

WORLD TRADE ORGANIZATION

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Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING

Held in the Centre William Rappard
on 20-21 October 1999

Chairperson: Ambassador Carlos Pérez del Castillo (Uruguay)

Subjects discussed:

- A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS
- B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT
- C. REVIEW OF LEGISLATION:
 - (i) Review of the legislation of the Kyrgyz Republic and Latvia
 - (ii) Arrangements for reviews after 1 January 2000
- D. SECTION 211 OF THE UNITED STATES OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT OF 1998
- E. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9
- F. IMPLEMENTATION OF ARTICLE 66.2
- G. TECHNICAL COOPERATION
- H. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2
- I. IMPLEMENTATION OF ARTICLE 23.4
- J. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)
- K. ARTICLE 64.3
- L. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO
- M. DRAFT ANNUAL REPORT
- N. OTHER BUSINESS
 - (i) Statement by Malaysia concerning optical disk piracy
 - (ii) Dates of meetings of the Council in 2000
 - (iii) Review of the implementation of the Agreement under Article 71.1

A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

1. The Chairperson said that the Council had before it 15 outstanding requests from intergovernmental organizations for observer status. The organizations in question were listed in document IP/C/W/52/Rev.7. Among these pending requests were three which had been submitted since the previous meeting. These were from the *Conférence des Ministres de l'Agriculture de l'Afrique de l'Ouest et du Centre*, the *Islamic Development Bank* and the *World Health Organization*.

2. The Chairperson said that informal consultations on the issue of the pending requests for observer status had not revealed any new developments. Consequently, he suggested that the Council revert to the matter at its next meeting.

3. The Council so agreed.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2

4. The Chairperson informed the Council that new notifications of legislation had been received from Australia, Denmark, Hungary, Latvia and the United Kingdom. All these notifications would be available in the IP/N/1/- document series as soon as possible.

5. The representative of the European Communities reverted to the question that he had raised, at the meeting of the Council of 21 and 22 April 1999, concerning a notification by Slovenia of a decree concerning Lippizaner horses.¹ Since that time, his delegation had examined the decree and reached the conclusion that there were serious concerns regarding its compatibility with the TRIPS Agreement, and intended to continue to hold bilateral discussions with Slovenia on this issue.

6. The representative of Slovenia said that, first, his government firmly believed that the decree in question was in full compliance with the TRIPS Agreement notwithstanding the fact that it related to horses which were live animals, possibly constituting the first case ever of such a geographical indication. Second, Slovenia welcomed the statement by the European Communities that the whole issue, and not just its intellectual property aspects, should first be discussed on a bilateral level. The Slovenian Minister for Agriculture had sent a letter to his Austrian counterpart proposing a meeting to deal with the Lippizaner horses issue. His delegation also welcomed the statement made the previous day in Vienna at a European Union-Slovenia Subcommittee on Agriculture meeting, where the representatives of the European Commission had indicated that they would attend the forthcoming bilateral discussions with Slovenia, whenever they should take place. Slovenia was pleased by these developments and believed that all existing differences could be resolved in a process of amicable bilateral consultations so that the issue could eventually be dropped from the Council's agenda.

7. The Council took note of the statements made.

(ii) Notifications under Articles 1.3 and 3.1

8. The Chairperson informed the Council that a notification under Article 3.1 of the Agreement in conjunction with Article 6 of the Berne Convention had been received from Jamaica and circulated in document IP/N/2/JAM/1.

¹ The decree in question has been circulated in document IP/N/1/SVN/G/1.

(iii) Notifications under Article 69

9. The Chairperson informed the Council that, since its last meeting, the Kyrgyz Republic had notified its contact points under Article 69. This brought the number of Members that had notified contact points under this provision to 94.

C. REVIEW OF LEGISLATION

(i) Review of the legislation of the Kyrgyz Republic and Latvia

10. The Chairperson said that, prior to the meeting, the Secretariat had received copies of questions posed, to the two Members to be reviewed, by Japan, the United States and the European Communities and their member States (documents IP/C/W/150, 151, 152 and 158), as well as responses from the Kyrgyz Republic to the questions posed to it by the United States and Japan (documents IP/C/W/153 and 160) and from Latvia to the questions posed to it by the United States and Japan (document IP/C/W/159).

11. The respective representatives of the Kyrgyz Republic and Latvia each provided a brief introductory overview of the structure of their country's legislation in the areas covered by the Agreement and of the changes that they had had to bring about in order to make the legislation compatible with the TRIPS Agreement. They both noted that they had only received questions from the European Communities on 12 October 1999 so that they had had insufficient time to prepare responses.

12. The representative of Japan expressed his appreciation for the efforts of the Kyrgyz Republic and Latvia in preparing the written responses to the questions asked by Japan as well as their oral explanations. The responses provided were sufficiently clear so that Japan had no further questions for the two delegations at present.

13. The representative of the United States indicated that his delegation might pose some additional questions at a later date.

14. The Chairperson recalled that, according to the procedures for these reviews, the Kyrgyz Republic and Latvia were to provide written responses to the outstanding questions within eight weeks of this meeting, and the Council would keep this issue on the agenda of its next meeting.

15. The records of the introductory statements by the Kyrgyz Republic and Latvia and the responses to all questions posed will be circulated in due course under the following symbols:

The Kyrgyz Republic	IP/Q/KGZ/1	Latvia	IP/Q/LVA/1
	IP/Q2/KGZ/1		IP/Q2/LVA/1
	IP/Q3/KGZ/1		IP/Q3/LVA/1
	IP/Q4/KGZ/1		IP/Q4/LVA/1

16. The Council took note of the statements made.

(ii) Arrangements for reviews after 1 January 2000

17. The Chairperson, reporting on his informal consultations on the matter, said that, in the first half of the year 2000, implementing legislation of 13 Members would be reviewed² and another 14³ reviews would be held in the second semester of the year 2000.⁴ The Chair would submit, prior to the

² The review meeting is scheduled for the week of 26-30 June 2000.

³ This number includes Estonia (see under Agenda Item L below).

⁴ The review meeting is scheduled for the week of 27 November to 1 December 2000.

next meeting, a proposal for the reviews of implementing legislation in the year 2001, in particular which Members would be reviewed when. As to the procedures for these reviews of implementing legislation, questions should be sent in some ten weeks before the meeting and three to four weeks before the meeting the countries concerned should submit their answers, in writing, to those questions. He recalled that funds were available under decisions of relevant WIPO bodies and pursuant to the Agreement Between WIPO and the WTO for the benefit of Members who had to translate laws and regulations to be notified.

18. The Council so agreed.

19. In response to a question from the representative of Singapore, the Chairperson said that the procedures for the notification and review of legislation in 2000 and 2001 would be made available in writing.⁵ As for submission of responses to the Checklist of Issues on Enforcement (document IP/C/5), he suggested that responses to the Checklist be submitted as soon as possible, but in any event in good time before the review of the Member concerned, so that other Members would be in a position to obtain a good knowledge of the relevant enforcement procedures before the review meeting.

20. The Council so agreed.

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

21. The representative of Cuba recalled, in December 1998, the delegation of Cuba had presented to the Council, under Article 63.3 of the TRIPS Agreement, a request for information from the United States government on the amendments that it had made to the Omnibus Consolidated and Emergency Supplemental Appropriations Act for the fiscal year 1999, in particular to Article 211, sub paragraphs a), b), c) and d), as well as its compatibility and relevance to the TRIPS Agreement. To date, his delegation had not received any satisfactory response to the request. It had only received a list of legal texts which dealt with the matter, but which were easily accessible through other means and which did not actually afford any extra clarity on the grounds for the action of the United States legislative body which had enacted Section 211. It could, therefore, not be considered to be in compliance with Article 63.3, which stipulated that Members were bound to be informed, in sufficient detail, of the matter raised. Cuba considered that the basic objective of the provision was to illustrate and show good faith in compliance with the TRIPS Agreement and the WTO Agreement by Members in their relations with other Members, and this had not been complied with. Cuba was following closely and with interest the consultations which were taking place within the framework of the DSU between the European Communities and the United States and they were awaiting the outcome of the process. In this connection his delegation reserved the right to take other action within the WTO framework, should the results of the consultations not respect the legitimate rights that Cuba had in this regard. Lastly, he thanked all those delegations which had, in the course of the last three meetings of the Council, afforded their support to Cuba and he reiterated his trust in the strict and unconditional observance of the principles of the multilateral trading system, the rules of which had to be implemented without discrimination, fairly and transparently.

22. The representative of the United States restated his delegation's view, that the material that had already been provided fully and completely met the obligations of the United States under Article 63.3 of the TRIPS Agreement. He requested that, since it was a subject of dispute settlement and would be dealt with under the procedures established by the DSU, the issue be removed from the agenda of the Council.

⁵ Subsequently circulated in informal document JOB(99)/6928 of 18 November 1999.

23. The representative of Cuba opposed removing the item from the agenda of the Council. His delegation would be writing to the United States indicating that it required pertinent information under Article 63.3 which, to date, it had not received.

24. The representative of Venezuela said that his delegation thought that the response of the United States to the questions put to it by Cuba on United States legislation, case law and jurisprudence was insufficient and wondered whether, in the review of legislation next year, a Member could respond to questions by simply sending in a copy of the relevant legislation. He believed that the obligations under the TRIPS Agreement went much further and that it was reasonable to expect a full explanation. This case would set an important precedent.

25. The representative of the United States recalled that the WTO system provided for the dispute settlement procedures to be used when one Member believed that another Member had taken an action inconsistent with its obligations. Continuing discussions in the Council would merely use valuable time which could be better used to deal with the Council's built-in agenda, which included regular reports on dispute settlement proceedings and developments thereunder.

26. The representative of the European Communities informed the Council that consultations had taken place between his delegation and the United States and that further consultations were under consideration in order to receive additional information.

27. The representative of Japan recorded his delegation's concern that the particular provision of United States law at issue could be inconsistent with the TRIPS Agreement, especially its Articles 3 and 4.

28. The Chairperson, referring to the request of the United States that the item not be on the agenda of the next meeting of the Council, said that the normal procedure was that, when a Member proposed an item for the agenda, that item was included in the draft agenda, which Members could adopt or modify at the start of the meeting. Additionally, he noted that the consultations between the United States and European Communities and their member States concerned those two delegations' respective interpretations, which were not necessarily the same as Cuba's

29. The Council took note of the statements made.

E. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9

30. The representative of the European Communities said that his delegation had carefully studied the additional information that had been provided prior to the last meeting, and believed that those Members that had responded had not clarified their positions sufficiently. His delegation intended to pursue the matter bilaterally.

31. The Council took note of the statement made.

F. IMPLEMENTATION OF ARTICLE 66.2

32. The Chairperson recalled that, at the Council's meeting of 1 and 2 December 1998, the delegation of Haiti had requested information from developed country Members on how Article 66.2 of the TRIPS Agreement was being implemented. The Council had agreed that this question be circulated in an informal document of the TRIPS Council to all Members and that developed country Members be invited to supply information in response to this question. Following the Council's meeting in July 1999, the Secretariat had received information on the implementation of Article 66.2 from the European Communities, which included also information from Austria, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden and the United Kingdom. All this information had been circulated in document IP/C/W/132/Add.4. Additional information, received from Ireland and

Germany, was being circulated as a supplement to this document. Apart from this information from the European Communities, to date, information had also been provided in writing by New Zealand, the United States, Japan and Australia. This information was available in documents IP/C/W/132 and addenda 1 to 3, respectively.

33. The representative of the European Communities referred to the supplementary submission made by his delegation, and foreshadowed a further submission that it would make in relation to another of its member States.

34. The Chairperson proposed that the Council urge the developed country Members that had not yet done so to supply the required information rapidly, and that it revert to the matter at its next meeting.

35. The Council so agreed.

G. TECHNICAL COOPERATION

36. The Chairperson recalled that the Council had agreed, at its meeting of 7 and 8 July 1999, to focus on technical cooperation at the present meeting. In preparation for that discussion, it had been agreed that developed country Members would update information on their technical and financial cooperation activities relevant to the implementation of the TRIPS Agreement in time for the present meeting. In addition, intergovernmental organizations observers to the Council 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/154 and addenda, and of intergovernmental organizations in documents IP/C/W/155 and addenda. Updated information on the WTO Secretariat's technical cooperation activities in the TRIPS area could be found in document IP/C/W/156. The updated information from the European Communities and their member States and from Australia, the United States, the FAO and UPOV would be circulated as addenda to documents IP/C/W/154 and IP/C/W/155 respectively.

37. The Chairperson said that some of the information had been received only very recently, and most of it was, thus far, available only in its original language. Therefore, the Council might revert to the matter at its next meeting, to allow Members to make further comments on the information submitted that they might not yet have been able to study, and any further information provided before that meeting.

38. Continuing, the Chairperson recalled that the WIPO and WTO Secretariats had launched in July 1998 a Joint Initiative on Technical Cooperation to assist developing countries to meet their commitments under the TRIPS Agreement by the year 2000, and that the Council had agreed, at its meeting in December 1998, to request the Secretariat to report on a regular basis on this matter. The above-mentioned submissions by the WIPO and WTO Secretariats, circulated, respectively, in documents IP/C/W/155/Add.4 and IP/C/W/155, contained information, *inter alia*, on the status of the implementation of the Joint Initiative. Since those two documents had been circulated there had been one additional request for assistance under the Joint Initiative.

39. The representative of WIPO said that the WIPO Secretariat had submitted a full report to the WIPO General Assembly on the issue of technical cooperation, which included information on the Joint Initiative. The document had been unanimously accepted by the Member States of WIPO and the same document had been submitted to the TRIPS Council in English, Spanish and French. For interested delegations, the document was also available in other UN languages, namely, Arabic, Chinese and Russian. The document would be updated regularly. Most of the Members in the present meeting had also been present in the WIPO General Assembly and the Director of the WTO Secretariat's Intellectual Property Division had responded, in detail, to the questions posed by

delegations in the assembly the Assembly. She expressed her readiness to respond to questions as well.

40. The representative of Venezuela highlighted the report from Australia, which provided information in a most transparent way, by means of a table listing all the expenses and countries involved. He thought this type of notification was very useful and suggested that others follow Australia's example. In addition, he suggested that developing countries might channel requests for bilateral technical cooperation through their missions in Geneva to developed country Members on the basis of those provisions of the TRIPS Agreement that required technical cooperation to be given to developing and least developed country WTO Members.

41. The representative of Australia said that her delegation hoped to submit, by the end of the month, a new formal study on the notification and review process under the TRIPS Agreement. This was intended to ease the considerable burden on national administrations which this process represented. Given that many developing country Members were on the point of commencing this process, she hoped that the study would help such Members to make the best use of the existing wealth of experience.

42. The representative of Japan, while referring to Japan's technical cooperation activities as outlined in document IP/C/W/154/Add.1, said that in the area of human resource development, Japan had undertaken the 1000 Trainees Programme. The target of this program was to invite a total of 1000 people from governments and the private sector, mainly from the Asia-Pacific region, to Japan to participate in training courses. From 1996 to the end of 1998, a total of 739 participants had been accepted from 34 countries and one economy. His government had been providing several countries with necessary personnel and computer equipment in order to build up computerised operation systems in industrial property offices. Finally, he stressed that Japan had been and would be willing to provide necessary cooperation to developing countries to the extent it could with a view to having self-sustained development in these countries.

43. The Chairperson suggested that the Council urge those developed country Members that had not yet provided updated information to do so soon.

44. The Council so agreed, while taking note of the statements made.

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

45. The Chairperson said that, at the previous meeting, the Council had requested the Secretariat to prepare a summary paper of the responses provided by Members to the Checklist of Questions contained in documents IP/C/13 and Add.1, on the basis of the outline contained in informal document No. 2104 of 13 April 1999.

46. The representative of the Secretariat reported that work had started on the summary paper analysing the considerable amount of information that had been received. It was a complicated paper with a rather detailed outline and there was a diversity of approaches that had been reflected in information received. The Secretariat would have the paper ready by the next meeting of the Council.

47. The Council took note of this statement.

I. IMPLEMENTATION OF ARTICLE 23.4

48. The Chairperson recalled that, at the previous meeting, the Council had continued its discussion of the proposals tabled, one from the European Communities and their member States and the other from Japan and the United States jointly. Since then, as foreshadowed at the previous

meeting, a revised version of the latter proposal had been circulated. It was sponsored by Canada, Chile, Japan and the United States.

49. The representative of the European Communities reiterated that his delegation's position had not changed from that in its submissions and interventions to date on the future multilateral register. His delegation looked forward to the establishment of such a register and expected the discussions to start with new momentum at the beginning of 2000.

50. The representative of India agreed with the European Communities that there would be new momentum next year and believed that the scope of the work might also be different on the basis of proposals made in the context of the General Council for the preparation of the Seattle Ministerial.

51. The representative of Peru said that, in accordance with Article 23.4, the Council had started the negotiating process to establish a multilateral system for notification and registration with the aim of facilitating protection of geographical indications for wines and spirits. Whilst Article 23.4 referred exclusively to wines, the Ministers in Singapore had agreed that matters relevant to spirits should form part of the preliminary work. Consequently, the Council's work should also include spirits, as had been requested by a large number of Members. In Peru's understanding, the voluntary nature of the multilateral system of notification and registration stemmed from the fact that it was not necessary for Members to include their geographical indications in such a register in order for other Members to be bound to protect them. The obligation to protect them derived directly from the substantive provisions of the TRIPS Agreement themselves. In this context, the inclusion of a geographical indication in the register would play an important role in facilitating its protection. In order to play that role, the registration could not be a simple notification procedure or a database which did not contribute to respecting the obligations under the TRIPS Agreement. A register of that type would not be a truly multilateral system and would not fulfil the commitment to reinforce effective protection for geographical indications. The term "facilitate" had to be understood as a grant of means to identify what were the geographical indications that Members were obliged to protect. It was essential that the register be made up of geographical indications that satisfied the criteria established by the TRIPS Agreement. Consequently, logically the multilateral system of notification and registration had to have an appropriate procedure that guaranteed that the inclusion of a geographical indication was done in conformity with these criteria and facilitated the understanding of Members in cases of disagreement. The system had to take into account the various modalities of protection that existed under national legislation of various Members. The system also had to guarantee the freedom of Members to request inclusion of their geographical indications on the register so as to benefit from it. The indications that had been included in conformity with the criteria established in the Agreement had to be protected by other Members. This did not mean that the inclusion of a geographical indication in the register was obligatory but rather that the protection of a geographical indication included in the register was obligatory because these indications had to be protected under the relevant provisions of the TRIPS Agreement. This system also had to provide the possibility for Members to express their reservations, at an appropriate time, when they did not agree to protect a particular geographical indication either because they did not believe it conformed to the criteria laid down in the Agreement or because of disagreement about its origin. The establishment of a register would necessarily imply certain costs due to its nature. Nonetheless, the real cost of the multilateral system of notification and registration could only be evaluated in light of the benefits obtained by Members. These benefits or this added value would be of an essentially procedural nature, which was why it could not be maintained that they involved additional obligations. One had to remember that Article 23 of the TRIPS Agreement provided additional protection for wines and spirits and from that point of view the establishment of a multilateral registration and notification system that did not contribute to improving protection for geographical indications would mean substantially short of the levels of protection that had been envisaged.

52. The representative of the United States endorsed the need to begin work with new vigour in the new year on this issue. He reminded delegations that, should there be a decision to expand the

scope of the discussions to other products, his delegation's proposal remained as valid for other products as it was for wines and spirits.

53. The representative of Korea said that his delegation favoured, in principle, the proposal initially put forward by the United States and Japan which was simple procedurally and did not impose excessive costs and additional burdens on Members or the Secretariat. Korea's interpretation of Article 23.4 clearly pointed to the voluntary nature of the system as was stipulated in the end of the Article, "...for protection in those Members participating in the system...". With regard to the product coverage, his delegation felt, as did a lot of Members, that the products to be protected by geographical indications had yet to be identified, so that it was premature to embark on a discussion of the extension of the product coverage beyond wines. It was also beyond the present mandate of the Council to discuss any such extension.

54. The representative of Hungary said that his delegation had, for a long time, been supporting the establishment of a multilateral system of notification and registration of geographical indications, and on various occasions had indicated why it felt more attracted to the proposal from the European Communities and their member States. His delegation strongly believed that the legal effects of the registration system must not vary amongst Members depending on their national legislation. In addition, he stressed the willingness of his delegation to go along with the proposals made by several delegations that the additional protection for geographical indications for wines and spirits be extended to products other than wines and spirits. The extension of the product coverage was not dependent on the issue or type of the multilateral system and therefore should not unduly delay the establishment of the system. Finally, he believed that the multilateral system was a voluntary one, which meant that it was up to Members to decide whether they wanted to join the system but once they participated it would be obligatory to accept the legal consequences of multilateral registration of geographical indications.

55. The representative of Mexico said that, based on Article 23.4 and also the Singapore Ministerial Declaration, there was a clear mandate to initiate work in the Council for the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits. Her delegation was interested in complying with the mandate as soon as possible, as it pertained to the built-in agenda. She welcomed the statements by other delegations expressing the hope to begin the negotiations with new impetus early next year. As regards coverage, Mexico's clear position was that, as the Agreement was currently drafted, there was no obligation to extend the additional protection for wines and spirits to other products. Any modification of the obligation would necessarily have to be done through other fora of the WTO. Her delegation did not share the idea that work on the nature of the notification and registration system could be done independently of what would be the coverage of the register. It did not seem feasible to design a system that could encompass all types of products and therefore it was necessary to have a clear idea of the products being referred to. Furthermore, experience had shown that existing multilateral registers of this type varied according to the type of products they were established to protect. Mexico agreed with many of the comments made by the representative of Peru, in particular those referring to the nature of the system, in the sense that a geographical indication did not have to appear in this register to enjoy protection because such protection was already granted under the relevant provisions of the TRIPS Agreement. Furthermore, she agreed that the fundamental value of this register was to identify, or facilitate the identification of, those geographical indications which complied with the definition of geographical indications in the TRIPS Agreement. As to whether the system had to be voluntary or not, there were possibilities for a mechanism for those cases in which Members did not agree on the need for protection of specific geographical indications. It would be relevant to have such a mechanism to solve such cases. At present her delegation had no problem with the coverage, which was clearly defined, but what the Council had to deal with as soon as possible was fulfilling its mandate to discuss the nature of the register that it had to establish.

56. The representative of Australia supported the revised proposal from the United States, Japan, Canada and Chile. She expressed concern that the multilateral register should serve its proper function as a voluntary practical aid for the implementation of existing commitments and not create new burdens for Members, be they new obligations or new administrative burdens. In addition, in Australia's view, there was no mandate in any existing provisions of the TRIPS Agreement for extending the scope of the additional protection stipulated in Article 23 for geographical indications for wines and spirits to those for other products.

57. The representative of Singapore looked forward to a fuller discussion of the issue at the next meeting of the TRIPS Council. In accordance with the terms of Article 23.4, the system had to be a voluntary one; one that did not pose any undue burden and was simple in nature.

58. The representative of India was of the view that there was a mandate to negotiate additional protection for geographical indications for products other than wines and spirits. India was in favour of extension of the scope to products other than wines and spirits and would like to consider this concomitantly with the negotiations on the register after obtaining any mandate from the Seattle Ministerial Conference.

59. The representative of Uruguay supported the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits, based on Article 23.4 and the Singapore Ministerial Declaration. As to the scope being extended to other products, it was necessary to await the upcoming deliberations in the context of the Seattle Ministerial Conference as well as observe the implementation of the system for wines and spirits.

60. The representative of Bolivia supported the statement made by India.

61. The representative of New Zealand supported the delegations who had noted the fact that Article 23.4 had not been amended as yet, so that its product coverage concerned only wines and, given the Singapore Ministerial Declaration, spirits. He recognised and acknowledged that some delegations had made proposals in the General Council, which was, thus, the appropriate forum for discussing the possibility of an extension of the coverage to other products. In the meantime, it was best to limit the discussion to Article 23.4. In the new year, Members would have a better picture about the issue of coverage and could discuss the matter with renewed vigour.

62. The representative of Canada said that the current mandate extended only to wines and spirits and the Council would require a new and separate mandate to discuss extension to other products. The question of extension of the mandate to other products should be separated from the question of the multilateral registry so that work could move ahead on the registry to be established. The system proposed by the United States, Japan, Chile and Canada lent itself to what other WTO Members had indicated should be a system that was voluntary, facilitative, simple and low-cost and which achieved the objectives set out in the TRIPS Agreement.

63. The representative of Venezuela shared many of the concerns expressed by Peru and reiterated the position it had expressed in their joint submission to the General Council. It was important to have a system for notification and registration which would be binding *erga omnes* and multilateral. In the Andean Community, there was a system for the protection of geographical indications which applied to natural, agricultural, artisanal and industrial products. This system, which was successful and operated in the five countries concerned, could be used as a basis, or at least a reference, for further discussions.

64. The representative of Switzerland supported the statement made by the representative of Venezuela. Switzerland considered the proposal from the European Communities to be best suited to addressing the concerns expressed through the provisions of the Agreement on geographical indications, which included issues concerning, for example, homonymous geographical indications or

relating to generics. Her delegation was ready to discuss a system that would be the least expensive. She recalled the statement made by Hungary on one of the possible means of not increasing the administrative cost of such a system. She expected that there would be further suggestions of this kind next year. As to the issue of extension of the system, she supported the statement by Venezuela and favoured extending the system to products other than wines and spirits.

65. The representative of Chile reiterated his delegation's position contained in the proposal that it had submitted jointly with the United States, Japan and Canada. He recalled that the Council's current mandate under Article 23.4 only concerned wines and spirits.

66. The representative of Cuba reiterated her delegation's view that the proposal submitted by the European Communities seemed the most satisfactory to address the issue. She also reiterated Cuba's opinion that the multilateral system for notification and registration should be extended to other categories of products with a view to ensuring that the interests of all Members would be fully served.

67. The Chairperson proposed that the Council take note of the statements made and agree to revert to the issue at its next meeting in the light of the outcome of the Seattle Ministerial Conference.

68. The Council so agreed.

J. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)

69. The Chairperson said that, at the previous meeting, the Council had had a substantive discussion on this matter, both on issues relating to the implementation of the provisions of Article 27.3(b) and on the scope of the review mandated by Article 27.3(b). It had been agreed to continue this discussion at the present meeting, both in informal and formal sessions, and delegations had been asked to make substantive contributions in writing in advance. To date, two such written contributions had been received, namely from India and the United States. Several papers addressing the issues concerned had also been submitted to the General Council in the context of the preparatory process for the Seattle Ministerial Conference.

70. The representative of India introduced his delegation's paper (document IP/C/W/161). He said that the language of Article 27.3(b) indicated that the review should be a substantive one of the provisions themselves. In the view of India, the review should cover three distinct but overlapping issues: (i) whether and what form of exclusion from patentability should apply to plants and animals *per se*; (ii) the effect of protection granted to micro-organisms and non-biological and microbiological processes; and (iii) the *sui generis* system and its effectiveness. The information submitted to the Council to date was incomplete as it mainly related to developed country Members who had had to implement the Agreement already; it did not reflect the practice of all Members. On the patentability of life forms, there was the ethical issue of the extent to which private ownership could extend to life forms. More importantly, there was the appropriateness of the concept of intellectual property, as it was understood in the industrialized world, in the face of the wider dimension of rights to knowledge, their ownership, use, transfer and dissemination. His delegation's paper focussed on the oral traditions of India and he cited the example of the revocation of a patent granted for turmeric as an antiseptic. In that case revocation was possible because some of the knowledge had been written down but much other knowledge was not. India recommended that patents should be excluded for all life forms or, if that were not possible, at least for those based on traditional or indigenous knowledge and essentially derived products and processes, and insisted on disclosure of the country of origin of source knowledge or genetic resources and the obtaining of prior informed consent of that country, so as to ensure equitable benefit-sharing. On the issue of micro-organisms, there was a difference between inventions, which could be patented, and discoveries, which could not. His delegation's paper cited an example of a United States patent that had been granted for what India did not consider to be an invention, and therefore an improper subject for a patent. His delegation did not question that a man-made micro-organism, that is to say, a genetically-

engineered bacterium, met the requirement of patentability, but it questioned whether patents could extend to cell-lines, enzymes, plasmids, cosmids and genes. The negotiators of the TRIPS Agreement had not investigated these issues, and it contained terms on which even scientists could not agree. This should not be left open to future interpretation by panels. In any case, some inventions, even though micro-organisms, could be excluded from patentability for the reasons set out in Article 27.2. On the issue of *sui generis* protection, Article 27.3(b) clearly allowed other options for the protection of plant varieties, namely patents or a combination of patents and *sui generis* protection. This gave Members great latitude to develop an effective means of protection. In devising such a system, a country might be expected to take into account its own public policy objectives, including developmental and technological objectives, clearly recognized in the TRIPS Agreement, and also obligations that the country might have undertaken in the context of other international agreements. UPOV was like any other system: one could not assume that it was an effective system and that only other systems had to be judged on a case-by-case basis. Developing country Members were still developing their own systems of protection, which could differ from the UPOV models which many developed country Members had chosen when they implemented the TRIPS Agreement. The Council still had to wait and see what types of systems the developing countries would introduce. The International Undertaking on Plant Genetic Resources for Food and Agriculture was being renegotiated in FAO, and this could provide another model as well. The TRIPS Agreement did not specify criteria by which to judge whether a *sui generis* system was effective. India believed that effectiveness depended on the enforceability of a right within a national legal system. He emphasized that India's paper was a discussion paper and that the substantive review had only just begun. The Council could not assess implementation yet as most Members had not implemented the Agreement, due to the transitional periods. He would provide comments on the United States' paper later in the meeting.

71. The representative of the United States introduced his delegation's paper (document IP/C/W/162). Responding to concerns that Article 27.3(b) would allow the patenting of naturally-occurring lifeforms in countries that did not avail themselves of the exception, he said that these would not satisfy the criteria for patentability in the TRIPS Agreement because they would not be new nor involve an inventive step, and as an example he quoted section 101 of the US Patent Law which, although it did not except plants and animals specifically, excluded naturally-occurring substances. Some Members had referred to unspecified moral and ethical consequences of the patenting of lifeforms, but patents only gave their owners rights to prevent others from taking certain actions in relation to the patented invention, so that it was difficult to divine what harmful consequences were envisaged. In most countries, a patent for a pharmaceutical product or process did not give the patentee the right to produce and market the pharmaceutical, or the pharmaceutical product using the process. A separate process was used to determine the safety and efficacy of the pharmaceutical in question so that it could not be manufactured, marketed or used until the product had been approved. He recalled the intervention by the representative of Australia at the previous meeting, that countries did not address arms control by discussing the patenting of weapons, but by controlling arms themselves. Likewise, the moral and ethical consequences of inventions of lifeforms were better dealt with directly. Concerning plant varieties, the most appropriate level of protection was the 1991 Act of UPOV, but he did not suggest that it was the only means of protection. However, the work of the Council had borne out that there was a commonality of view that UPOV was an effective means of providing plant variety protection. The 1991 Act ensured that newly-developed varieties not covered by the 1978 Act could be protected. Delegations which had criticized UPOV on the basis that it would not allow farmers to replant seed had failed to note that UPOV allowed member countries to allow farmers to save seeds from their harvest for replanting on their own holdings. The synoptic tables of information provided by Members in the review that had been prepared by the Secretariat (informal document Job No. 2689) showed that the majority of Members who had provided information granted protection for plant varieties primarily through a system that complied with the 1991 Act of UPOV. In addition, some Members, including the United States, also provided protection through their patent systems. This was useful for Members still in the process of implementing the Agreement. Concerning access to genetic resources and traditional knowledge,

some delegations had suggested that patent applicants should identify in their applications the source of any genetic resources used in the development of their claimed invention as a means of ensuring benefit-sharing. Such a system would be impractical and not ensure that the contributors would share in the benefits that would flow from the commercialization of the invention. The most effective way to exercise those rights would be to require that parties seeking access to those resources enter into a contract with the entity granting access. Those contracts would spell out in detail the terms of access and of any benefit-sharing. This option had not received adequate attention, but would clarify rights and obligations at the outset, and help avoid misunderstanding and confusion. The United States believed that it was sound public policy to grant patents in all fields of technology, including biotechnology. It had encouraged the birth and evolution of an entirely new industry, which had brought about extraordinary developments in agriculture and public health, and this experience was transferable to all WTO Members.

72. The representative of the European Communities said that economic growth, social welfare and public health in the world benefitted from innovations. Access to knowledge and effective protection of intellectual property rights were key ingredients to stimulate research and development leading to economic expansion. The use of genetic resources, such as plants, animals and micro-organisms played an important role in this process, because they constituted the raw material for future innovative developments in a wide range of industrial sectors. While the agricultural sector appeared to rely exclusively on the use of genetic resources, large industries, such as the pharmaceutical sector, also depended quite considerably on genetic resources. The process of reviewing Article 27.3(b) of the TRIPS Agreement should be seen in this context. The discussions at the last Council meeting showed that beyond issues covered by the scope of Article 27.3(b) of TRIPS, several other issues had been addressed. He wished to comment on these matters, while emphasising that many of the issues raised by WTO Members in this discussion fell outside the scope of the review. Several Members had raised the issue of the link between environmental concerns and patent protection, in particular by referring to a possible conflict between the provisions of the Convention of Biological Diversity ("CBD") and the TRIPS Agreement. The CBD aimed to enhance biological diversity and the sustainable use of its components, and provided a multilateral legal framework relating to the sovereign right of states to regulate the access to and transfer of their genetic resources. His delegation was of the opinion that the CBD and the TRIPS Agreement were mutually supportive and that neither of them ran counter to the objectives of the other. Having said so, he also wished to state that his delegation was of the view that this matter did not fall within the scope of the review of Article 27.3(b). An important objective of the TRIPS Agreement was to promote effective and adequate protection of intellectual property rights, including by providing incentives to inventors through the provision of exclusive rights on a temporary basis. Intellectual property rights were instruments to ensure an adequate level of transparency and openness regarding all kinds of inventions, including those using genetic material. Without transparency, economic operators, research and development institutions and inventors could not benefit from the knowledge which could be derived from the use of genetic material in the innovative processes and activities. Innovative creations would be kept secret and non-available to the public because there would be no economic incentive to disclose them. This might lead to increased business secrecy and thereby develop an anti-competitive contractual environment. Furthermore, intellectual property rights were instruments, but not the only ones, used by providers of genetic material to obtain a commercial return from commercial operators depending on genetic material to develop new products. Some countries regulated the contractual relationship between providers and users of genetic material (access and benefit-sharing agreements). Patents could be used as an instrument between the parties to these agreements to secure remuneration to the provider country for the use of genetic resources on a long term basis. With the advent of modern technology the commercial use of genetic resources had become a fact of life. However, it had to be taken into account that genetic resources used in these products came from many sources: synthetic production, existing collections and natural origins from both developed and developing countries. In fact, the majority of genetic resources used to develop new innovations did not come directly from a "natural source provider", e.g. a developing country. There appeared to be no common understanding of the amount of genetic resources which were

provided directly from nature and used by commercial operators. The same applied for the commercial value of these resources. If a country provided for easy access to its genetic resources and a high level of intellectual property rights for new inventions, it might attract foreign investors preferring to use natural genetic material instead of synthetic production. Intellectual property rights did not aim to regulate the production and distribution of, or access to, genetic resources. Neither did they regulate the terms and conditions for bioprospecting. These were matters for regulation by national legislation. The illegal use of genetic resources (biopiracy) could best be tackled through effective national legislation such as criminal and civil laws and enforcement systems. The establishment of easily accessible and transparent application systems for access to genetic resources were equally important to control the transfer of genetic material, and thus to counter illegal exploitation. Many Members at different levels of development had already established or were in the process of elaborating transfer and access legislation. He highlighted the importance of co-operation on mutually agreed terms between providers of genetic material and the research-based industry. This would enable both parties, through monetary compensation and other means (knowledge sharing, education programmes, etc.) to benefit from the sustainable exploitation of a country's resources. Many companies from the industrialised world were already engaged in such co-operation and had committed themselves, on a long-term basis, to provide training, know-how and common sharing of benefits, in return for access to resources.

73. Continuing, he said that biodiversity in the process of creating new inventions did not raise only commercial aspects. Ethical and moral concerns might also be addressed and considered carefully, and different societal values might be taken into account. A fair balance should be reached between these concerns and the need to provide for a sound protection of intellectual property rights. Intellectual property rights helped to promote new innovations which contributed to combat diseases, hunger and other miseries. To find a fair balance, Article 27.2 of the TRIPS Agreement provided for exclusions from patentability. In addition, Article 27.3(b) gave Members the right to decide, on a national level, whether or not plants, animals and essentially biological processes should be excluded from patentability. However, Article 27.3(b) only dealt with specific exclusions from patentability. General exclusions were covered by Article 27.2. The synoptic tables prepared by the Secretariat (informal document Job No. 2689) showed the balance reached by the majority of Members providing information in the review. They had provided for patent protection of plants and animals as well as for plant variety protection schemes under the UPOV provisions, with limited exceptions. While the European Communities and their member States, following very extensive debates, had established the scope for the legal protection for biological inventions in Europe, it was up to other WTO Members to implement the provision as they saw fit. They should find a balance between legal protection and their ethical, moral and other societal values. Several WTO Members had asked the question whether or not the existing intellectual property rights regime was effective to protect traditional knowledge. His delegation considered that there was a need to refine and develop a common understanding of the concept of traditional knowledge and its link to the existing intellectual property rights regime, for instance by clarifying the definition of protectable subject matter, ownership relations and rights conferred. In respect of these issues, the WTO should benefit from the work that was already underway in WIPO. However, he stressed that this was not an issue which should be dealt with in relation to Article 27.3(b).

74. Continuing, he said that Article 27.3(b) obliged WTO Members to provide for a *sui generis* protection system and/or patent protection for plant varieties. His delegation was of the view that the 1991 Act of UPOV created the most effective and complete protection scheme for new plant variety innovations. Not only big international companies, but also traditional breeders could, for a relatively small sum, register their new creations and thus ensure the economic benefits derived therefrom. The 1991 Act of UPOV also made it utterly clear that farmers had a privilege to freely use propagated seed the following season on their own holdings without having to pay licence fees. The information-gathering exercise carried out by the Council had shown that implementation of a *sui generis* protection system similar to the UPOV system was preferred by those Members responding to the review. His delegation considered such UPOV-like systems "effective" in accordance with Article

27.3(b) and would urge Members who did not already adhere to this Convention to do so. Some WTO Members had raised concerns regarding the deadline for implementation for setting up *sui generis* protection for plant varieties. This should be done before 1 January 2000. His delegation recognised the difficulties in creating *sui generis* protection systems and the administrative system for handling these rights, and considered that the most efficient and rapid way to implement Article 27.3(b) would be to rely on existing harmonised plant variety systems with possible adaptations to ensure special national needs. In his delegation's view, regarding the issues which were directly covered by the review of Article 27.3(b), the following conclusions could be drawn. First, there appeared to be a large degree of similarity among developed country Members on the way they implemented the provisions of Article 27.3(b) in their patent laws; he recalled that the European Communities provided for the exclusion of plant varieties and animal varieties and a number of exceptions to patentability related to life forms, but provided for the patent protection of plants and animals if they fulfilled the normal requirements for patentability. Second, Members responding to the information-gathering exercise seemed to agree to a large extent that the UPOV system for the protection of plant varieties established an effective *sui generis* protection for plant varieties as required by Article 27.3(b); protection for plant varieties could also be provided by patents. Third, his delegation drew the conclusion that Article 27.3(b), as it stood, provided the necessary flexibility for Members in implementation; the review of Article 27.3(b) could be closed. Fourth, with regard to the specific protection of plant varieties, in his delegation's view, in the future it could be considered appropriate to clarify the phrase "effective *sui generis* system" by including a reference to the UPOV Convention. With regard to the implementation of Article 27.3(b) by developing countries, his delegation looked forward to receiving and examining the relevant legislation as of the beginning of 2000 at the latest.

75. The representative of Kenya, speaking on behalf of the African Group, said that the Members on whose behalf he spoke had been following the discussions on this item very closely. He referred to their submission to the General Council (document WT/GC/W/302), which he requested be considered a formal submission to the TRIPS Council as well.⁶ He lent his full support to the submission made by India. He then highlighted some of the salient features of the African Group's own submission. On the scope and nature of the review, the mandated review was one of the substance of the subparagraph itself. This was clear from the wording of the last sentence of Article 27.3(b). On the substance of the provisions, the review should seek first to clarify the criteria or rationale for deciding what could and could not be excluded from patentability under Article 27.3(b). This related to the implicit distinction made between plants and animals (which might be excluded from patentability) on the one hand, and micro-organisms (which might not be excluded) on the other. Another distinction was made between "essentially biological processes" (which might be excluded from patentability) and "microbiological processes" (which might not be excluded). Second, the review should confirm that the concept of "effective protection" as it related to the protection of plant varieties, either by patents, an effective *sui generis* system or a combination thereof, left the discretion to Members to decide the effectiveness of their implementing legislation in achieving their broad economic objectives in a manner consistent with the TRIPS Agreement. The achievement of such economic objectives required an optimal combination of instruments including those contained, for instance, in the CBD and other available international instruments. These objectives included preservation of biological diversity, farmer's rights, the environment, as well as ensuring food and health security. It was in this light that the African Group viewed the need for harmony between the CBD and the TRIPS Agreement. On the architecture of the Agreement, his delegation was concerned that deliberations on this subject might not be fruitful and comprehensive until developing countries had had time to gain sufficient experience with the implementation of the provisions, both of the Agreement as a whole and of the provisions of Article 27.3(b) in particular.

76. The representative of Norway said that his delegation was of the opinion that the TRIPS Agreement and the Convention on Biological Diversity as well as other multilateral agreements,

⁶ Distributed subsequently as document IP/C/W/163.

specifically in the environmental field, should be mutually supportive. All these international instruments should support the sustainable use and exploitation of resources. Thus, all Members should be aware of the principles under the CBD, when establishing their own regimes for the protection of intellectual property. In this regard, he noted the wording of Article 16.5 of the CBD. The obligation to ensure compatibility, among various international instruments also had to be kept in mind, i.e. when parties to the CBD reviewed their own national regimes for intellectual property rights and those of other Members. One important issue in this respect was whether the TRIPS Agreement provided for the necessary flexibility for Members to enact measures for the implementation of CBD obligations, e.g. measures to safeguard the traditional knowledge of indigenous and local communities, and the equitable sharing of benefits arising from such knowledge. On the question of patents and biotechnological inventions, Norway's experience, stemming back to the adoption of the Paris Convention for the Protection of Industrial Property, showed that a well-functioning patent system was of vital importance to innovation, economic growth and social welfare for citizens. At the same time, the patent system had demonstrated a great ability to adapt to the ever-shifting needs for the protection of technology in new areas. Norway strongly believed that the fulfilment of the TRIPS Agreement would foster the same experiences globally. At the present time, biotechnology was one of the most promising and increasingly important areas of research for the development of new products. In fact, technological progress was so rapid, that fundamental ethical, social and environmental values were sometimes neglected. Other complex issues, such as what constituted an inventive step and equity considerations, also confronted Members. These difficult issues would have to be considered both in relation to how far Members could go in accepting patents on lifeforms and in relation to the principle of benefit sharing. With regard to the former, Norway maintained a restrictive attitude, not only in relation to the patenting of plants and animals, but also of cells which could develop into plants and animals. His delegation had noted the proposals made in the review, including the proposal of Kenya, on behalf of the African group, which related to the issue of patentability of micro-organisms as well as to the patentability of microbiological processes for the production of plants and animals. Underlying the Kenyan proposal his delegation sensed a fundamental concern as regards the ethical aspects of the extent to which intellectual property rights should be granted as a result of man's ability to create or duplicate life forms. These aspects should form an integral part of the Council's discussion. They were difficult issues. During the forthcoming Round, Members were under an obligation to review the provisions of Article 27.3(b). During the review process it would be preferable not to alter the delicately balanced wording on the question of patentability in Article 27.3(b). In this context, the fact that developing countries had not yet been under an obligation to implement the TRIPS Agreement also had to be taken into consideration. As to the question of benefit sharing, both the interests of the providers of genetic resources and the users of such material had to be taken into consideration. In this context, Members had to ensure compatibility between the CBD and the TRIPS Agreement. In this regard, he noted that India had proposed to incorporate a provision, which required the disclosure of the origin of the genetic resources and associated knowledge. He thought that this should be seriously considered. As to international companies which made use of indigenous genetic resources, they should, through appropriate agreements, ensure that the people of those societies, from where substances and life forms originated, benefited from bio-patents. The current wording in Article 27.3(b) gave Members the option to establish an "effective sui generis system" for the protection of plant varieties, as an alternative to patents. If this option was the preferred one, it was the responsibility of each and every Member to create a system which gave sufficient protection for the parties involved. As long as this was done, Norway could associate itself with Members who had expressed the need for flexibility in this regard. He therefore saw no need for a more formal or explicit reference to international agreements on plant breeders' rights in order to clarify what was meant by an effective system.

77. The representative of Australia, commenting on procedural issues, said that it was an open question whether the Council should have a mandate to continue its work on this issue in future meetings and, if so, what the scope of that mandate should be, for example whether it should simply review national mechanisms, or seek to formulate recommendations concerning implementation and interpretation of the language in the Agreement. There were broad unsubstantiated claims, for

example, on a supposed conflict between the TRIPS Agreement and the CBD or on a lack of clarity as to the boundary between micro-organisms and other organisms, but there had been no discussion of the extensive material tabled in the Council in the review process on national provisions implementing this Article. Many developing country Members were still in the process of implementation and there might be many lessons to learn from their laws once they had been notified. Australia considered it appropriate for the review of the provisions of Article 27.3(b) to be extended to all Members obliged to implement by January 2000; otherwise, any conclusions that could be drawn might be weighed in favour of the Members who had implemented and provided information earlier. This review should proceed in conjunction with the Article 71.1 review of overall implementation, which was the process already established to consider how the TRIPS Agreement functioned and, if necessary, to provide the conceptual basis for any future discussions as to how the Agreement might develop further. Without that conceptual basis, it was difficult to see how further substantive work could be justified, particularly if it meant overriding the existing processes mandated by the Agreement.

78. The representative of Thailand said that, on the issue of scope, Article 27.3 called for a review of the provisions of its subparagraph (b). This required more than an information-gathering exercise on how each Member applied or implemented its provisions, but rather an examination and discussion of the basis and content of the exception that it contained, ultimately leading to its modification, if necessary. As things currently stood, the Council was not at liberty to exclude such a discussion for at least two reasons. Firstly, this was one of the most high-profile and controversial issues handled by the WTO, which entailed serious ethical, economic and developmental consequences. It was therefore appropriate that in the built-in agenda Members be required to continue discussing the scope of the exception, and it would be surprising if they were not. Secondly, the text of the provision did not call for a review of the application or implementation of subparagraph (b), but for a review of the provision itself. Other Articles in the TRIPS Agreement, such as Articles 24.2 and 71.1, referred to reviews of the application or implementation of all or parts of the Agreement but Article 27.3(b) did not: it went further, and Members had to give full faith and credit to its text. Turning to the substance of this review, his delegation supported the view expressed by the representatives of India and others and could not accept any narrowing of the exception to patentability contained in Article 27.3(b), or that any lifeforms had to be patentable, beyond what was already required. Where Members chose not to take advantage of this exception and allowed patents to be granted in respect of plants and animals, certain consequences had to flow where these patented inventions were developed using genetic resources from another Member's jurisdiction. Article 27.3(b) should expressly recognize the right of Members to control access to and use of genetic resources from within their jurisdiction, and to receive compensation for revenue derived from inventions using those resources. Turning to plant varieties, he said that so long as Article 27.3(b) required Members to provide protection for plant varieties, the choice of system for that protection that was currently available under Article 27.3(b) had to remain open, so that each Member could choose a patent system, an effective *sui generis* system or a combination of both, and develop it in furtherance of the objectives and principles of the Agreement contained in Articles 7 and 8, in a manner consistent with the Agreement. The meaning of the word "effective" in the phrase "effective *sui generis* system of protection" would be greatly improved by clarification. Although the Agreement already allowed general exceptions to exclusive rights, his delegation saw merit in adding express provisions permitting specific exceptions to plant variety rights. These exceptions should, as a minimum, cover farmers' rights, in particular to sow and share harvested seed of a protected variety; communities' rights; and compulsory licensing where plant varieties were not available on reasonable commercial terms, in times of national emergency and in cases of public non-commercial use. The provision should also put it beyond doubt that Members were under no obligation to protect all varieties in the plant kingdom. These provisions would clarify that the many Members who applied these exceptions and limitations nevertheless complied with the requirement of an effective *sui generis* system of protection. Finally, Article 27.3(b) did not refer to UPOV, much less to any particular Act of that Convention, and his delegation would not accept any attempt to add such a reference. Members were free to choose a model other than UPOV and should remain free to do so. He referred to the United States' paper on Article 27.3(b), which stated that

systems other than UPOV would have to be judged on their merits, case by case.⁷ Naturally, UPOV also had to be judged on its merits and there was no authoritative interpretation which guaranteed that UPOV satisfied the requirements of Article 27.3(b).

79. The representative of South Africa said that his delegation supported the submissions by India and by Kenya, made on behalf of the African group, which reflected a convergence of views. First, in the view of his delegation, this review was one of the substance of the provisions of Article 27.3(b). The review should clarify the criteria and rationale for what could and could not be excluded from patentability. The review should also clarify the discretion for Members to decide what constituted effective protection for plant varieties. Members were seeking to find a suitable balance between patents and other rights. He had listened with interest to the example of turmeric. Many developing country Members were concerned that their products and processes might not be capable of industrial application, as required by Article 27.1, because they were based on traditional knowledge. They therefore needed to find alternative forms of protection. South Africa was a member of UPOV and had a highly developed agricultural sector. It therefore sought to use some of the options provided by UPOV, but did not exclude the possibility of using other instruments, such as the CBD. In response to suggestions by other Members, his delegation objected to any attempt to incorporate UPOV in Article 27.3(b).

80. The representative of Singapore said that, concerning the scope of the review, the Council should not *a priori* exclude anything from the review. If problems had arisen in practice, these should be discussed. This might lead to clarification and satisfactory resolution. India's paper had raised interesting questions which the Council should try to answer. For example: was there an internationally accepted view as to what constituted a micro-organism? If not, the Council should examine what could be generally accepted. India's paper had also raised the question of the patentability of biological material, namely cell-lines, enzymes, plasmids, cosmids and genes. He acknowledged difficulty in understanding these terms and suggested that the United States or European Communities' delegations could assist in explaining them. India's paper suggested that the patenting of micro-organisms could be left to national policy. He suggested that the Council attempt to reach an understanding on issues that fell within the scope of the TRIPS Agreement in an effort to harmonize approaches. This was important because many countries were involved in biotechnology, both agricultural and pharmaceutical, and they could not be disregarded. It would be better to have international rules than differing national rules. The United States paper had referred to micro-organisms, such as unicellular organisms, bacteria and yeast. He suggested that the United States delegation clarify the question raised by India in this regard. The language of Article 27.3(b) offered flexibility as to the choice of a system to protect plant varieties. He agreed with the United States that Members' respective systems had to be examined case-by-case and was hesitant about requiring a particular Act of UPOV as the model for implementation. The number of speakers on this agenda item indicated the importance of this issue. He would provide more detailed comments at a later stage.

81. The representative of Switzerland said that her delegation had not kept silent on this issue because of lack of interest. It had done so for two reasons. Firstly, the issue was still at an early stage of discussion: even industrialized Members first had to analyze the situation, from an objective and factual perspective. Even for these Members, absorbing the subject-matter and its complexity required time. The Council had spent more than two years reviewing legislation and was only at the beginning of a fact-finding exercise. Secondly, the TRIPS Agreement was a minimum standards agreement which allowed for transitional periods because the negotiators were aware of the problems of structural adjustment in developing country Members. Those for whom the transitional period expired on 1 January 2000 had first to implement the minimum standards, and then their legislation had to be reviewed, which would require time. As the developed country Members had needed time to digest the material, this applied *a fortiori* to the developing country Members. She agreed with the

⁷ Document IP/C/W/162, page 4.

Indian delegation that a fact-finding exercise would not give a complete picture because it only concerned developed country Members, but she found this logical as the developing country Members had not yet implemented the Agreement. In order to obtain a complete picture, developing country Members had to be included once their legislation had been reviewed. Her delegation supported the views expressed by the United States and the European Communities and by Australia at the previous meeting. The explanations given had been objective and were useful. The issue of traditional knowledge was not new; those who had participated in the discussions in the context of the CBD and FAO knew that it was a complex subject with ramifications affecting the structural, administrative and cultural organization of a country, for example, its system of land ownership and the notion of collective rights. For Switzerland, this involved an important socio-economic right: whether it involved an intellectual property right was the question raised in these international fora and her delegation had welcomed the explanations from those countries which had created a new, operative and effective category of intellectual property right. The work in these fora had to be taken into account, as did the work of WIPO which was examining traditional knowledge. Switzerland attached great importance to the concerns raised by developing country Members and was trying to find operational solutions in the framework of the CBD and the FAO. In the CBD, Switzerland had proposed draft voluntary guidelines on the subject of access to genetic resources and benefit-sharing, with the support of economic operators and research institutes and on the basis of voluntary agreements. Wherever responses could not be found in the framework of the CBD or FAO, imaginative solutions should be looked for. For example, the Indian delegation had cited examples of problems that had arisen with regard to traditional knowledge, such as in relation to turmeric and neem, in particular the important problem of the cost involved in patent revocation procedures. One possible solution was the creation of a database managed by WIPO in cooperation with organizations which collected traditional knowledge of communities, in order to facilitate the examination of the novelty of claimed inventions. Rather than the creation of a new intellectual property right, she would propose, instead, to use existing intellectual property rights, such as trade secrets, trademarks (these could, for example, be used for turmeric, and medicines such as St. John's wort), patents (wherever a local community could add an inventive step), plant variety rights and geographical indications. Ignoring these possibilities denied holders of traditional knowledge access to instruments proven to be effective for generators of intellectual property in industrialized countries and several developing countries. There was a whole range of solutions available on this subject.

82. Continuing, she referred to the representative of the United States, who had given an exhaustive statement on the issue of *sui generis* protection, to which she wished to add just one comment. Apart from literal reading of the Agreement, it should be noted that the drafters had not incorporated a reference to UPOV because of the limited geographic coverage of that Convention at the time of the negotiations. It had already been difficult for some parties to accept a reference to the Paris Convention. However, her delegation was ready to review any effective *sui generis* system developed by a Member and the review of the Agreement in the year 2000 would be a suitable time to do this. The objective of the TRIPS Agreement was not to deal with the protection of intellectual property in each and every detail. It would be dangerous to consider it an exhaustive document. There were specialists in other fora examining the issues involved not only from an intellectual property perspective. Lastly, she referred to a specific case in which a company had withdrawn a patent application made in respect of terminator gene technology. In her view, this represented a defeat for the opponents of the patent system, because the technology could now be used by anyone without surveillance. The usefulness of the patent system lay, among others, in the transparency it provided: technology claimed to be new could be tracked and if necessary challenged.

83. The representative of Malaysia said that his delegation shared many of the views expressed by the representatives of Thailand and Singapore. Firstly, he emphasized that the scope of the review covered the provisions themselves and not just their implementation. Secondly, UPOV was not the only acceptable means for the implementation of the provisions on plant variety protection. The Secretariat's background note (WT/CTE/W/125) had shown that some Members, such as the Members of the Andean Community and Costa Rica, had different models. Thirdly, there was a need to

examine the compatibility of the TRIPS Agreement with the CBD. Although the United States and the European Communities had expressed a different view, Malaysia and other Members, as well as civil society, believed that there were incompatibilities between the two. The traditional knowledge of people in developing countries had been cast aside in favour of multinational corporations. Finally, he agreed with the point in the United States' paper that patents gave owners the right to restrain others from taking certain actions, but did not give the owners the right to exploit the claimed inventions themselves. However, he recalled that the United States had never made such a statement in the discussion on non-violation complaints, although many Members were concerned that the non-violation remedy could be used to prevent them from implementing public policies which restricted or prohibited the exploitation of intellectual property rights. He invited the United States to reassure Members by clarifying that it held this view with respect to non-violation complaints as well as the patenting of biotechnology.

84. The representative of Paraguay offered preliminary comments to the Indian and United States' papers and drew attention to a joint proposal made by Cuba, Honduras, Paraguay and Venezuela to the General Council (document WT/GC/W/329 of 20 September 1999) on the protection of intellectual property rights in traditional knowledge.⁸ His delegation, in view of text of the Agreement, believed that the treatment and analysis of the establishment of a *sui generis* system or register of traditional knowledge should be handled under Article 71 and not under Article 27. It would not be opportune to continue to discuss traditional knowledge under this agenda item. Responding to the intervention by the representative of Switzerland, his delegation believed that, more than taking account of the work carried out in other fora, such as UNESCO and WIPO, the TRIPS Council and the WTO should take note of the economic implications of the commercialization of goods which contained ample traditional knowledge, and broaden the application of the Agreement and its protection, as had, for example, also been proposed for electronic commerce and other subjects. His delegation reserved the right to make more detailed comments on this issue, given the limited time that there had been to analyze the various proposals.

85. The representative of Peru said that Bolivia, Colombia, Ecuador, Nicaragua and Peru had made a joint proposal on the protection of traditional knowledge of local and indigenous communities for the Third Ministerial Conference (document WT/GC/W/362 of 12 October 1999) and requested that it be distributed to the Council for TRIPS.⁹

86. The representative of Venezuela, like the representative of Paraguay, referred to the joint proposal on traditional knowledge made by Cuba, Honduras, Paraguay and Venezuela to the General Council (document WT/GC/W/329 of 20 September 1999). This proposal was completely compatible with the joint proposal made by Bolivia, Colombia, Ecuador, Nicaragua and Peru and his delegation could share all the concepts that it contained. He wished to avoid confusion between access to genetic resources and the protection of traditional knowledge. Access to genetic resources was more linked to biodiversity, the CBD, and the preservation of the environment. The legal or illegal acquisition of genetic resources was also an important issue, for which perhaps the method of identifying the source material for patents was especially useful. This was also related to databases of genetic material which had been studied in the FAO. However, the issue of traditional knowledge was fundamentally different because it concerned added value, which could be recognized as an intellectual property right, as had been in some countries, although not in the majority of countries. It had added value with particular characteristics, which could affect novelty, whether something was in the public domain, and whether something was considered an invention or a mere discovery. Secondly, there could be inventions with a handicraft application, but not a true industrial application, and this was important for many developing countries. His delegation believed that a *sui generis* system was necessary for various reasons: first, traditional knowledge had certain characteristics that were peculiar to it. The holders were typically collectives, not individuals, whilst existing intellectual

⁸ Subsequently also distributed as document IP/C/W/166.

⁹ Subsequently also distributed as document IP/C/W/165.

property regimes were basically directed toward natural or legal persons. Moreover, these groups usually had no legal personality, although they acted collectively. The subject-matter was very broad, and could involve medicinal practices, construction techniques, folklore, literature, music, dance, design, etc. Many countries had begun to protect this subject-matter by first compiling inventories for registers reflecting this knowledge and its diversity, trying to specify and determine them. Another reason why current intellectual property systems, such as the patent system, were inapplicable, was that traditional communities often did not have scientific methods, but rather tradition and trial and error over time. He quoted the joint proposal made by Bolivia and others: "Over time, the scope of intellectual property has been expanded by recognizing new subject matter of protection. This broadening has taken place by the inclusion of special (*sui generis*) systems of protection or through the widening of the traditional categories of protection so as to cover new subjects. In recent decades, the laws of WTO Members as well as international instruments have recognized as new subject matter of protection, for instance, plant varieties (1950s and 1960s), biological material, plants and animals (1970s and 1980s), layout-designs (topographies) of integrated circuits (1980s), software (1980s and 1990s) and databases and compilations of data (1980s and 1990s)."¹⁰ The creation of a new system was therefore nothing extraordinary. It was necessary to protect the traditional knowledge of local and indigenous communities. Many countries, including Venezuela, were currently having constitutional problems, but they had cultural diversity which should be respected, conserved and maintained. The intellectual property system could deliver results which, although they might not be magic or marvellous, would be useful and appropriate to this need.

87. The representative of Ecuador noted that many delegations had made submissions on the scope of the review of Article 27.3(b). This subject gave rise to many concerns for all Members but especially developing country Members. In the view of Ecuador, the review was not simply a question of this provision's application, but rather one of its substance, involving a detailed examination which could eventually lead to a substantive modification of the provision. His delegation agreed with the criteria presented by many other delegations for a framework for this review, as reflected in some respects in the papers of Kenya, on behalf of the African Group, and of India. In this context, it seemed particularly relevant to clarify the criteria as to what could or could not be patentable subject-matter in the light of Article 27.3(b) and other points with implications from a conceptual perspective, for example the distinction between essentially biological processes and microbiological processes. Ethical and moral aspects also had to be given careful consideration, given their growing impact on activities related to Article 27.3(b) and with intellectual property rights in general. Ecuador was a co-sponsor of the proposal on the protection of traditional knowledge of local and indigenous communities to which the representative of Peru had referred, which required a comprehensive and effective multilateral framework that permitted them to safeguard their economic, commercial and cultural value. The majority of this traditional knowledge consisted of innovations, creations and cultural expressions generated or preserved through communication from one generation to another over time, a fortune of inheritance which was closely linked to the application of genetic, biological and natural resources and equally with the question of the preservation of the environment. In this framework, he underlined that Ecuador attached great importance to the harmonization of the TRIPS Agreement with the CBD, given that this would contribute decisively to the completion of a multilateral legal framework which would assist in a just and equitable sharing of the results of investigation and development as well as the benefits of their commercial use and of other kinds of genetic resources. He took note of the suggestion of the representative of Switzerland on the creation of a database that could be administered by WIPO, on which he would reflect and comment at the next meeting.

88. The representative of Pakistan welcomed the substantive debate that had begun. He suggested that future discussions focus on specific issues which had been raised, according to a list which the Secretariat would prepare, cross-referenced to the written submissions that had been received. These issues should include, first, the definition of micro-organisms and the criteria or

¹⁰ See document WT/GC/W/362, paragraph 2.

rationale for deciding what could or could not be excluded from patentability, as identified in the Kenyan paper in paragraph 1.2.1, in particular the distinction between essentially biological processes and non-biological processes. Second, the review should examine what constituted "effective" *sui generis* protection, and whether systems other than the 1991 Act of UPOV were acceptable. Third, on the issue of access to genetic resources and traditional knowledge, the United States' paper suggested that the most effective means to address this issue was by contracts between those granting and obtaining access to resources, whilst other delegations suggested that the source of material should be disclosed in patent applications. These suggestions were not mutually exclusive and there might be others. He sought clarification from the United States of its suggestion, and stated that his delegation did not believe it would be ineffective to require disclosure of the origin of genetic resources in patent applications, since the national authorities in places of origin could be notified in order to verify that consent had been obtained. The United States' suggestion assumed that those national authorities were duly contacted prior to obtaining access of genetic resources, which was not always the case. Fourth, ethical concerns needed to be fleshed out further.

89. The representative of India noted that the substantive review of the provisions of Article 27.3(b) had begun. Commenting on the United States' paper (document IP/C/W/162), he recognised the benefits of biotechnology outlined, but pointed out that it brought with it the risk of lesser use, and hence possible extinction, of landraces (i.e. plant varieties) and thereby affected biological resource availability. Paragraph 8 of the paper listed biotechnological developments mentioned, but many were in fact based on traditional knowledge. As regards paragraph 9, which mentioned a significant portion of the research which was conducted by universities and federal laboratories, he wondered what was the public funding component of this research. He recalled that the representative of Switzerland had referred to Monsanto's withdrawal of its patent application, but other harmful technologies, such as those known as "GURTs", were also being patented, and his delegation was concerned that firms were making greater efforts to obtain technological protection than legal protection. In relation to paragraph 10, he wondered how many patent disclosures were actually sufficient to enable the invention to be replicated and how many were actually replicated to judge novelty or inventiveness before grant in patent offices. He said that 90% of the world's biological diversity resources were in developing countries and 97% of patents were granted to companies from developed countries. At least 50% of the pharmaceuticals that were developed would have to be based on these biological diversity resources, and this was the situation that Members had to face. He disagreed with the view that the CBD and the TRIPS Agreement were compatible: one talked of conservation of biological resources, the other talked of purely commercial exploitation without respect for community rights. These objectives were fundamentally different. One talked of sovereign and communal rights, the other talked of monopoly rights. He referred Members to India's submission to the Committee on Trade and Environment (document WT/CTE/W/65, dated 28 September 1997). Turning to the United States' suggestion of a material transfer agreement entered into by an inventor who used indigenous knowledge, he knew of such an agreement in Kerala in India. Whilst it was all very well to acknowledge that countries had sovereign control over their own natural resources, the problem was that it could not be enforced at national borders because genetic resources could be removed from a country so easily, by simply carrying germplasm or seed in a pocket. Therefore, prior informed consent was essential. Enforcement had to occur at the international level, due to the nature of biological resources. Where was the guarantee that a person removing genetic resources had obtained prior informed consent? An international arrangement requiring disclosure of origin was needed. Lastly, he commended the Norwegian submission which he had found the most balanced of all.

90. The representative of Mexico hoped to offer detailed comments on the written submissions in the future. Without commenting on the nature and scope of the review of Article 27.3(b), she said that Mexico had implemented its obligations under that Article which would enter into force for developing country Members on 1 January 2000. The Mexican patent legislation did not allow patenting of plants or animals, nor of plant varieties. Mexico had enacted a specific law for the protection of plant varieties which incorporated the substantive obligations of UPOV and had entered

into force on 26 October 1996. In 1997, Mexico had acceded to the 1978 Act of UPOV. Mexico believed that this legislation provided effective protection for plant variety rights in the terms of Article 27.3(b) and that it fulfilled the obligations as they currently stood. Her delegation wished to maintain the flexibility that the provision currently allowed, both preserving the possibility of excluding from patentability plants and animals and essentially biological processes, and the option of protecting plant varieties through an effective *sui generis* system according to national legislation and practice.

91. The representative of Canada underlined the importance of the work being undertaken in WIPO on traditional knowledge, which identified the issues of this new concept. Much traditional knowledge was not written down and presented unique challenges as to how to deal with it. The WIPO process should be the main focus of Members' actions in this area, as WIPO had the necessary expertise and a process that involved people from outside governments, which was important in this area. This issue did not involve simply trade and, consequently, it was appropriate to handle it in a body that did not have a trade focus. Not only internationally, but also domestically, in national administrations, the concept of traditional knowledge was still being explored. Turning to biotechnology, he said that an increasing number of agricultural and industrial products developed through biotechnology were being commercialized and traded. Countries at all levels of development were participating in this biotechnology trade. A number of WTO Agreements were relevant and, although a number of Members felt that the existing provisions were adequate to deal with biotechnology, others felt that clarification and elaboration were required. Canada had therefore proposed the establishment of a working party on biotechnology which would have as its focus a fact-finding exercise within a limited timeframe, which would identify all elements under the WTO Agreement that impacted upon biotechnology, in addition to the work of the Council for TRIPS.

92. The representative of Egypt referred to his delegation's submission to the General Council (document WT/GC/W/136) and supported the submissions made by Kenya and India. This review should consider the provisions of Article 27.3(b), and their possible amendment, and not just their application. He stressed the need for flexibility in the means of implementation, and the importance of leaving Members discretion in establishing an effective system consistent with their broad economic objectives. His delegation rejected any attempt to remove this flexibility. Time was required to allow developing country Members to gain experience with the implementation of this Article.

93. The representative of Japan said that his delegation's interpretation of the relevant provisions was somewhat different from that expressed by India in its paper. The differences had nothing to do with the obligation to implement the TRIPS Agreement which all Members, including Japan and India, had to fulfil. In implementing the Agreement, Members should follow established practice in international intellectual property circles. There was already great similarity in the relevant practices among Members, even though Members had legislated based on their own interpretation of the TRIPS Agreement. Japan had already ratified the CBD and therefore accepted its underlying objectives. However, the CBD and the TRIPS Agreement had different perspectives which were complementary and mutually compatible, so that they should be implemented and deliberated upon in separate frameworks. The CBD was aimed mainly at conserving biological diversity and the sustainable use of its components, whilst the TRIPS Agreement aimed to reduce distortions and obstacles to international trade. Moreover, the CBD was currently under elaboration. His delegation was therefore of the view that it was premature to address related issues in depth within the framework of the TRIPS Agreement. Thirdly, the concept of traditional knowledge of local and indigenous communities was not yet clearly defined and had no clear relationship to intellectual property. The possible inclusion of its protection in the TRIPS Agreement had therefore not reached a suitable stage for discussion in the TRIPS context. Finally, he noted that India was participating in the UPOV community, and that other developing countries, including Kenya, were already Contracting Parties to UPOV.

94. The representative of Brazil wished to highlight, without prejudice to the discussions undertaken at the General Council on the issues related to the review of Article 27.3(b) of the TRIPS Agreement, some of the useful contributions recently put forward at the WTO and other fora related to this issue. The documents circulated by the Kenyan, Indian and United States delegations presented many interesting considerations on the issues of the patentability of lifeforms, the relationship between the CBD and the TRIPS Agreement, and the protection of plant varieties, among other issues. On the issue of the patentability of lifeforms, the Brazilian Law on Industrial Property, along the same lines as the TRIPS Agreement, excluded from patentability the whole or parts of lifeforms other than transgenic micro-organisms that complied with the three requirements of patentability (novelty, inventive step and industrial applicability) and that were not mere discoveries. In this sense, Brazil considered that both the proposal of excluding patentability for all lifeforms, as proposed by India, and the proposal of extending patentability to all lifeforms, as proposed by the United States, would not be satisfactory for Brazil. The optimal outcome for Brazil on this particular issue would be to maintain the *status quo* of Article 27.3(b) as it was. On the relationship between the TRIPS Agreement and the CBD, Brazil was employing its best efforts to implement and enforce the TRIPS Agreement. At the same time, Brazil had the greatest biodiversity on the planet and was the first signatory of the CBD. As a Member with vested interests in both Agreements, Brazil considered that the TRIPS Agreement could be an important instrument to provide effectiveness to Article 8(j) of the CBD, thus ensuring that both agreements were mutually supportive. Furthermore, Brazil was of the view that the incorporation of some notions of the CBD in the TRIPS Agreement should not necessarily entail a reduction of the existing standards for protection of intellectual property rights. In fact, Brazil considered that a broader scope of protection that included elements of particular interest to developing countries would be highly beneficial for the strengthening of the intellectual property system under the WTO. As regards the issue of traditional knowledge, the United States' paper referred to the possibility of establishing contracts with the sovereign entity that granted access. In fact, Brazil was undertaking discussions at the national level on draft laws regarding this issue. However important such mechanisms might be, Brazil understood that they were not sufficient to provide a fair and equitable partition of the benefits between the users and owners of traditional knowledge. Consequently, developing countries were seeking stronger multilateral protection for such knowledge under the TRIPS Agreement. Several countries had mentioned the issue of the protection of plant varieties by an effective *sui generis* system. Brazil had established a Law on the Protection of New Varieties of Plants in 1997 and had recently adhered to the Convention on the Protection of New Varieties of Plants (UPOV). The *sui generis* protection in Brazil resulted in an effective protection of new plant varieties that had been developed in Brazil. Although Brazil considered that the UPOV system should always be considered as an important reference under the review of Article 27.3(b), the national experiences of other countries in developing other *sui generis* systems should not be excluded as important contributions to the discussions. In this connection, Brazil called the attention of Members to the background note on “*The Relationship between the Convention on Biological Diversity (CBD) and the TRIPS Agreement, with a focus on Article 27.3(b)*” (document WT/CTE/W/125), prepared by the Secretariat on a request from the Committee on Trade and Environment. This document provided an overview of existing international instruments relevant to plant variety protection, as well as country studies on the implementation of *sui generis* systems based on the UPOV Convention, and examples of legislation enacted to implement the CBD. Brazil considered that this paper was a useful input for delegations in further discussions on Article 27.3(b). In the context of the preparations for the next Ministerial Conference in Seattle, Brazil welcomed the proposals by several delegations to discuss the review of Article 27.3(b), particularly on the issue of the protection of traditional knowledge. The fact that a significant number of delegations like Venezuela, Peru, Ecuador, India, Cuba, Kenya (on behalf of the African Group) and Egypt, among others, had expressed their wish to include issues related to Article 27.3(b) demonstrated the importance of such discussions for developing countries. Among those proposals, Brazil would like to single out the joint proposal by Bolivia, Colombia, Ecuador, Nicaragua and Peru on the protection of traditional knowledge of local and indigenous communities (document WT/GC/W/362 of 12 October 1999), which presented sound arguments in favour of discussing the issue of traditional knowledge at the WTO. The paper suggested the establishment of studies, in collaboration with other

relevant international organizations, in order to issue recommendations on the most appropriate means of protecting traditional knowledge as an object of intellectual property rights. Brazil considered that such studies could be a first step for the better understanding of all Members on the benefits of the incorporation of traditional knowledge in the intellectual property system.

95. The representative of Korea said that his delegation intended to provide comments on the written submissions in the future. Traditional knowledge, as his delegation understood it, was a vague concept that had not yet been fully explored. The Council should wait for the outcome of the discussion in WIPO on the matter so as to benefit from its expertise in this area. The CBD and the TRIPS Agreement should be developed in a mutually complementary and supportive manner.

96. The Chairperson, summing up, said that the debate had been interesting and substantive. The discussions, which had not only touched on intellectual property but also on ethical, social and cultural areas, should be continued in the future. Many delegations had requested time to consider written submissions made, including in the context of the General Council. He suggested that the Council take note of the statements made and revert to this matter at its next meeting, taking into account the outcome of the Seattle Ministerial Conference.

97. The Council so agreed.

K. ARTICLE 64.3

98. The Chairperson said that, at previous meetings, the Council had had a substantive exchange of views on the matter which appeared in the minutes of those meetings. His informal consultations on the matter since the meeting of the Council of 7 and 8 July 1999 had shown that no consensus had been reached.¹¹ The Council had to send to the Ministerial Conference certain recommendations on this matter, but it was clear that no recommendations could be agreed upon. He suggested that the Council use its Annual Report (1999) to convey to the General Council what the situation on the matter was, for example by adding the following text to paragraph 26 of the draft Annual Report (1999) as contained in document IP/C/W/157: "Most Members have expressed themselves in favour of recommending to the Ministerial Conference an extension of the period referred to in Article 64.2 of the Agreement in order to allow the Council to further examine the scope and modalities of non-violation complaints under the TRIPS Agreement. One Member has made it clear that it is not in a position to join a consensus to that effect."

99. The representative of the Philippines said that he concurred with the Chair's summary but that, if the Annual Report were to take into consideration the positions of single Members, it should include an additional sentence that many Members were of the view that if there were no consensus on the scope and modalities, there was no room for non-violation and situation complaints as of 1 January 2000.

100. Following a discussion in the Council, the Chairperson proposed that a record of the debate in the informal consultations on this matter be included in the Minutes (see Annex) and the following two sentences be added to his earlier proposal for the Annual Report: "Some Members were of the view that, in the absence of a decision of the Ministerial Conference pursuant to Article 64.3, there would be no scope for non-violation complaints under the TRIPS Agreement. Some other Members were not in a position to share this view."

101. The Council agreed to proceed as proposed by the Chair.

¹¹ Various delegations requested their statement made during the informal consultations on 20 October 1999 to be reflected in these minutes. As suggested by the Chair, the discussion at the informal consultations is reflected as a whole in the Annex to the present document.

L. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

(i) Accessions

102. The Chairperson informed the Council that on 21 May 1999, the Government of Estonia had accepted, subject to ratification, the Protocol of Accession of Estonia to the Marrakesh Agreement Establishing the World Trade Organization, done at Geneva on 21 May 1999 (WT/Let/300). Paragraph 2 of the Protocol of Accession for Estonia (circulated in document WT/ACC/EST/30) incorporated the commitment given by Estonia in relation to intellectual property as reproduced in paragraph 126 of the report of the Working Party on the Accession of Estonia. This paragraph said that "the representative of Estonia stated that Estonia would fully apply all the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of its accession to the WTO, without recourse to any transitional period". Estonia had deposited its instrument of ratification and would become Member of the WTO on 13 November 1999. Consequently, it would be under an obligation to apply the provisions of the TRIPS Agreement as of that date.

103. The Chairperson suggested that, in accordance with the practice so far in respect of newly acceded Members, the Council add Estonia to the list of Members whose implementing legislation would be reviewed in the second part of 2000.

104. The Council so agreed.

105. The Chairperson informed the Council that on 6 October 1999, the Government of Georgia had accepted, subject to ratification, the Protocol of Accession of Georgia to the Marrakesh Agreement Establishing the World Trade Organization, done at Geneva on 6 October 1999 (WT/Let/312). Paragraph 2 of the Protocol of Accession for Georgia (to be circulated in document WT/ACC/GEO/33) incorporated the commitment given by Georgia in relation to intellectual property as reproduced in paragraph 161 of the report of the Working Party on the Accession of Georgia. This paragraph said that "the representative of Georgia stated that Georgia would fully apply all the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of its accession to the WTO, without recourse to any transitional period".

(ii) Dispute Settlement

106. The Chairperson informed the Council that since its meeting in July 1999, one new dispute settlement case concerning the TRIPS Agreement had been initiated under the DSU. As he had mentioned under Agenda Item D, the European Communities and their member States had requested consultations with the United States concerning Section 211 of the United States Omnibus Appropriations Act of 1998 (IP/D/20).

M. DRAFT ANNUAL REPORT

107. The Chairperson recalled that the draft Annual Report of the Council had been circulated in document IP/C/W/157 and updated on the day of this meeting in document IP/C/W/157/Rev.1. The changes were marked up in bold type but they were minor. The Chairperson proposed that the Council adopt this revised version, with the addition of the four sentences agreed under Agenda Item K, as its Annual Report (1999) and have it forwarded to the General Council.

108. The Council so agreed.

N. OTHER BUSINESS

(i) Statement by Malaysia concerning optical disk piracy

109. The representative of Malaysia said that his government, in its efforts to combat optical disc piracy, was contemplating optical disc (licensing and control) legislation to be tabled in Parliament. This legislation would further enhance IPR protection, which was now provided by the Copyright Act 1987. This legislation was aimed at licensing and regulating manufacturers of optical discs, with a view to preventing the manufacture of counterfeit copies of optical discs and the infringement of copyright works in optical discs. The legislation provided for stiff penalties for offenders, and it was Malaysia's intention to strictly enforce the provisions of this legislation. However, he said it was sometimes all too convenient to blame optical disc piracy or counterfeiting solely on the infringers of copyrights. In relation to this, owners of copyrights must also bear a certain responsibility to discourage piracy, such as by setting reasonable rates for their products or by including tamper-proof or copy-proof devices so that the motivating factor for piracy was reduced. It had to be stated that infringement of rights would be difficult to contain, so long as the environment remained conducive to it and the priority of copyright holders was on making profits with little regard for ensuring reasonable prices for their products in the international market. For Malaysia, as a developing country Member, the TRIPS Agreement was lopsided, as the onus was on governments to enforce rights and scarce resources had to be devoted to this task. Malaysia would continue to do so, but there had to be shared responsibility between governments and right holders. He reserved the right to revert to this issue at the appropriate time.

(ii) Dates of meetings of the Council in 2000

110. The Chairperson said that the Secretariat had pencilled in tentatively the following dates for meetings of the Council in 2000, which could be modified depending on the outcome of the Seattle Ministerial Conference. These were:

21 and 22 March

26 to 30 June

21 and 22 September

27 November to 1 December

(iii) Review under Article 71.1

111. The Chairperson informed the Council that this issue had been discussed informally. It had been noted that there were relevant proposals before the General Council which would be discussed at the Seattle Ministerial Conference. Therefore, he proposed that this item be included on the agenda of the Council for TRIPS at its first meeting in 2000, taking into account the results of the Ministerial Conference.

112. The Council so agreed.

ANNEX

Record of the Informal Consultations on the Issue of Article 64.3

(held by the Chair on 20 October 1999)

1. The Chairperson said that this was the last meeting of the Council before the end of the period during which the Council had to conduct the examination provided for in Article 64.3. According to Article 64.3, the Council shall "submit its recommendations to the Ministerial Conference for approval." Consequently, he had invited delegations, in the fax inviting them to this meeting, to consider what recommendations the Council might make on this matter. He was conscious that this was also the subject of debate in the General Council and that various delegations had made proposals regarding the extension of the moratorium under Article 64. However, it appeared that it would be useful to share views on this issue and, in particular, to see, in the absence of a consensus in the TRIPS Council, what follow-up could be given in the General Council, in preparation for the Ministerial Conference.
2. The representative of Canada said that the Council needed to continue its examination of the scope and modalities of the use of this remedy in the context of the TRIPS Agreement. His delegation proposed that the draft Annual Report note that Members of the Council for TRIPS submitted a recommendation to the Ministerial Conference that the Council for TRIPS take an appropriate period of time to examine the scope and modalities of complaints of the type provided for under this Article, followed by the original language of Article 64.3, to the effect that any decision of the Ministerial Conference to extend that period of time shall be made only by consensus and that approved recommendations shall be effective for all Members without further formal acceptance process.
3. The representative of India said that the Council had not examined substantively the scope and modalities of non-violation complaints, although many delegations had expressed their points of view, and there was an overwhelming majority opinion, but not a consensus, that non-violation complaints should not apply. Some, like Canada, suggested a further period to examine complaints of this type. India's view was that non-violation complaints should not apply to the TRIPS Agreement at all, and he referred to the rarity of such complaints under the GATT. The absence of a substantive examination in the Council meant that, as a minimum, the complaints should not apply immediately, although India would prefer that they were excluded indefinitely.
4. The representative of the United States maintained the views he had expressed in earlier meetings. It was clear from a plain reading of Article 64.3 that, in the absence of a consensus, the moratorium would expire on 1 January 2000. His delegation believed that it was appropriate for the moratorium to expire. He saw no scope for a recommendation from the Council to the Ministerial Conference.
5. The representative of Hungary said that, in light of the relative lack of clarity of the basic concepts, the complexity of the issues involved and the divergence of views as to the applicability and desirability of the remedy, further analysis was needed to forge a consensus on the recommendations on the scope and modalities called for by Article 64.3. In his delegation's view, recommendations by the Council and their approval by the Ministerial Conference was a precondition for the lapsing of the moratorium. In the course of preparations for the 1999 Ministerial Conference, the CEFTA countries and Latvia had proposed that the Ministerial Conference should clarify that the period in Article 64.2 did not expire until the period of work, including the approval by consensus of the Council's recommendations on the scope and modalities, was completed. The Council should make recommendations and, in order to give momentum to this work, it should be able to agree on setting a new and realistic target date by which time it could deal with and complete the necessary analytical work and consensus-building.

6. The representative of Singapore said that Article 64.3 required an examination of the scope and modalities, but the Council had not complied with that requirement. Members therefore needed to decide what to do, either in this Council, the General Council or the Ministerial Conference.

7. The representative of the Philippines said that from a strictly legal viewpoint his delegation agreed with the United States that the moratorium lasted five years and that it required consensus to extend it, failing which the moratorium expired *de jure* on 31 December 1999. However, even if the moratorium expired, Article 64.3 also required there to be consensus on scope and modalities, failing which there would be a *de facto* extension of the moratorium. Non-violation complaints could not apply without consensus on their scope and modalities.

8. The representative of Malaysia said that there was an emerging consensus to extend the moratorium, which one delegation did not join but should recognize. Referring to the intervention by the Philippines, he said that there had to be an extension of the moratorium until the Council had worked out the scope and modalities of the remedy. It was incumbent on the Council to recommend an extension of the moratorium, which was inevitable. The length of the extension, and whether it should be indefinite, could be worked out later.

9. The representative of Egypt referred to his delegation's proposal contained in document WT/GC/W/141. Egypt had proposed that the time-period under Article 64.2 be extended for an "adequate" time until such time as the complexity and implications of this remedy in the area of intellectual property was better understood and the possible scope and modalities were adequately addressed in accordance with Article 64.3.

10. The representative of Venezuela wished to support the view expressed by the representative of the Philippines. As a matter of international law, obligations had to be specific and determinable for them to be operative and performed. Without defined causes of action or even issues that could be addressed, a panel would have to decide in a specific case the scope and modalities of application, which would, from a technical point of view, be so difficult that, *de facto*, the moratorium would be extended.

11. The representative of Hong Kong, China said that this was not simply a matter of drafting the Council's Annual Report. Rather, Article 64.3 provided that the Council "shall" determine the scope and modalities. It had not fulfilled that mandate. He reiterated his delegation's strong support for Canada's proposal.

12. The representative of Pakistan noted that there appeared to be no consensus on an extension of the moratorium, so that it would lapse. He recalled that the Member which had stated that it would not join such a consensus had said at the July meeting of the Council that, in the absence of a decision by the Ministerial Conference, panels themselves would interpret the provision in the context of particular disputes. His delegation did not believe that this was a healthy way to address this issue. The Council for TRIPS would be avoiding its responsibility by not addressing the scope and modalities, so that one could wonder what a panel might decide. He urged the Member that would not join the consensus to reconsider its position carefully. It was possible that the General Council would take some action on the matter in its preparations for the Ministerial Conference. The Annual Report could reflect the factual situation and communicate that to the General Council, or the Council for TRIPS could make its best effort to resolve the matter and agree on an extension to conduct a review of the scope and modalities. He saw no other option.

13. The representative of Norway said that the Council should try to solve this issue without going into the legal question of how to interpret the requirement of examining the scope and modalities. His delegation would support an extension of the moratorium. It was difficult to decide how the non-violation remedy would be an effective remedy under the TRIPS Agreement or how it would have real implications for the rights and obligations of Members. The Council should embark

on analysis as required by Article 64, which it had not yet done. Norway would not object to a non-violation remedy available in respect of the TRIPS Agreement, mainly because it did not think that this would make any difference as to rights and obligations.

14. The representative of the European Communities doubted whether this problem would be solved at the present meeting. From a procedural point of view, the Council had not undertaken an in-depth examination of what the scope and modalities of non-violation complaints might be in the context of the TRIPS Agreement. It was not wise to put non-violation complaints to a panel without any guidance from the Council. On the other hand, there was a clear provision in Article 64.3.

15. The representative of Mexico said that her delegation had many doubts about the applicability of the non-violation remedy in the sphere of the TRIPS Agreement. There was clearly a problem of the operability of the remedy. The Council had not completed the mandate it had to examine substantively the scope and modalities for non-violation complaints, nor the complex implications that would derive from their application in the framework of the TRIPS Agreement. As a result, the Council did not yet have a clear idea of what would be the scope and modalities. The substantive problem was how this Article would apply in a case before a panel, if there were no clear definition of the scope and modalities of non-violation complaints. According to the DSU, a panel could not add to nor diminish the rights and obligations of the Members nor, by the same token, could it create or define the said scope and modalities of non-violation complaints. The Council first had to conduct a full examination and, when it had a clearer idea of the definition of this remedy, it could consider making this Article operative. It was therefore necessary to extend the moratorium.

16. The representative of New Zealand said that there was an emerging consensus that the Council had not yet had an adequate opportunity to examine the scope and modalities for non-violation complaints in relation to the TRIPS Agreement. This was an integral part of Article 64.3 and it was therefore necessary to extend the moratorium, so that Members could understand how this *sui generis* remedy could or should apply to the TRIPS Agreement. He echoed the comments of the representative of the Philippines that, if the Council could not agree to an extension, then the plain reading of the provision meant that the moratorium would end, but that did not prevent the Council from examining the scope and modalities, lest a dispute settlement panel be left to determine the scope and modalities. Members could do better than that; they should be able to determine from their own perspective how this remedy could apply.

17. The representative of Ecuador agreed with other delegations that had expressed their concerns about the application of this remedy to the TRIPS Agreement. A majority of Members wished to extend the moratorium and he asked the Member who had opposed such an extension what exactly were its arguments for opposing what the other Members were seeking. These arguments had not been sufficiently clear or convincing to understand the basis of its position. If it was afraid of setting a precedent for future moratoria, it should state so clearly. If the Council for TRIPS was unable to make a recommendation, it would pass the issue to the General Council.

18. The Chairperson said that Members had to tackle problems which were substantive in nature, but procedural matters would also need to be considered. Without wanting to sum up the discussion, he said it was clear that, firstly, there was no consensus and, secondly, the Council had not complied to the letter with the requirement in the TRIPS Agreement in this respect. At the same time a large majority of delegations were in favour of an extension of the moratorium and had made pronouncements to that effect.

19. The representative of India said that, to have a meaningful discussion in the formal meeting, it would be useful to have a few examples of the cases which the proponents of the proposal to end the moratorium envisaged.

20. The representative of the United States said that he had already given his delegation's view on the proposal to engage in a discussion on hypothetical situations where non-violation claims might be appropriate. He did not feel that it would be a productive course for the discussion and he was not prepared to provide such examples. While he appreciated the concerns expressed by many delegations, he looked forward to further discussions in the formal meeting, but, like India, he too felt that these might well follow the same course as the present discussion.

21. The Chairperson said that, if the matter could not be solved within the Council and a recommendation was not sent to the Ministerial Conference, then the matter would have to be taken up in the General Council. He called upon Members to consult each other before the formal meeting as to whether the issue could not be solved in the TRIPS Council rather than in the General Council where the concerns would not relate only to intellectual property.
