal consultations with Members who had objections to a more structured discussion in order to see how a more productive exchange of views could be achieved.

156. Flagging some issues of concern to his delegation, he said that it had been signalled in a number of publications that patents which were granted in a very broad manner could have effects on both the ability of countries and private parties to conduct research and also on the question of how firms could enter into certain industries, especially the biotech industry. With regard to research itself, it had been pointed out by the United States National Institute of Health that broad basic patents on fundamental processes might deter and complicate follow-on research. For example, research tools such as expressed sequence tags (ESTs) were patented in such a broad manner that research was inhibited. It also made a difference as to whether a patent covered sub-cellular, cellular variety or species levels of a plant or animal; if it covered the entire scope, it might prevent innovation or commercialization in related areas. Even though some collective action might have been taken in these cases, the issue as such remained. There was also a question of horizontal reach, for example if patents allowed control over a number of varieties or species, or the insertion of genes into plants. Then there was the question of vertical reach, i.e. when patents had too great a coverage across generations extending backwards and forwards to generations straight from the original plant. Finally, patents might overlap and there might be a combination of a number of related processes and products into a single patent, creating an integrated web of rights which might prevent others from commercializing the results of innovation in related areas. If a patent was granted in such a broad manner that it would cover the function of a plant or its structure or both (e.g. in the case of a United States patent for high tryptophan corn), all plant breeders, regardless of whether these plants were bred by traditional or patented processes, might potentially be challenged by the patent right holder. This problem was not limited to the United States nor to biotech industries alone. Pakistan would suggest that the Council for TRIPS might address these issues.

157. With regard to patents wrongfully granted and challenged at great cost, as in the neem and turmeric cases referred to by India, he said that the paper from the United States was arguing that the patents in these two cases had been revoked, showing that the system was working correctly. However, another possible argument was that the patent system was inordinately expensive, in particular for developing countries, if one had to monitor what was going on but did not have the ability or resources to challenge individual patents. There was an obvious need for a systemic solution to this problem.

158. As regards the question of prior informed consent, his delegation was of the opinion that it was too simplistic an approach to say that prior informed consent would lead to huge expenses and that therefore the possibility of concluding contracts between individual prospectors and users of biodiversity should be explored instead. Such an approach presumed that the two parties negotiating the contract would be equal and would be able to defend their rights in a more or less equal manner. Experience showed that this presumption was unrealistic and that, therefore, an additional safeguard was required. Even though a requirement of prior informed consent might not be the ideal solution,

this would in any case provide an additional safeguard in that it allowed patent offices to see that, whether or not a contract concluded, the patent applicant had obtained a prior informed consent from the country of origin or the community concerned.

159. Turning to the concept of a "communities register", he said that Pakistan was also considering this avenue. However, such a register did not give a right to the communities or the country which had created the register to the knowledge recorded in it. Any third party could make use of the knowledge contained in it and the question arose as to how such use could be prevented. Should legal safeguards be created preventing exploitation of knowledge contained in the register? This raised issues comparable to those concerning intellectual property rights on databases. His delegation had mixed feelings on this matter and would appreciate input from Members who had more experience on it.

160. The representative of the European Communities said that his delegation would react to the written contributions and statements at the next meeting. The European Communities and their member States were examining all the issues raised by Members and did so with an open mind. He informed the Council that one of the EC member States had recently organized a successful seminar where the clarification of the issues linked to Article 27.3(b) had been addressed.

161. The representative of India said that his delegation would look carefully at the new submission from the United States and would react to it at the next meeting. India supported the submission from the African Group as well as the points made by Brazil. He also welcomed the intervention from Australia. In reply to the comments made by the delegation of Pakistan on "communities registers", he said that the idea of having such registers was basically to put the information into the public domain. This idea had been generated by India's experience in the turmeric case, where the US Patent Office had asked for written evidence from the Indian research organization opposing the patent. As the knowledge of the wound-healing properties of turmeric was mainly based on oral evidence, it was only thanks to searches leading to an ancient scripture reporting these properties that the Indian party had won the case. The purpose of putting this kind of knowledge into the public domain was to prevent, at least, what India considered misappropriation and bio-piracy through patents. However, his delegation would reflect on the question raised by the delegation of Pakistan on the legal effects of such registers.

162. The representative of Japan said that his delegation needed more time to study the papers submitted. His delegation was interested to learn more about the concerns and interests of other Members and, in that regard, considered it important that all Members respond to the Secretariat's questionnaire relating to Article 27.3(b) (IP/C/W/122). The Council for TRIPS needed such inputs in order to get a clear worldwide picture regarding the implementation of this provision. In order to allow questions raised, such as those with regard to the definition of "micro-organisms", the criteria for "inventive step" or "novelty" of inventions concerning micro-organisms, or the meaning of the term "effective *sui generis* system", a correct understanding was required of how Members had implemented Article 27.3(b) nationally. In Japan's view, some questions raised seemed irrelevant to Article 27.3(b), but their relevance might become clear through a process of information exchange. Japan would be prepared to contribute with a paper addressing the questions raised if it could define what those questions were. He said that his delegation considered it useful for the Council to closely follow relevant developments in other international fora, such as the WIPO, in order to avoid duplication of efforts and to facilitate the Council's discussions.

163. The representative of the United States said that his delegation had noted that, unfortunately, its previous paper and perhaps also its new submission had not been entirely persuasive to a large number of delegations. Turning to the submission from Mauritius on behalf of the African Group, he noted that the paper began with a reference to the set of issues that the Chairperson had identified as being representative of the subjects that had been discussed in the context of the review under

Article 27.3(b). Although his delegation had always appreciated the Chairperson's efforts during informal consultations to try to bring all Members together, he wished to recall that the United States was not able to support this list of issues as comprising an appropriate scope for the review under Article 27.3(b).

164. The representative of Korea reiterated his delegation's position that, in order to have a more effective review, it was important at this stage to exchange experience as well as information on implementation and to enhance understanding among Members on systems for the protection of plant varieties and their operation. His delegation's view was that Article 27.3(b) focused on implementation aspects. In that connection, Members who had not yet submitted responses to the Secretariat's questionnaire (IP/C/W/122) were called upon to do so as soon as possible. This would contribute to a more constructive discussion of the various issues involved. With regard to the relationship between the TRIPS Agreement and the CBD, his delegation remained of the view that both international instruments were complementary and mutually supportive. However, some of the issues raised in this connection went beyond the mandate of Article 27.3(b). Since these issues were being studied and discussed in the WIPO, he suggested that the Council for TRIPS might first await the results of this work.

165. The representative of Venezuela said that the review of Article 27.3(b) provided an opportunity for a substantive discussion of a number of issues of great interest to all Members and reiterated her country's interest in having a structured and comprehensive discussion. The usefulness of the list drawn up by the Chairperson in March 2000 and the informal consultations held on the matter had been proven by the documents that Members now had before them. The papers from the African Group and from India reflected many of the points of concern to Venezuela. In her delegation's view, the CBD and the TRIPS Agreement were not incompatible. On the contrary, both instruments were mutually supportive in achieving common goals. However, their relationship might benefit from a confirmation concerning the Members' right to require prior informed consent and benefit-sharing for the use of genetic resources.

166. The representative of South Africa supported the submission from Mauritius on behalf of the African Group.

167. The representative of India, commenting on the suggestion made by some delegations that certain issues should be dealt with in the WIPO, said that his delegation, on the contrary, held the view that it would be inappropriate to have issues and problems arising out of the TRIPS Agreement dealt with by the WIPO. He agreed with Australia that the Council for TRIPS should play an active role in this regard. More generally, his delegation did not accept arguments to the effect that, for example, development issues always be referred to UNCTAD, financial issues to the IMF or to the World Bank, and intellectual property issues related to traditional knowledge to the WIPO. In respect of issues arising out of the TRIPS Agreement, including issues arising out of Article 27.3(b), the Council for TRIPS had an obligation to, at least, study them. He wondered which of the issues raised were considered by the delegation of Korea to go beyond the mandate of Article 27.3(b).

168. The representative of Brazil, agreeing with India, said that his delegation recognized the supportive role of the WIPO in the discussions on these issues but, at the same time, held the view that there were systemic issues related to the review under Article 27.3(b) that could only be tackled in the Council for TRIPS.

169. The representative of the Dominican Republic supported the statements made by India and Brazil and expressed his delegation's support for the document submitted by Mauritius on behalf of the African Group and for the Indian paper as well as the intervention made by Pakistan.

170. The representative of the FAO informed the Council that the Contact Group of the Commission of Genetic Resources for Food and Agriculture had held, from 26 to 31 August 2000, a meeting in Teheran, the purpose of which had been to continue the negotiations relating to the revision of the International Undertaking on Plant Genetic Resources. The meeting represented an important step forward because the Group had reached an interpretation on certain essential but controversial aspects. As regards the conditions of access to genetic resources, there would not be an obligation to track individual accessions and the multilateral system would only include the genetic resources for food and agriculture included in the list annexed to the Undertaking, i.e. it would not include chemical, pharmaceutical and/or other non-food/feed industrial uses. Benefit-sharing would be achieved through the sharing of economic benefits arising from commercialization, the exchange of information, access to and transfer of technology and capacity-building. With regard to the sharing of economic benefits arising from commercialization, it was agreed to establish a mechanism through which royalties would be collected on patented products whose subsequent use for research purposes would be restricted. In cases of other forms of protection allowing subsequent use for research, contributions would be on a voluntary basis and depend on each State. However, other issues remained unsolved such as those concerning the list of species covered by the multilateral system; the possibility of applying for intellectual property rights on components of the material covered by the multilateral system; the possibility for requesting access to plant genetic resources for food and agriculture for purposes of conservation only; the conditions for accession by states that were not party to the International Undertaking and for institutions that were not associated to the agreement; and the financing system. She finally informed the Council that an extraordinary session was planned in order to conclude the negotiations before November 2000, i.e. before the 119th session of the FAO Council, and to present to that Council the final version of the compromise text.

171. The representative of the UPOV recalled the reasons for protecting breeders' rights. By the year 2020, the world's population would increase to more than seven billion people. This meant that food production had to be increased by 40 per cent just in order to maintain the present, and in many cases, insufficient status of nutrition. As land resources were scarce and other resources as well, this had to be done mainly by better varieties, i.e. higher yielding varieties, varieties which would have a better resistance against pests and diseases and varieties with a better quality. In order to achieve this goal, it was necessary to give an incentive to plant breeding. The breeder needed the possibility to recover his investment of, sometimes, ten or twenty years of breeding. The UPOV Convention provided a flexible system. It only dealt with the protection of plant varieties. However, member states were of course, and had always been, free to develop additional systems to protect indigenous or traditional knowledge. The UPOV Convention gave a clear definition of what was a variety, i.e. the protected subject-matter – as well as of the minimum scope of the breeder's rights. It contained a set of international standardized criteria for protection. In order to be protected, a variety had to be novel, clearly distinguishable from other varieties being a matter of common knowledge, uniform to a certain degree, and stable when reproduced. This was the set of criteria for protection. The UPOV Convention contained provisions for farmers' privileges to take into account traditional procedures of farmers of saving seed and using it for subsequent sowing, provided that the legitimate interests of the breeders were respected. The UPOV's member states had developed various solutions to this problem. With regard to traditional knowledge, he said that, because a new variety for which protection was sought had to be checked against all varieties of common knowledge, including landraces, the UPOV Convention did not allow the wrongful protection of landraces. It had been said that variety protection would reduce biodiversity. The contrary was the case. The protected varieties under the UPOV system were available for further breeding without the authorization of the right holder. At present, 45,000 protected varieties under the UPOV system represented a broad source of genetic variation. They were made known to the public and they could be used for further breeding. The growing membership of UPOV showed that an increasing number of states were convinced of the advantages of the system. Out of the current 46 member states, almost 20 had adhered to the 1991 Act of the Convention. Some of the members whose representatives had spoken under this agenda item were in the process of joining the UPOV. The Conference of African Trade Ministers

which had met in Cairo three days before the present meeting had urged the continued cooperation and technical assistance of the UPOV. This showed that there was, in fact, growing interest in the UPOV system which, as far as he knew, was the only *sui generis* system for the protection of plant varieties which currently existed.

172. The representative of India did not agree that the UPOV system was the only *sui generis* system that existed in this area.

173. The Chairperson said that, with regard to the question of how to find a way of handling the Council's further work, he detected on the whole a broad readiness to discuss further the range of issues that had been raised, but that there were concerns about the extent to which Article 27.3(b) was the correct reference point. He therefore asked delegations to reflect on whether it would be possible for the Council to find a practical way of providing a more organized way of continuing the discussions, while avoiding prejudicing the positions of delegations with regard to whether Article 27.3(b) was the right context. He intended to consult further on this matter. He also called upon Members who had not yet done so to submit responses to the questionnaire contained in document IP/C/W/122.

174. The Council took note of the statements made and agreed to revert to this matter at its next meeting.

L. REVIEW OF THE IMPLEMENTATION OF THE AGREEMENT UNDER ARTICLE 71.1

175. The Chairperson recalled that Article 71.1 required the Council for TRIPS to review the implementation of the Agreement after the end of the five-year transition period provided for in Article 65.2. The Council had had a number of discussions of how it should approach this general review of the implementation of the Agreement. At the Council's previous meeting, the discussion had focused on a non-paper circulated by the delegation of Australia setting out that delegation's thoughts in some detail on this matter. Since then, formal contributions had been received from Australia and India.⁷

176. Introducing his delegation's paper, the representative of Australia said that his delegation had endeavoured to take into account comments made by other delegations at the previous meeting. The key areas that had been revised when comparing the text with the earlier non-paper were, first, the need to take into account the trade and development impact on developing countries during the course of this review. Regarding the substantive areas that the review could cover, the paper suggested ways of implementing the Agreement that optimized Members' interests, especially in the areas of biotechnology, traditional knowledge and genetic resources and of making implementation of the Agreement more consonant with the objectives of the Convention on Biological Diversity. His delegation would provide further information regarding its own implementation of the Agreement to illustrate how this process could work and draw attention to the options available to advance social and economic interests under the Agreement.

177. The representative of India said that the detailed paper presented by Australia had overtaken his delegation's comments on the earlier non-paper from Australia. His delegation's understanding of Article 71.1, which was evolving, was that the review should cover the residual issues. Turning to the introduction of his delegation's own paper, he said that, since national implementing legislation was already being reviewed under a different agenda item, his delegation presented its paper under the present agenda item. The paper was entitled "Clarifying TRIPS: A Confidence Building Measure". The first paragraph discussed the scene since the Seattle Ministerial Conference, and how the long-term health of the multilateral trading system would depend on the extent of flexibility retained

⁷ Subsequently distributed as documents IP/C/W/210 and 214, respectively.

by all Members, not just developing country Members, in meeting their WTO obligations. The second paragraph made the point that introspection in the WTO was required to determine the extent of sovereign flexibility necessary to retain a balance between the right of peoples and Member countries to achieve their needs and aspirations and the obligation of Member governments to provide a predictable multilateral trading system. The paper referred to Article XVI:4 of the WTO Agreement which obliged each Member to ensure the conformity of its laws, regulations and administrative procedures with its obligations and, in this case, as provided in the TRIPS Agreement. For a determination as to whether such conformity was being ensured, recourse was available to the Council for TRIPS or to the Dispute Settlement Body. He drew Members' attention to Articles 7 and 8, which contained the objectives and principles of the TRIPS Agreement, respectively. His delegation believed that these were two pillars to promote inventions and the transfer and dissemination of technology embodied in such inventions. These objectives and principles, and the fact that the TRIPS Agreement had been annexed to the WTO Agreement, demonstrated that the TRIPS Agreement was a trade agreement with the overarching objective of promoting trade through international transfer of technology. This was the only reason why it had become part of the WTO *acquis*. Although export of pharmaceuticals or active ingredients, sound recordings, films and software might have been the primary objective of the *demandeurs* of the Agreement, it had been sold to the entire membership of the WTO as a trade agreement, and thus transfer of technology was an integral part of its objectives. The TRIPS Agreement balanced the private rights of inventors with the rights of the users of inventions. Any debate of the TRIPS Agreement should therefore take into account the objectives and principles stipulated in Articles 7 and 8. The Council for TRIPS, as well as the Dispute Settlement Body, needed to reflect them in their discussions and decisions. He referred to the objectives in the preamble to the WTO Agreement, in particular those concerning raising of standards of living and ensuring full employment, i.e. welfare considerations, which should be taken into account in discussions concerning the TRIPS Agreement, in addition to Articles 7 and 8. Thus far, the discussions in the Council for TRIPS had focused on two key aspects: review of practices of Members in implementing their obligations under the TRIPS Agreement, and some specific mandated negotiations and reviews. A survey of the numerous questions posed by Members, in particular developed country Members, during the reviews of legislation over the previous four years had revealed that all questions were based on obligations resulting from minimum standards of protection provided for under the Agreement and that no questions had been asked on the extent to which the objectives and principles of the Agreement had been translated or applied in national legislation. Rather, exercise of legislative or administrative flexibility by some WTO Members, to accommodate competing public values, such as the use of compulsory licences or government use, had been the subject of repeated follow-up questions meant primarily to question the use of such flexibility. The transfer and dissemination of technology and the consequent increase in trade appeared to be of little concern to the questioning Members. It could thus be argued that the TRIPS Agreement, instead of being the trade agreement that it was, had been sought to be converted into a means of enforcing private rights irrespective of their trade effects. While during the discussions of mandated negotiations and reviews, developing countries had largely emphasized the flexibilities available under the Agreement to pursue public interest, developed countries had been proposing further strengthening of the rights of inventors irrespective of public interest. His delegation's submission then discussed developments in the Dispute Settlement Body and cited the DSB's interpretation of the word "limited" in Article 30 of the TRIPS Agreement, in which little account had been taken of Articles 7 and 8 but which let Article 30 stand virtually on its own. Many developing country Members had sought the operationalization of Articles 7 and 8 in their proposals; attention could be drawn to proposals submitted in the context of the Seattle Ministerial Conference. Whilst lip-service had been given to the objectives and principles in Articles 7 and 8, there had been an actual practice of little accommodation in terms of accepting them in legislative or administrative practice. It was unfortunate that the WTO membership had handed over its primary responsibility of clarifying the trade implications of intellectual property rights, and the basic objectives and principles behind the TRIPS Agreement, to the Dispute Settlement Body. The kinds of rumblings heard in Seattle and reflected in a number of implementation issues would not go away if the collective WTO membership

refused to accept its responsibility and interpret the Agreement for itself rather than leaving it to the judgement of a few. There was more reason to do this under the TRIPS Agreement than in other areas, because the TRIPS Agreement concerned largely uncharted territory. His delegation was committed to the TRIPS Agreement, India being the repository of an immense amount of intellectual property. It did not doubt the need to protect intellectual property both in India and elsewhere. It was also true that protection of intellectual property coupled with liberal trade and investment policies was important for development and particularly for India. The abjectly mercantilist use of intellectual property rights involving possible losses to health and other development objectives was neither intended by negotiators nor should it be encouraged. This trend needed to be checked through the operationalization of Articles 7 and 8. His delegation's submission contained some recommendations: a clarification could be made of the language used in Articles 7 and 8 for the benefit of national governments pursuing public interest and for the benefit of the dispute settlement mechanism itself. For example, it could be clarified that Article 7 was not circumscribed by any other provision of the Agreement. The phrase "provided that such measures are consistent with the provisions of the Agreement" in Article 8.1 could be clarified to emphasize that the principles in Article 8 could not be completely negated by this proviso. Referring to a number of implementation proposals in paragraphs 21 and 22 of the draft Ministerial text prepared for the Seattle Ministerial Conference, he said that it would be a confidence-building measure if the developed countries agreed to these proposals and would help in operationalizing Articles 7 and 8. His delegation urged the Council for TRIPS to examine the above issues in order to build the confidence of weaker trading partners who might not be able to otherwise express their negotiating intent either through the existing agenda of the Council or through recourse to dispute settlement.

178. The representative of the European Communities said that he would respond to the intervention by the representative of India at the next meeting, but requested clarification of his references to "flexibility" inherent in the TRIPS Agreement and in Articles 7 and 8. He asked the representative of India why he had said that this flexibility had not been recognized when countries had been implementing the TRIPS Agreement in their national legislation.

179. The representative of India said that the context of his comment had been the current review of the implementing legislation of developing countries. Whilst great interest had been shown in whether developing country Members had met the minimum standards of protection stipulated in the Agreement, not many questions were sensitive to the fact that the Agreement also stipulated objectives and principles and that developing country Members, through their implementing legislation, might be trying to achieve those very objectives and principles legitimately. He said that he would complement this preliminary response in more detail at a later stage.

180. The representative of Malaysia welcomed the papers presented by Australia and India respectively as the way to proceed with the review under Article 71.1. In a way, the review had already begun with a review of the national implementing legislation as well as the reviews under Article 27.3(b) and regarding geographical indications. She agreed with the representative of India as regards the importance of Articles 7 and 8. These provisions could guide the review under Article 71.1, for example by addressing the following issues. Did the TRIPS Agreement contribute to the promotion of technological innovation? Did the TRIPS Agreement promote the transfer and dissemination of technology to the mutual advantage of producers and users? Were the provisions of the TRIPS Agreement consistent with the provision that countries could adopt measures to protect public health and promote public interest in sectors of vital importance? What were the appropriate measures that were needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrained trade and had they been adequately reflected in the Agreement? Although only a limited period of time had passed since the Agreement had had to be implemented by many Members, even in the drafting of national legislation her delegation had found that there were difficulties associated with the TRIPS Agreement. Additionally, the issues raised by Australia and India also fell within the scope of the review.

181. The representative of the Dominican Republic said that his delegation supported the paper introduced by India. He would be happy to respond informally to the request by the representative of the European Communities for evidence of problems related to the flexibility available under the Agreement. However, placing that evidence on the formal record could lead to more inflexibility, which no-one in the Council wished to occur.

182. The representative of Australia underscored the fact that the Article 71.1 review could be an opportunity for Members to present the way in which they had been able to implement TRIPS provisions in a way that served the objectives and principles of Articles 7 and 8.

183. The representative of Egypt supported the main thrust of the Indian paper. As a matter of principle, the review of the implementation of the Agreement under Article 71.1 should take into account the General Council decision of February 2000 to analyse the effect of the implementation of the TRIPS Agreement on trade and developmental aspects of developing countries. There should be no a priori conclusions as to whether or not the review might lead to amendments to the text of the Agreement. The review should aim to examine to what extent the implementation of the Agreement had so far achieved and satisfied the objectives and principles as stated in Articles 7 and 8, and how the balance of rights and obligations between the interests of right holders and the broader interests of society had been struck. The transfer of technology should be the central focus and key element of the TRIPS Agreement, and should be promoted by the establishment of a mechanism to facilitate access to new technologies on a reasonable and fair basis. Competition could also be an element of the review by examining implementation to ensure that strengthened intellectual property rights did not have an adverse effect on competition, especially in developing countries, in the light of anti-competitive conduct that might result from their exercise.

184. The representative of the European Communities said that he would welcome an informal discussion with the representative of the Dominican Republic on the flexibility available under the provisions of the TRIPS Agreement. His delegation's approach to the review of implementing legislation was not to reject any flexibility in implementation but, rather, to check whether, in its view, the minimum requirements set out in the Agreement had been translated into national legislation. If his delegation had not respected flexibility, there would have been many more dispute settlement cases. Responding to the Indian intervention, he said that he was not convinced that there was a need for clarification of Articles 7 and 8, since proof was available that dispute settlement panels already took those Articles into account.

185. The representative of Brazil said that, in principle, his delegation shared Australia's reasoning in its reading of Article 71.1. The support of developing countries to implementation-related issues in the preparations for the Seattle Ministerial Conference and currently in the General Council indicated the relevance of this issue. It made sense that, at this time, the review took into account the experience gained by Members at the present phase of implementation. A more comprehensive review leading to possible amendment of the Agreement should take place from 2002 and every two years thereafter. Responding to the Australian paper, Brazil favoured a discussion of measures to counter anti-competitive abuses of intellectual property rights under Article 40, taking into account the experience of different Members to remedy abusive practices of intellectual property rights that limited transfer of technology. On implementation of existing TRIPS standards in the digital framework, he wished to point out that the Council for TRIPS was about to resume discussions on electronic commerce as mandated by the General Council. More importantly, the issue had no connection with implementation of the Agreement and therefore fell outside the scope of the review under Article 71.1. Brazil had a well-known interest in intellectual property rights in connection with traditional and indigenous knowledge, but this issue was currently being discussed more appropriately as part of the review of Article 27.3(b), which was not a review of implementation but a substantive review. There might be problems of conflicts in the implementation of the Convention on Biological Diversity (CBD) and of the TRIPS Agreement, but this demanded a systemic solution to be addressed

as part of the review of Article 27.3(b). Brazil did not agree with Australia that in the review under Article 71.1 new intellectual property standards should be discussed in the light of other multilateral agreements, such as the WIPO Copyright Treaty, as such discussions would obviously lead to negotiations aimed at modifying substantive provisions of the TRIPS Agreement, and consequently move the focus of the review away from implementation. If anything, the CBD should take precedence in the identification of other multilateral agreements that were relevant for the purpose of Article 71.2, in light of their provisions that were relevant to the objectives of the TRIPS Agreement on transfer and dissemination of technology. In this connection, Brazil supported several notions expressed in the submission from India contained in document IP/C/W/195. Brazil was open to discuss the Indian proposal to consider ways and means to make operative the objectives and principles of the TRIPS Agreement in respect of transfer and dissemination of technology to developing countries, in particular the least developed countries. The TRIPS Agreement was usually understood as an Agreement essentially to protect individual intellectual property rights, but little effort had been made in the Council to ensure that the principles and objectives were actually fulfilled. The Australian paper had noted the widespread interest in increasing the range of beneficiaries from intellectual property right protection and in improving the contribution of the intellectual property system to overall national development and well-being. This approach was all the more relevant if considered in the light of the implementation of Articles 7 and 8 and in the context of work on implementation carried out by the General Council. Brazil felt that this approach in the review would be a relevant way of allaying the concerns of civil society on potentially negative effects of the TRIPS Agreement on developing countries. Brazil had noted that a recent resolution on human rights and intellectual property rights by the Sub-Commission on the Promotion and Protection of Human Rights requested "the WTO in general and the Council for TRIPS during its ongoing review of the TRIPS Agreement in particular to take fully into account existing State obligations under international human rights instruments". Additionally, the UN Human Development Report 2000, in box 4.9 on page 84, mentioned that "the TRIPS Agreement benefits technologically advanced countries. It is estimated that industrialized countries hold 97 per cent of all patents and global corporations 90 per cent of all technology and product patents. Developing countries have little to gain from stronger patent protection from the TRIPS Agreement, because they have little research and development capacity." The report concluded that "There is little evidence so far that patent protection has stimulated research and development in or for poor countries or that it offers the potential to do so". Whether WTO Members agree or not with such a conclusion, a review of how Members were implementing measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance, for instance, would, as a minimum, send a positive signal to civil society and other international organizations.

186. The representative of the Dominican Republic thanked the representative of the European Communities for his willingness to have an informal discussion with his delegation on the issue of flexibility and announced that his delegation was planning to revert to this item at the next meeting and, later, to submit a written contribution. He noted that the representative of the European Communities had interpreted inflexibility or disagreements about implementation solely in terms of an increase in the number of disputes before the Dispute Settlement Body. However, in reality, such disagreements were being expressed by other means. The review of the implementation of the Agreement should examine how, in effect, the TRIPS Agreement provided a framework of minimum standards within which Members had choices. Unfortunately, this had been forgotten in international debates and especially in bilateral discussions. The objectives and principles of the Agreement were being applied by developed country Members in a most creative manner. Developing country Members, such as the Dominican Republic, would be interested to know, for instance, how developed countries maintained a preponderance of pro-competitive objectives and laws above and beyond the provisions on the protection of intellectual property. They would also like to know how some developed country Members were able to grant more compulsory licences than any other country in the world. It was important that the review of the implementation of the Agreement addressed these mechanisms, because it would influence how developing country Members, such as the Dominican

Republic, had to implement the Agreement. It was important to review the ways in which some Members were interpreting the provisions of the Agreement nationally, in particular given that this was not necessarily consistent with the attitude of those same Members with regard to what occurred in other countries. This was the key to the problem of inflexibility.

187. The representative of Pakistan suggested that there was a need for clarity regarding what should be discussed as part of the review under Article 71.1 now, what should be discussed later, and what was the scope of the review. There had been a suggestion that the 2000 review under Article 71.1 should address the steps taken to implement TRIPS obligations, namely legislative provisions and enforcement procedures. His delegation believed that that was a sub-set of the issues to be covered in the review, but that in addition the Council should look at the difficulties that had been encountered in that process of taking those steps. Both were important. Many developing countries were identifying certain areas which fell within the second sub-set, where perhaps the TRIPS Agreement was not balanced. The two sub-sets were not mutually exclusive. There was no justification for excluding either.

188. The representative of New Zealand referred to a number of "common sense" proposals in the Australian paper regarding the procedure for this review. He emphasized the value in focusing on the measures taken by different Members to implement TRIPS obligations in different sectors, bearing in mind the range of different systems and approaches taken. The current exchange of information could be valuable in clearing up ambiguities and problems that might be identified along the way.

189. The representative of the Philippines said that, to date, "implementation" had referred to the measures taken by a Member to protect and enforce intellectual property rights. However, in the context of implementation, no-one had asked how those measures promoted social and economic welfare. Aside from the other aspects of implementation, his delegation hoped that there would be a meaningful review of the extent to which the operational provisions of the Agreement had met the objectives of the Agreement itself. The review also needed to take account of the trade and development impact on developing countries.

190. The Council took note of the statements made and agreed to revert to this matter at its next meeting.

M. NON-VIOLATION COMPLAINTS

191. The Chairperson recalled that, at the previous meeting, the representative of the European Communities and their member States had introduced a joint submission by his delegation, Brazil, Canada, the Czech Republic, Hungary and Turkey (document IP/C/W/191), and the representative of the United States had introduced a paper by his delegation (document IP/C/W/194). The Council had had a preliminary discussion on these two submissions. Since then, the Council had received a formal submission from Australia and a non-paper from Korea.⁸

192. The representative of Australia said that his delegation's paper was intended to take forward the Council's work on non-violation. All Members had an interest in clarifying this difficult and obscure issue which led to varying levels of concern among Members. Above all, the paper focussed on the potential meaning of any recommendations that might be developed on scope and modalities and the sort of issues and sources of law that could be drawn on in doing so. The paper did not advance any formal position and concluded with some mere suggestions of the sort of material that recommendations could include, and some might even be considered obvious. It mentioned that non-violation was widely perceived as having an exceptional character and there was a general

⁸ Subsequently distributed as documents IP/C/W/212 and JOB(00)6166 of 9 October 2000, respectively.

interest in retaining it as an exceptional remedy; it referred to the arguably higher burden of proof for non-violation complaints; it drew on comments in other delegations' papers on the elements of a successful non-violation complaint; it considered how the expected benefits under the TRIPS Agreement could be assessed, referring to Articles 7 and 8 as well as the detailed substantive provisions of the Agreement; it addressed concerns raised in previous debates, such as avoiding undermining the consistent application of the agreements covered by the Dispute Settlement Understanding and the notion that non-violation complaints could be precluded for measures found consistent with provisions in the Agreement that permitted exceptions to intellectual property rights.

193. The representative of Korea, highlighting the main elements of his delegation's non-paper, said that it identified three requirements necessary for a cognizable claim: first, application of a measure; second, existence of a benefit accruing directly or indirectly to a complaining Member under the Agreement; and third, nullification or impairment of such benefit as a result of the application of the measure. In addition to these three requirements, other elements could be considered. With regard to the first requirement, Korea's non-paper focused on the meaning of the term "measure" and its implications for the TRIPS Agreement, in light of the application of the Agreement to the acts of private parties and the scope of its subject-matter. The Council could discuss what measures potentially fell within the scope of the subject-matter of non-violation complaints under the TRIPS Agreement, particularly since the scope of the Agreement could lag behind the expansion of new technological property rights. With regard to the second requirement, there were no concessions under the TRIPS Agreement and, as indicated by Canada in its paper (IP/C/W/127), this made it difficult to apply the non-violation remedy. It was essential that there be some common understanding among Members as to what constituted reasonable expectations of benefits in the context of the TRIPS Agreement. With regard to the third requirement, the concept of a competitive relationship was key. A complainant should demonstrate that a competitive position was being upset, nullified or impaired by the application of a measure not reasonably anticipated. Under the TRIPS Agreement, there was not only the competitive relationship between a Member's own nationals and the nationals of other Members, but also the bargain between the right holder and society as a whole. Further, the demonstration of causality between the measure and its effect on the competitive relationship was another issue to discuss. In addition to these three requirements, the Council also needed to take into account the role played by the objectives and principles of the Agreement in Articles 7 and 8. The Agreement was intended to achieve a balance between the protection of intellectual property rights and other social and economic policies, and it was important that Members have the necessary flexibility to adjust intellectual property rights to maintain the desired balance. His delegation hoped that this important matter would be clarified and that Members would obtain a common understanding of the various issues surrounding it.

194. The representative of India supported the Australian intervention in a preliminary manner and said that it had raised a number of issues which the Council had a duty to consider. He would respond to the Australian and Korean contributions at a later meeting. Providing his delegation's preliminary comments on the United States' paper (IP/C/W/194), he first referred to the part entitled "Background", which said that the delay in the application of non-violation complaints to the TRIPS Agreement had ceased on 1 January 2000 and that the United States was not in a position to agree to continue discussions but was willing to listen to others' views regarding what purpose the continued discussion might serve. It added that no purpose would be served in continuing discussions, particularly at a time when the Council's built-in agenda already required substantial, significant work. In India's opinion, this view was not only at variance with the understanding of all the other WTO Members, but it did not appear to be legally correct either. The discussions on the subject in 1999 had been inconclusive as was evident from the annual report from the Council for TRIPS for 1999 (document IP/C/19, paragraph 6). That report had been forwarded to the Seattle Ministerial Conference with a view to arrive at a consensus decision, but the Conference had been inconclusive.

"Therefore," as stated by the Chairman of the Conference in the closing plenary session⁹, "Ministers had agreed to *suspend* the work of the Ministerial Conference, and to allow the Director-General time to consult with delegations in order to do the following: first and foremost, to ensure that the WTO developed rules and processes that would ensure maximum transparency for all delegations, and second, to discuss creative ways in which to *bridge the remaining differences in areas where consensus did not yet exist*, so that the Ministerial Conference could resume and *complete* its work."¹⁰ The Council for TRIPS had to, therefore, resume its discussions with a view to arriving at a consensus on the issue and, until that happened, the work envisaged under Article 64.3 would not conclude. The United States paper emphasized that the TRIPS Agreement was a market access agreement. It was acknowledged that the TRIPS Agreement had been introduced into the WTO *acquis* with the desire, as stated in the Preamble, to reduce distortions and impediments to international trade. It would have been a classic market access agreement if it had dealt with only trade in counterfeit goods, as envisaged at one time during the negotiations. However, now its connection with market access lay only in its basic principles as enunciated in Part I, i.e. Articles 1 to 8. For example, it provided for national treatment and most-favoured-nation treatment in Articles 3 and 4, respectively. It also had the objective of transfer and dissemination of technology and the reasonable expectations in respect of such transfer and dissemination through the promotion of technological innovation envisaged under the Agreement. In Part II onwards, the Agreement was a minimum standards agreement on the scope and level of intellectual property rights, their enforcement, acquisition and maintenance, etc. This distinction was important in the context of the scope for non-violation disputes. The reasonable expectations in respect of intellectual property rights, for example, would relate to the minimum standards prescribed and not the market access expectations of the kind found in market access agreements. The Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phyto-Sanitary Measures, on the other hand, not only had the specific objective of providing predictable market access, but their substantive provisions were also related primarily to predictability of market access through universally accepted standards in respect of legitimate objectives like safety, health, etc. The Council for TRIPS, therefore, had a responsibility to determine the scope and modalities and application of non-violation complaints in the specific context of the TRIPS Agreement and, until that was done, there could be no clarity about the application of non-violation complaints to TRIPS issues. The United States paper argued that protection through the TRIPS Agreement enabled producers of protected goods to invest with greater assurance that their investments would be rewarded. This appeared to have no basis, either in the TRIPS negotiations or in the TRIPS Agreement's provisions, as there was no legal basis for assuming that the negotiators wanted TRIPS to be an investment Agreement. Even if one talked of reasonable expectations, this could relate only to market access of goods which had obtained intellectual property right protection in the country of export, and it could not extend to the expectations of reward of investments, if any. In arguing that the TRIPS Agreement was a market access agreement, the United States paper gave three examples. In India's opinion, these examples conveyed a misplaced view of the expected benefits of intellectual property right protection. Firstly, intellectual property rights had to be granted under national law and the TRIPS Agreement only prescribed minimum standards. Therefore, the level of protection available in the home country might not necessarily be available in the country to which products were exported, nor could reasonable expectations in the home country be equated to the expectations in the host country. Secondly, intellectual property rights were negative rights to exclude others from the market where they applied and not a positive right to compete in the export market with directly competitive products. Thus, tariff reduction might have no relationship with the rights obtained through the TRIPS Agreement, nor the reasonable expectations arising therefrom. His delegation agreed with the position of the United States that the measures illustrated in the paper introduced by the European Communities were not legitimate subjects for non-violation complaints.

⁹ See WT/MIN(99)/SR/8.

¹⁰ Emphasis added by India.

195. The representative of Canada said that her delegation appreciated the Australian paper's detailed analysis of the various issues surrounding the concept of non-violation nullification and impairment in the context of the TRIPS Agreement and other WTO agreements. It built on the work undertaken by other Members in the Council and presented an additional basis for discussing these issues in a more substantive manner. She would come back to the new contributions at a later stage.

196. The representative of the European Communities, while reminding Members of his delegation's paper presented at the previous meeting (IP/C/W/191), said that his delegation had much sympathy for some of the recommendations presented in the Australian paper. He requested the representative of Korea to clarify what he had meant by his references to the concept of "competitive relationship" and from where it originated. He appreciated the comments of the representative of India on the question of whether or not the TRIPS Agreement was a market access agreement, which his delegation's paper had dealt with at length. He looked forward to more contributions on this agenda item.

197. The representative of Hungary believed that the papers that had been presented raised many pertinent issues that the Council had to examine. He would provide substantive comments at the next meeting.

198. The representative of the United States thanked the representative of India for his reaction to some of the specific comments in the United States paper. He would respond to them at the next meeting.

199. The representative of Korea said that he would respond to the European Communities' request for clarification at the next meeting.

200. The Council took note of the statements made and agreed to revert to the matter at its next meeting.

N. ELECTRONIC COMMERCE

201. The Chairperson recalled that, at its meeting of 17 July 2000, the General Council had agreed to invite the Council for TRIPS and three other subsidiary bodies, namely the Council for Trade in Goods, the Council for Trade in Services and the Committee on Trade and Development, to pick up where they had left off in their work on electronic commerce within their respective spheres of competence, to identify cross-sectoral issues, and to report back to the General Council at its regular meeting in December 2000 (paragraphs 94 and 131 of document WT/GC/M/57). He had held informal consultations on how the Council might proceed on this invitation. The Council for TRIPS had submitted its Progress Report to the General Council on 30 July 1999, which had been circulated in document IP/C/18. In this Progress Report, the Council had expressed the view that the WTO should continue to consider developments in relation to electronic commerce and intellectual property, including the further work of the WIPO. Given that the General Council had requested the Council for TRIPS to report back to it at its regular meeting in December, the Council for TRIPS should be able to agree to its report at its next meeting scheduled from 27 November to 1 December 2000. He invited a representative of the International Bureau of the WIPO to make a presentation on recent activities of the WIPO of relevance to electronic commerce.

202. The representative of the WIPO highlighted the main areas of activity that the WIPO had pursued since its previous presentation on the matter to the Council.¹¹ The member states of the WIPO had adopted in September 1999 a digital agenda, of which he would highlight selected items. The first such item was directed at trying to enhance the participation of developing countries in the

¹¹ See document IP/C/M/24, paragraphs 71 and 72.

discussion of the issues that were arising as a result of the impact of electronic commerce on the intellectual property system. To this end, over the past several months, the WIPO had conducted a series of regional consultations throughout the world and the discussion of the implications of electronic commerce on intellectual property was now a regular feature of its programme for development cooperation. Turning to three particular substantive areas, he first drew attention to that item in the WIPO's digital agenda pursuant to which the WIPO was pursuing compatibility between, on the one hand, the system of "real world identifiers" that existed, most notably trademarks, and, on the other hand, the system of "virtual identifiers" that existed, most notably domain names. The real world naming systems had in common two characteristics. They usually had a limited purpose and were usually geographically specific in their operation. For example, trademarks were limited to commerce and naming systems for scientific genera were limited to the purposes of science. Virtual identifiers, most notably domain names, in contrast occurred or were used on a multifunctional medium, the Internet, which was used for economic, social, cultural and political purposes without limitation, and which was global and did not respect any borders. The opposition of these two characteristics of the systems of real and virtual identifiers produced all of the legal problems that were currently being experienced. As the Members of the Council were aware, the WIPO had conducted a hybrid process involving both the public sector and the private sector, to develop recommendations on dealing with the intersection of trademarks and domain names. Pursuant to the report that had been presented as a result of that process to the Internet Corporation for Assigned Names and Numbers (ICANN) in 1999, a uniform dispute resolution procedure had been established for the generic top level domains of .com, .net and .org. The WIPO had been administering dispute resolution services under this dispute resolution procedure since the beginning of 2000 and the demand was heavy. WIPO had had more than 1,250 complaints filed since the beginning of 2000, based on the deliberate, bad faith cyber-squatting or theft of identity reflected in a trademark. That number of cases did not represent the number of domain names involved because, for example, one case had been filed which involved 108 variations of the words "HarryPotter.com". To date, 636 of the cases had been resolved. Eighty per cent of the complaints had been resolved in favour of the complainant; thus 20 per cent were being denied. There had been widespread geographical participation in the procedure; complaints had been filed from residents of 68 countries.

203. Continuing, he said that the cases filed had revealed that there were nevertheless a number of outstanding issues in respect of the intersection of domain names and "real world identifiers". First, at the request of the WIPO's member states, the International Bureau had been invited to commence a second domain name process, involving public sector and private sector participation, to develop recommendations on the deliberate bad faith use and registration of domain names in violation of other forms of "real world identifiers", notably personal names or personality rights, geographical indications, the names and acronyms of international organizations that were protected under Article 6*ter* of the Paris Convention and under the TRIPS Agreement from appropriation in the trademark system, international non-proprietary names for pharmaceutical substances and the names and entities that were not otherwise protected by trademark law, such as events or corporations. That process had started and very shortly a second Request for Comments on these questions would be issued and he expected that the report developing any recommendations on these questions would be published in the middle of 2001. The second set of outstanding issues concerned the country code top level domains ("ccTLDs"), i.e. the top level domains that bore the two-letter country code of the various countries of the world. The WIPO had been requested to work with those administrators of country code top level domains that so wished to examine whether the uniform dispute resolution procedure might be applied in the ccTLDs. A number of these ccTLDs operated in what was known as an "open" sense in that they permitted registrations from persons or entities all over the world. The consequence was that, if a trademark, or rather an intellectual property right, was violated as a result of a registration, there was very often a jurisdictional difficulty in finding an appropriate forum in which to pursue the violator of the intellectual property right. To date, 12 ccTLDs had adopted the uniform dispute resolution procedure and the WIPO had administered four cases concerning violations of trademark rights in ccTLDs. Another major item of the WIPO digital agenda was the

promotion of the adjustment of the international legislative framework to deal with digital technology and electronic commerce. As was well known, two treaties had been concluded at the end of 1996 - the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty - and a major element of the WIPO's work programme was promoting accession or adherence to these treaties so that they could enter into force. Each required 30 accessions or ratifications. To date, one had 19 and the other 16, but the WIPO hoped that, in the course of the next 12 months, a sufficient number of ratifications or accessions might be achieved to bring the treaties into force. In December 2000, a diplomatic conference would be held also to conclude a new instrument on one of the issues that had been left outstanding at the 1996 diplomatic conference, namely the international protection of audiovisual performances.

204. Turning to the coordination of horizontal issues that affected intellectual property, he said that the issue that was of most concern to the WIPO was the question of jurisdiction, which was not an issue that was confined to intellectual property. The Hague Conference on Private International Law was the forum in which discussions were being pursued on a draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters. It had been brought to the WIPO's attention that intellectual property jurisdiction questions might present some particularities which distinguished them from contract or other commercial jurisdictional questions. For example, in electronic commerce generally, for sales there was a discussion as to whether the law of origin or the law of destination in respect of the sale ought to apply. Many in business and industry extolled the virtues of the rule of the law of origin in order to reduce compliance costs on the part of business and in order to create greater predictability and certainty. That rule did not fit well, however, for example, with copyright. If the law of origin were to apply, then it would be possible to create intellectual property piracy havens where no intellectual property protection existed and where that law would be the law which would apply to the distribution of copyrighted works on the Internet. In order to address these questions in the context of intellectual property, the WIPO was organizing, jointly with the Hague Conference Secretariat, a conference to address jurisdictional questions on intellectual property and electronic commerce in Geneva on 30 and 31 January 2001. Finally, many people considered that the best approach to dealing with the complex questions relating to jurisdiction was a composite approach, not just an approach of trying to adjust treaty law, but also using, to the extent possible, alternative dispute resolution mechanisms, particularly in the context of consumer disputes. In this respect, the WIPO would also organize, in November 2000, a conference on dispute resolution in electronic commerce, where its experience to date had been chiefly with respect to Internet domain names.

205. The representative of Japan said that this issue should be considered further in view of the rapid nature of technological development in the area of electronic commerce. His delegation supported further informal consultations on issues relevant to electronic commerce. The Council should pay attention to the parallel discussions in other organizations such as the WIPO, OECD and the Hague Conference on Private International Law. Issues such as international jurisdiction, or choice of law, related not only to violations of intellectual property but also to privacy and consumer protection. Various electronic commerce issues should be considered from a horizontal point of view, in particular, from the points of view of technology and economic development. Cross-cutting issues, such as jurisdiction or choice of law, should be discussed in appropriate fora. Accordingly, his delegation strongly supported establishment of an ad hoc task force for cross-cutting issues, which many other Members had already supported at the July 2000 meeting of the General Council. This was the best way to have an effective and efficient discussion. He asked the Chair, when reporting to the General Council on the restarted discussions on electronic commerce-related issues, to note that support had been expressed for an ad hoc task force.

206. The representative of the European Communities underlined the importance his delegation attached to electronic commerce and the need to study further intellectual property-related issues. He foreshadowed a paper on this agenda item. He appreciated the intervention of the representative of

the WIPO which had demonstrated the value of contributions by representatives of observer organizations. Given that the Council needed to adopt a report to the General Council on its work under this agenda item at its next meeting, he asked how the Chair proposed to proceed.

207. The Chairperson said that the procedure under this agenda item depended on interventions made at this meeting and subsequent inputs by Members. The Council had to revert to this matter at its next meeting at which time it would decide how to report to the General Council.

208. The representative of Australia recalled that in July 1999 his delegation had submitted a paper on electronic commerce, shortly before the Council's previous progress report. Electronic commerce was one of the most important issues confronting policy-makers in the intellectual property field. The presentation by the WIPO highlighted that this was a fast-moving area, and that there had been a range of developments since the TRIPS Agreement had been concluded. It was incumbent on the Council to keep track of those developments and respond to them. His delegation would update its paper to take account of developments in the meantime and re-circulate it. Nonetheless, he reminded the Council that its main proposal related to the general applicability of intellectual property principles and the TRIPS objectives to the realm of electronic commerce. It considered the distinctive features of intellectual property in the digital environment and the challenges for enforcement and particularly border measures under the TRIPS Agreement; it highlighted the importance of international cooperation relating to enforcement in line with Article 69 and the jurisdictional issues raised by the representative of the WIPO in his intervention. It considered the impact of some of the development issues, such as access to new technologies and the role of electronic commerce technology in intellectual property administration. Finally, it considered some of the substantive legal issues that had arisen in the context of electronic commerce, in particular concerning copyright standards, and the possible relationship of the TRIPS Agreement to the 1996 WIPO Treaties that represented extensions of the Berne Convention; and the issue of distinctive signs such as trademarks, geographical indications and the names of international organizations and the possibility of extending the TRIPS Agreement's standards in the internet environment, not only in relation to domain names but also general use on the Internet.

209. The representative of Pakistan, responding to the intervention by Japan, said that debate on a task force had taken place in the General Council and there had been no consensus on it. He reiterated his delegation's position that no task force was needed.

210. The Chairperson said that, in the light of discussions at the present and next meetings, he proposed that he would prepare a report to the General Council on his own responsibility on the further work done by the Council for TRIPS. He would circulate the draft report for comments.

211. The Council took note of the statements made and agreed to proceed as suggested by the Chairperson.

O. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

(i) Accessions

212. The Chairperson said that Albania had become the 138th Member of the WTO on 8 September 2000 (WT/Let/353). Albania had committed itself to apply fully the provisions of the TRIPS Agreement by the date of its accession to the WTO without recourse to a transitional period. On 17 July 2000 the Government of Croatia had accepted, subject to ratification, its Protocol of Accession, which included a commitment to apply fully the provisions of the TRIPS Agreement by the date of its accession to the WTO without recourse to a transitional period.

(ii) Dispute Settlement

213. The Chairperson informed the Council that the report of the Panel on United States - Section 110(5) of the US Copyright Act, a complaint by the European Communities and its member States (document WT/DS160/R), had been adopted by the Dispute Settlement Body on 27 July 2000 (document IP/D/16/Add.1); and that the report of the Appellate Body in Canada - Term of Patent Protection (document WT/DS170/AB/R) had been circulated on 18 September 2000.
