

**Council for Trade-Related Aspects
of Intellectual Property Rights**

MINUTES OF MEETING

Held in the Centre William Rappard
from 27 to 30 November and 6 December 2000

Chairperson: Ambassador Chak Mun See (Singapore)

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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. An up-to-date list of the pending requests had been circulated in document IP/C/W/52/Rev.9. In the light of informal consultations that he held on the matter, he sensed that the Council was not ready at this stage to admit any new observers.

2. The Council agreed to revert to this matter at its next meeting.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2

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

3. The Chairperson drew the Council's attention to the Secretariat's updated note reflecting the status of the notifications received from these Members and distributed prior to the present meeting (JOB(00)/7447 of 22 November 2000). Since its distribution, a notification had been received from Costa Rica. The note showed that many Members whose legislation was scheduled to be reviewed in 2001 had not yet submitted any notification concerning their implementing legislation. In this regard, he urged those Members to submit the outstanding material without delay, not only those to be reviewed at the first meeting in 2001, but also those to be reviewed later in 2001. He recalled that Article 63.2 of the Agreement required these Members to notify the laws and regulations pertaining to the subject-matter of the Agreement applicable as of 1 January 2000 and that, under procedures established by the Council, notification of these laws and regulations had been due since end

January 2000. He again urged the delegations in question, if not all the material to be notified was ready yet, to submit whatever could be notified at present and complement the notification as soon as other parts of the material to be notified would be ready for submission. He reminded delegations that, under the WTO/WIPO cooperation agreement and decisions taken by WIPO's Governing Bodies, the International Bureau of WIPO was in a position to assist delegations with the translation of their main dedicated intellectual property laws and regulations, as required.

- *Notifications from other Members*

4. The Chairperson said that, since the Council's previous meeting, amendments to legislation notified earlier had been received from Norway, Germany, Finland and the Czech Republic. These would be available in the IP/N/1/- series of documents as soon as possible.

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

5. The Chairperson said that such a notification had been received from Uganda and would be distributed as soon as possible in the IP/N/1/- series of documents.

(ii) *Notifications relating to Articles 1.3 or 3.1*

6. The Chairperson said that such a notification had been received from the delegation of Jordan and would be distributed in the IP/N/2/- series of documents as soon as possible after the meeting.

(iii) *Notifications under Article 69*

7. The Chairperson said that, since the last meeting, notifications under Article 69 of the Agreement had been received from Austria and Jordan. To date, the Council had received such notifications from 99 Members. Notifications on contact points were circulated in the IP/N/3/- series of documents.

C. REVIEW OF LEGISLATION

(i) *Follow-up to reviews of legislation taken up at the Council's meeting in June 2000*

8. The Chairperson said that responses to questions posed to Belize, Cyprus and Mexico in the review of their national implementing legislation, which remained outstanding at the last meeting, had since been received.

9. He also drew the Council's attention to document IP/C/W/220, in which further questions from the European Communities to Indonesia had been distributed. Given that he had announced at the last meeting the completion of the review of Indonesia's legislation, these questions were not strictly speaking part of the follow-up to this review. However, as the Chairperson of the Council had always indicated when closing such a review, Members were free to revert to any matter stemming from such a review at any time.

10. The representative of the European Communities said that his delegation looked forward to receiving responses to the questions it had posed to Indonesia.

11. The Chairperson suggested that the item concerning the reviews of the legislation of Belize, Cyprus and Mexico be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from this review at any time.

12. The Council so agreed.

(ii) Review of the national implementing legislation of Chile, Colombia, Estonia, Guatemala, Kuwait, Paraguay, Peru and Turkey

13. The Chairperson informed the Council that seven of the eight Members under review had provided comprehensive notifications of their implementing legislation prior to the meeting, as well as responses to the Checklist of Issues on Enforcement (document IP/C/5). Questions posed to the Members under review had been received prior to the meeting from Canada, the European Communities and their member States, Japan, Switzerland and the United States and circulated in documents IP/C/W/219, 208, 207, 215 and 225 and addenda. Many questions had been posed three weeks or less before the present meeting, including some less than a week before the present meeting. Colombia, Guatemala, Paraguay, Peru and Turkey had provided responses to most of the questions that had been posed well in advance of the meeting; these would be circulated in documents IP/C/W/221, 223, 226, 227, 231 and addenda.

14. In accordance with the procedures for the reviews of legislation, each of the delegations whose legislation was under review provided a brief introductory overview of the structure of its legislation in the areas covered by the Agreement and of the changes, if any, that it had had to bring about in order to make the legislation compatible with the TRIPS Agreement. The records of these introductory statements as well as the questions put to them and the responses given (including responses to follow-up questions given after the meeting) will be circulated in the following documents with the following symbols:

Chile	IP/Q/CHL/1; IP/Q2/CHL/1; IP/Q3/CHL/1; IP/Q4/CHL/1;
Colombia	IP/Q/COL/1; IP/Q2/COL/1; IP/Q3/COL/1; IP/Q4/COL/1;
Estonia	IP/Q/EST/1; IP/Q2/EST/1; IP/Q3/EST/1; IP/Q4/EST/1;
Guatemala	IP/Q/GTM/1; IP/Q2/GTM/1; IP/Q3/GTM/1; IP/Q4/GTM/1;
Kuwait	IP/Q/KWT/1; IP/Q2/KWT/1; IP/Q3/KWT/1; IP/Q4/KWT/1;
Paraguay	IP/Q/PRY/1; IP/Q2/PRY/1; IP/Q3/PRY/1; IP/Q4/PRY/1;
Peru	IP/Q/PER/1; IP/Q2/PER/1; IP/Q3/PER/1; IP/Q4/PER/1;
Turkey	IP/Q/TUR/1; IP/Q2/TUR/1; IP/Q3/TUR/1; IP/Q4/TUR/1.

15. The representative of the United States thanked Kuwait for agreeing to conduct this review despite the fact that some of the legislative amendments to implement the TRIPS Agreement were still pending.

16. The representative of the European Communities expressed concern that, despite the efforts undertaken, several pieces of draft legislation were still pending before the Kuwaiti Parliament. He hoped that they would be approved in the very near future. He regretted that Kuwait had only provided responses to approximately 23 out of 60 questions posed by his delegation, and he looked forward to receiving the outstanding responses as soon as possible. He noted that the Kuwaiti representative had indicated that this state of affairs was partly due to a lack of specialized human resources. However, since technical assistance by developed country Members had been offered since long. Such assistance was still available and might be provided to Kuwait to get the job done as soon as possible.

17. During the meeting, some Members posed additional and follow-up questions, and four of the delegations whose legislation was under review provided responses to many of these during the meeting. After the presentation of these responses, the Chairperson suggested the following arrangements for the subsequent follow-up to the reviews in question:

- outstanding responses to initial questions already posed should be submitted to the country concerned and the Secretariat by the end of December 2000;

- the texts of any further follow-up questions be submitted to the country concerned and the Secretariat by 1 February 2001; and
- a target date of 19 March 2001 be set for the submission by the countries under review of responses to follow-up questions to which they had not yet replied, fine-tuned versions of responses to questions to which they had given preliminary replies and, to the extent possible, responses to any further follow-up questions that would be made available before 1 February 2001.

18. The Council so agreed.

(iii) Review of legislation in April 2001

19. Reporting from informal consultations that he had held on the practical arrangements for the reviews of legislation in 2001, the Chairperson said that it had been agreed that, at the next meeting, which would take place in the week beginning 2 April 2001, and not that of 26 March 2001 as announced earlier, 12 Members would have their legislation reviewed, namely Bolivia, Brazil, Cameroon, Congo, Grenada, Guyana, Jordan, Namibia, Papua New Guinea, St. Lucia, Suriname and Venezuela. The legislation of Cameroon would be taken up first, followed by the other Members in alphabetical order. The status of notifications of laws and regulations by these Members had already been addressed under the previous agenda item. He recalled that at the previous meeting the Council had agreed on a schedule for the submission of questions and replies but, given that the next meeting had been postponed by one week, he suggested that the Council also postpone the dates in this schedule by one week so that, in accordance with the agreed procedures for these reviews, questions for these Members should be submitted to the country concerned and the Secretariat by 22 January 2001, and the countries concerned should submit their answers in writing to those questions by 5 March 2001.

20. The representative of the United States urged the Members under review to make a determined effort to submit their notifications well in advance of their review meeting, as this would enable other delegations to pose detailed and specific questions that were geared directly to the laws notified rather than ask a large number of general questions. Specific questions relevant to specific laws made the reviews more productive for all concerned. He recalled that there had been a clear obligation to notify these laws by the end of January 2000.

21. The representative of Brazil said that Brazil had demonstrated its unambiguous commitment to Article 63 of the Agreement by providing a timely and complete notification of all its TRIPS implementing legislation to the Council. Brazil considered that the process of reviewing national legislation was extremely useful, since it gave Member governments the opportunity to explain their views as to the compatibility of their own intellectual property laws and their interpretation of the TRIPS Agreement. His Government regretted that one Member had decided to initiate dispute settlement proceedings against Brazil regarding its industrial property law. Such an initiative directly affected the review of Brazil's implementing legislation in the TRIPS Council. Brazil could not engage in this process while the same legislation would at the same time be the subject of a litigation. Brazil had not anticipated this situation when it had agreed to be taken up in the schedule of reviews in the Council. His Government could not accept the inclusion of his country's legislation in the schedule of reviews for 2001 as long as Brazil might need to clarify its position with regard to that legislation in ongoing dispute settlement proceedings.

22. The representative of the United States agreed with the representative of Brazil that the review procedure served the purposes of confidence-building and transparency. He regretted that a formal dispute concerning one specific aspect of Brazil's law left the Brazilian delegation unable or

unwilling to submit the full range of legislation that it had notified to review in the Council. He noted that some delegations had not enacted implementing legislation but had agreed to be reviewed even though they were vulnerable to dispute settlement. Brazil had gone much further and passed all implementing legislation and notified it. The fact that one narrow issue might be the subject of dispute settlement proceedings should not deprive other Members of understanding how Brazil had implemented its TRIPS obligations. He commended Brazil for its implementation of the Agreement and said that all Members could benefit from a review of the implementing legislation.

23. The Chairperson concluded that Brazil was yet to confirm its agreement to its inclusion in the schedule of reviews in April 2001 but that, for the purpose of planning, Brazil would remain in the schedule.

24. The representative of Argentina expressed her delegation's understanding for the concern expressed by Brazil. The paucity of legislation notified submitted under Article 63.2 of the Agreement demonstrated the problems implementation of the Agreement brought for many developing country Members. Various Members had made special efforts to carry forward the exercise in transparency as required by the Agreement, including Brazil and Argentina. Compliance with a mechanism designed to ensure greater transparency should not potentially affect the rights of a Member to an adequate defence of provisions of its legislation, if these were taken up in WTO dispute settlement proceedings. A request for consultations under the DSU had been addressed to Brazil and it appeared reasonable to suppose that a review of its legislation could affect Brazil's rights, since many questions posed in reviews of legislation concerned interpretation of the scope of the TRIPS Agreement's standards.

25. In response to a question from the delegation of the representative of the Dominican Republic, which had requested in writing a postponement of the review of its legislation, due to a change of government which had entailed a complete change of its administrative structure and the development of new intellectual property legislation which had recently been approved and for which implementing regulations were pending, the Chairperson suggested that the review of the Dominican Republic's legislation be taken up in June 2001 instead of April 2001.

26. The Council took note of these statements and agreed to proceed as proposed by the Chairperson.

(iv) Review of legislation in June 2001

27. The Chairperson proposed that the TRIPS Council's second meeting for 2001 be scheduled for the week commencing 18 June. Questions for the Members to be reviewed at that meeting should be sent in, in accordance with the agreed procedures for these reviews, by 9 April 2001, i.e. 10 weeks before the meeting, and the Members concerned should submit their answers in writing to those questions by 21 May 2001.

28. The Council so agreed.

D. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9

29. The Chairperson informed the Council that it had not received any new notifications under this agenda item since its previous meeting.

E. IMPLEMENTATION OF ARTICLE 66.2

30. The Chairperson recalled that the implementation of Article 66.2 had been under discussion in the Council since December 1998 and that the Council had received information from 20 developed country Members on how that provision was being implemented in their territories. Since June 2000, the Council had also had before it a Secretariat note (IP/C/W/169) prepared on a request from the Council, setting out the types of incentive measures that had been notified, with cross references to where further details could be found; as well as a proposal from the delegation of Zambia relating to special and differential treatment in respect of technology transfer (IP/C/W/199). In relation to Article 66.2, the Special Session of the General Council had agreed, at its meeting of 18 October 2000, to invite the TRIPS Council, with a view to facilitating full implementation of Article 66.2: to give consideration to drawing up an illustrative list of incentives of the sort envisaged by Article 66.2; to put on a regular and systematic basis its procedure for the notification and monitoring of measures in accordance with the provisions of Article 66.2 and, in doing so, to give consideration to avoiding unnecessary burdens in notification procedures; invite other intergovernmental organizations to provide information on their activities aimed at technology capacity-building. During informal consultations that he had held on 31 October, it had been agreed that Members would also have informal consultations on this matter during the course of this week's TRIPS Council meeting and, in that connection, all interested delegations had been urged to submit either in writing or orally at this meeting their suggestions for an illustrative list of incentives and also for a regular notification and monitoring procedure. Moreover, it had been agreed to discuss which intergovernmental organizations should be invited to provide information on their activities aimed at technology capacity-building, with a view to taking a decision on that matter.¹

31. Continuing, he said that, in the informal consultations on the matters that had been referred to the Council for TRIPS by the Special Session of the General Council concerned with implementation matters, it had become clear that those countries which had previously indicated their intention to submit proposals concerning an illustrative list of incentives and a systematic notification and monitoring procedure were not yet ready to do so. Accordingly the Council would have to come back to this matter when such proposals were before it. Based on his informal consultations, he proposed that the Council agree to invite the secretariats of UNCTAD, WIPO, UNIDO, the World Bank and the CBD to provide to it, prior to its April 2001 meeting, written information on their activities on technology capacity-building. He would report on this and other implementation-related issues to the Special Session of the General Council, on his own responsibility.²

32. The Council so agreed.

F. TECHNICAL COOPERATION

33. The Chairperson recalled that the previous meeting of the Council had had a special focus on technical cooperation and in that context developed country Members had provided their annual updates of information on their technical cooperation activities. Some of that information had been provided just prior to the previous meeting and most of it had only been available in its original language. Therefore, it had been agreed, as in previous years, to invite Members to make further comments on those annual reports at the present meeting. He also informed the Council that, shortly before the present meeting, a non-paper had been received and made available, jointly submitted by the delegations of Bangladesh; the European Communities and their member States; Hong, Kong, China; and Norway (JOB(00)/7535). This document addressed the issue of "Technical Assistance on TRIPS Notification between WTO Members".

¹ See JOB(00)/6908 of 2 November 2000, Annex II.

² See document IP/C/21.

34. The representative of Hong Kong, China introduced the joint non-paper which it had co-sponsored with Bangladesh, the European Communities and their member States and Norway. Hong Kong, China had gone through the process of notification and review of legislation earlier in 2000. It had benefited from generous technical assistance from international organizations and Members, including IP Australia, the UK Patent Office and the European Patent Office. As a recipient of technical assistance, Hong Kong, China had found it useful to explore and develop a voluntary and informal system for sharing experiences among Members with respect to the TRIPS notification and review requirements. This would supplement the wide range of assistance currently provided by the WTO and WIPO Secretariats and by some developed country Members. In essence, the proposal was to create a pool of experts provided by Members who could offer advice to those Members who had yet to go through the notification and review process. These experts could provide written advice or, on request, visit the economy requiring assistance. For developing and implementing substantive intellectual property law or enforcement measures, the experts could point to sources for further assistance, for example from the WTO, WIPO, the WCO or from individual Members under their technical assistance programmes. It was not envisaged that these experts would be involved in the drafting of intellectual property legislation, although Members would offer such assistance if they wished. It was hoped that least-developed country Members could benefit from the proposed scheme, when they eventually would take on the notification obligations with effect from 1 January 2006. Developing country Members might also benefit from the scheme but, since the Council was working on the basis that the reviews of their legislation would be completed by the end of 2001, they might not be able to benefit from it fully. It was hoped that this scheme would be set up in a flexible and informal manner. It would supplement and not deter the bilateral technical assistance offered by some developed Members. It was a purely voluntary and demand-driven scheme but the co-sponsors certainly hoped that more developed country Members, and developing country Members who had completed the notification and review process, would participate in the scheme and offer expert assistance. Hong Kong, China was ready to offer some assistance in future years, although its capacity was relatively small compared with that of developed country Members. The time-frame for assistance suggested in paragraph 7 of the non-paper only served as a guideline and should be implemented flexibly. Concerning least-developed country Members, whilst the proposal aimed to commence providing assistance some two years before the date for notification of laws, some least-developed country Members might wish to start the preparation earlier and others later. It was envisaged that the bulk of activities would take place between early 2004 and early 2006. Nevertheless, the list of experts or Members willing to offer assistance as suggested in paragraph 7 of the non-paper should be established as soon as possible to cater for the needs of developing country Members requiring assistance or least-developed countries who would like to start their preparation early. The co-sponsors hoped that the Secretariat would kindly establish and maintain a list of Members willing to offer assistance and facilitate communications between Members requesting and offering assistance. Whilst the initiative was informal in nature, it was hoped that Members would be kept informed of such activities for the sake of transparency, for example, through annual updates on technical co-operation activities submitted by Members. He invited other Members to support the proposal in principle, and begin the process of establishing a list of Members' experts who could provide assistance, leaving minor details to be refined later. The co-sponsors were ready to listen to comments from other Members and refine the proposals before submitting the paper as a formal WTO document, with all details finalized, hopefully before the end of December 2000.

35. The representative of Australia welcomed the general thrust of the joint non-paper and thanked Hong Kong, China for initiating it. Australia had already done extensive work in the area of technical cooperation for notification and review in cooperation with countries in its region, including the preparation of a major study on the notification and review process developed precisely to provide the kind of practical assistance that was called for in the joint non-paper. Australia had distributed copies of its informal survey to all developing country Members and least-developed country Members in Geneva in December 1999. The survey was also available on the Internet at a website

address.³ Australia had an active programme of technical cooperation focused especially on its region and the programmes included promotion of appropriate technology transfer and legal, technical and logistical support for TRIPS implementation and effective use of the intellectual property system. A concrete example was the biotechnology training package which focused on commercialization and management of intellectual property which had been trialled in Viet Nam and Thailand earlier in 2000. Work was continuing on the package to enable its widespread distribution and use throughout the South Pacific and Asia-Pacific regions and by other interested developing and least-developed countries. Australia's policy for development cooperation sought to take full account of the priority requirements expressed by developing and least-developed country partners to ensure that a technical assistance programme met the needs identified and articulated by the recipient country. A prescriptive approach to providing technical assistance would undermine this principle and could lead to lessened emphasis on the expressed needs of the recipient country. The introductory remarks in the informal survey noted that, given the diversity of national laws and legal frameworks among Members and the discretion that they had exercised, there could be no model or ideal approach to the notification and review processes. Australia recognized that these processes could be burdensome and difficult for Members to undertake. Her delegation wished to share more broadly the practical lessons drawn from its informal survey and its experience in working with a number of countries in its region and thereby increase confidence and mutual understanding among Members. Her delegation wished to discuss its specific comments on the joint non-paper with Hong Kong, China and its other co-sponsors and hoped to co-sponsor it when it was circulated as a formal document.

36. The representative of Norway said that, at present, there was a scheme under which international organizations aided developing country Members in drafting legislation, but there was no similar scheme for the notification of legislation under Article 63.2 of the Agreement. The joint non-paper proposed a list of developed country Members who were willing to provide such assistance. It was important for developed country Members to take on this responsibility to make themselves available to least-developed countries when they had to notify implementing legislation by 2006. The developed country Members had already been through the notification procedure and had relevant experience. In order to assist least-developed countries in this task, the scheme had to be prepared well in advance both in terms of personnel and financing. The emphasis in the Agreement was on least-developed countries to provide timely notifications of implementing legislation, and this was necessary to have a meaningful review of national implementing legislation.

37. The representative of Japan said that the scheme proposed in the joint non-paper might be of assistance in the notification of Members' national legislation. This kind of technical assistance among Members could be most meaningful as need-oriented assistance, particularly in the field of registration activities. Japan had been providing technical assistance with a primary focus on the operational aspects of intellectual property systems, such as human resource development and computerization of intellectual property administrations, mainly through contribution of voluntary funds to WIPO. His delegation reiterated that it would continue to provide assistance to least-developed countries as well as developing country Members, as it believed that it was important for developed country Members to make various efforts which could be complementary and function as a whole so that meaningful technical assistance could be achieved.

38. The representative of Canada believed that the joint non-paper was a useful contribution in considering the important issue of technical assistance for notification. Its suggested approach would be helpful in identifying whether the technical assistance that was being offered was actually beneficial from the recipient countries' points of view.

³ <http://www.dfat.gov.au/trips>.

39. The representative of the European Communities said that his delegation was a co-sponsor of the joint non-paper, because it believed that it was a useful complement to technical assistance programmes offered by international organizations such as the WTO and WIPO, as well as by the European Communities, their member States and other developed country Members. He highlighted that the proposal was informal, practical and flexible and hoped that the intended beneficiary countries would make use of it and call on the listed experts. He recalled that, at the previous meeting, he had raised the issue of the provision of technical assistance by WIPO and the WTO in light of the target date of 2006. He welcomed any future information on this issue that the Chairperson might provide so that the least-developed countries could fulfil their obligations as well.

40. The representative of the Secretariat, responding to the European Communities' query regarding technical assistance cooperation, reported that the Secretariat was discussing with the International Bureau of WIPO how to coordinate better and enhance cooperation specifically with the needs of least-developed countries, and the expiration of their transitional period, in mind. He hoped to report more specifically on this issue at the next meeting.

41. The representative of Hong Kong, China said that some fine details in the joint non-paper remained to be clarified, and he also wished to consult other potential co-sponsors, such as Australia. He suggested that Members agree to the proposal in principle so that a beginning could be made with the establishment of a list of Members that were willing to provide assistance on notification to least-developed country Members as well as developing country Members. He hoped to be in a position to circulate the proposal as a formal paper shortly.

42. The Chairperson noted that there was no objection in the Council to this proposal for assistance on a voluntary basis and that the sponsors should feel free to proceed.

43. The representative of Zambia said that his delegation was awaiting instructions to co-sponsor the joint non-paper.

44. The Council took note of the statements made.

G. IMPLEMENTATION OF ARTICLE 23.4

45. The Chairperson recapitulated where the Council was in dealing with the matter. At the last meeting, the Council had continued its discussions under this agenda item on the basis of a proposal from the European Communities and their member States, of which the Council had received a revision at its meeting in June 2000 (document IP/C/W/107/Rev.1), and a joint proposal from Canada, Chile, Japan and the United States (document IP/C/W/133/Rev.1). The Council had also had before it, at the last meeting, a paper from New Zealand on the subject (document IP/C/W/189). Information gathered by the Council in the context of its work on this matter also included 12 submissions from Members on systems for the registration of geographical indications which they operated (document IP/C/W/76 and addenda); a background note prepared by the Secretariat on existing notification and registration systems for geographical indications relating to wines and spirits (document IP/C/W/85); a background note prepared by the Secretariat on international notification and registration systems for geographical indications relating to products other than wines and spirits (document IP/C/W/85/Add.1); and information provided orally by WIPO, at the previous meeting, on the work that had commenced in July 2000 in that Organization in relation to the Lisbon Agreement. The Council was discussing this matter on the basis of paragraph 34 of its 1996 annual report (IP/C/8) and the agreement reached in the General Council at its meeting of 7 and 8 February 2000. Since the last meeting, a paper on the matter had been received from the delegation of Hungary (document IP/C/W/234).

46. The representative of Hungary, introducing his delegation's paper, said that the purpose of this communication was to move forward the mandated negotiations in the Council for TRIPS on the establishment of a multilateral system for the notification and registration of geographical indications under Article 23.4 by providing some input with respect to an opposition/challenge procedure and its effect concerning the registration of geographical indication notified under this system. The paper built on the revised proposal from the European Communities and their member States because, in his delegation's view, this was the only proposal on the table at present which was in conformity with Article 23.4, in the sense that it foresaw the establishment not only of a database but also of a register. Stressing two points concerning the paper, he first said that Hungary believed that an effective and fair opposition/challenge procedure was an indispensable element of the multilateral register in order to ensure that the register would genuinely facilitate protection. The opposition/challenge procedure should be fair and simple and should contain, in addition to the direct bilateral discussions proposed by the European Communities and their member States, a multilateral element. Such an element would, in particular, provide an adequate opportunity for smaller WTO Members to represent their interests and would prevent potential abuse of the opposition/challenge procedure, by ensuring that it was not left to individual Members to determine whether an opposition/challenge was justified or not. Regarding the form of this multilateral procedure, his delegation suggested that the Council should explore the possibility of establishing a specific arbitration system under which decisions would be final and binding. As outlined in paragraph 6 of his delegation's paper, such a form of settling disagreements was not alien to the WTO framework. The second suggestion was that the effect of the arbitrators' decision would be of an *erga omnes* nature, i.e. as a result of a successful opposition/challenge the notified geographical indication would not be entered into the register and third parties would not be under an obligation to provide protection for it. Hungary was not wedded to the specific solution it was offering in its paper and was open to discuss any other solution that would be effective and simple and which would take care of its two most important concerns.

47. The representative of the European Communities noted that the Hungarian proposal built upon the proposal from the European Communities and their member States. Paragraph 5 of Hungary's paper showed that Hungary was suggesting that the system should combine the direct bilateral consultations which his delegation had proposed with a multilateral procedure for cases where direct discussions between the parties did not yield a bilateral settlement. He assumed that Hungary had good reasons for further elaborating on his delegation's proposal and for proposing complementary elements to the possible solution his delegation had proposed for dealing with conflicts concerning geographical indications in the framework of the register. Hungary's proposal merited close analysis and further discussion in the Council. He said that the establishment of the arbitration system that Hungary was proposing, under which decisions would be final and binding and would have *erga omnes* effect, would go in the direction of his delegation's initial proposal (document IP/C/W/107). He was grateful to Hungary for this useful contribution and would be interested to know whether Hungary's proposal also corresponded to the needs of other Members.

48. Responding to the Chairperson's question as to how the work on geographical indications might be pursued further, he said that at many meetings of the Council, formal or informal, his delegation had expressed the view that its proposal was the only proposal that really corresponded to the requirements of Article 23.4. The system proposed by Canada, Chile, Japan and the United States merely aimed at setting up a database and providing information, which was not good enough for his delegation and did not meet the requirements of Article 23.4. As confirmed by Hungary's proposal, it was important to get to a registration system with legal effects and which solved problems.

49. The representative of India gave some preliminary reactions to the contribution from Hungary, but would comment on it more substantively at a later stage. He commended Hungary for supplementing and strengthening the proposal from the European Communities and their member States usefully, by proposing to combine the bilateral consultations proposed by the European Communities, which were probably an indispensable element for the system to be established, with a

settlement procedure that had a multilateral character. He also expressed appreciation for the inherent flexibility in the Hungarian proposal, which called for a system that was extendable to geographical indications for other products than those envisaged in the current work under Article 23.4. He agreed with the previous speakers that the proposal from the European Communities and their member States would appear to be the only proposal which met both the letter and spirit of Article 23.4. The mandate in Article 23.4 was an important mandate and had yet to be fulfilled. He also reiterated his delegation's view that there was concomitance between the negotiations that were to be undertaken under this provision and the extension of protection contemplated under Article 24.1.

50. The representative of the United States said that Hungary's paper significantly contributed to the progress of the work of the Council in connection with Article 23.4. Providing his delegation's preliminary comments on it, he said that, contrary to the approach his delegation had proposed, Hungary's proposal would not simply facilitate the protection of geographical indications for WTO Members participating in the system to be established under Article 23.4, but would impose substantive obligations regarding the protection of geographical indications beyond those currently set out in the TRIPS Agreement, because of the very formal nature of the opposition/challenge procedure proposed. His delegation was of the view that any proposed system *should* simply facilitate the protection of geographical indications for Members who chose to participate in the system to be established, and this view was shared by other supporters of the proposal that his delegation had jointly submitted with Canada, Chile and Japan. That proposal did not impose substantive obligations regarding the protection of geographical indications beyond those currently set out in the TRIPS Agreement and would allow voluntary participation as reflected by the words of Article 23.4 "in those Members participating in the system". A WTO Member was not required to participate in the system to be established under Article 23.4 to obtain full protection under the TRIPS Agreement for its geographical indications. The system his delegation had proposed would recognize and accommodate the various regimes of WTO Members for the protection of geographical indications described in the responses to the Checklist of Questions on Article 24.2, if those regimes were consistent with the TRIPS Agreement. This system would be simple and not costly for those choosing to participate. It would also allow participating WTO Members and others to use information submitted without undue burden or cost to them. Neither would it impose undue administrative burdens and costs on the WTO Secretariat. In his delegation's view, it was the only proposal submitted that accomplished these goals.

51. The representative of Slovenia said that the aim of the Council's work in this area should be the establishment of an effective and credible multilateral system for the notification and registration of geographical indications. Furthermore, his delegation would favour an approach which would allow the system that would be agreed upon to be usable for geographical indications no matter what kind of product they identified. Slovenia supported, in general, the proposal made by the European Communities and their member States, but some questions required further discussion. He welcomed the paper submitted by the delegation of Hungary on an opposition/challenge procedure, which his delegation believed raised an important issue. Since this paper had just been received, his delegation had not had sufficient time yet to study it, but intended to comment on it in detail at the next meeting.

52. The representative of Chile, reacting on a preliminary basis to Hungary's contribution, said that Hungary's approach went away from the basic principles contained in Article 23.4 and did not allow for the flexibility and voluntary nature of the system to be established under that provision and would impose more obligations than those explicitly laid down in the Agreement. He wished to recall that, when the negotiators of the Agreement had wanted to incorporate in it rules which were already the subject of provisions of existing international instruments, they had agreed to make express reference to the international instrument and the provisions in question; they had, however, not done so in connection with the notification and registration system of Article 23.4, despite the existence, since 1958, of the Lisbon Agreement. The fact that a reference to the registration system of the Lisbon Agreement had not been incorporated into the TRIPS Agreement denoted clearly that the

negotiators had had in mind a system of another nature than the one established by the Lisbon Agreement. Even if they had envisaged a system corresponding to that of the Lisbon Agreement, the Hungarian proposal was aiming at a system of obligations which went further than the obligations flowing from the Lisbon Agreement; and the Lisbon Agreement was adhered to by only 19 countries.

53. The representative of Australia said that her delegation continued to support the collective proposal, which it considered more flexible and suited to Australia's own regime and interpretation of Article 23.4. In this regard, she emphasized that Article 23.4 stipulated that the system to be established should "facilitate the protection of geographical indications for wines". As Article 23.4 also stipulated that participation in the system would be voluntary, given that it should facilitate protection of geographical indications for wines "eligible for protection in those Members participating in the system", wide-ranging acceptance and participation by WTO Members was central to achieving this objective. A register only suited to the legal, economic and social circumstances of a limited number of WTO Members could not facilitate protection and would be redundant. This was one of the main failings of the Lisbon Agreement. The Lisbon Agreement closely mirrored the proposal from the European Communities and their member States, but had only attracted a small and narrow range of adherence. In contrast, for example, a system such as that of the Patent Cooperation Treaty had attracted the voluntary adherence of most WTO Members. Consequently, as a starting-point, all WTO Members should agree that the register to be established under Article 23.4 take account not only of the myriad of legal regimes that Members had chosen for the implementation of their obligations in respect of geographical indications, but also of the resource and administrative implications and constraints of individual Members and the varying trade importance to them of geographical indications.

54. Commenting in a preliminary way on the Hungarian paper, she said that, in her delegation's view, the only appropriate mechanisms for settling disputes were regimes established at the national level for that purpose. The register to be established under Article 23.4 was not intended to alter the substantive provisions of the TRIPS Agreement, which included the clear grant of the right to make determinations concerning the protection of geographical indications at the national level by the courts or administrative structures. Further, a register proposal that did not have any substantive legal effect and operated as an information resource, as mandated, in her delegation's view, by Article 23.4, avoided the need for a costly and resource consuming dispute settlement process. This comment also applied to the proposal from the European Communities and their member States, which made the DSB the ultimate arbiter of a dispute in relation to the registration of an individual geographical indication. Australia was concerned that this would be a most costly and inefficient way of settling such disputes and would query whether the resources of the DSB were properly consumed settling individual disputes of this kind.

55. Continuing, she said that her delegation felt that, in order to make progress on the negotiations under Article 23.4, to which Australia was committed, a useful way of advancing discussions would be to draw out some of the practical implications of the proposals that were before the Council. In that vein, she thanked the European Communities and their member States for their revised proposal, which sought to take account of concerns raised by various WTO Members in relation to their previous proposal. The issue of the multilateral register was a complex one requiring a detailed examination of the various proposals. There was a definite need for a greater exchange of information in relation to each of the current proposals, so that Members could properly understand the implications that each proposal might have for them. Her delegation would, therefore, be grateful for any clarification that the European Communities and their member States could provide in relation to a number of questions her delegation had on their revised proposal. Australia supported a number of statements made by the European Communities in the explanatory note to its proposal, namely that the register should "allow a participating member to inform WTO Members of the geographical indications that are protected in its territory"; that it should only facilitate the application of existing provisions; that it should *not* require WTO Members to enact new domestic legislative or

administrative structures; and that it should *not* lead to the development of heavy and costly national registration systems. However, having examined these basic elements against the details of the proposal, Australia had serious concerns about the extent to which the proposal was actually consistent with these statements. The proposal went beyond the establishment of an information source in a manner consistent with existing TRIPS obligations. Her delegation's reading of the proposal suggested that the register would build upon existing TRIPS obligations and create a global, pre-emptive system with the legal effect of securing protection in all jurisdictions, unless Members successfully objected within a limited time-frame and on limited grounds. This proposal appeared to supersede the right of national governments and courts to make their own determinations regarding the legal protection of individual geographical indications in their own jurisdiction. Furthermore, despite the statement that the register would not require costly new administrative or legal structures, her delegation believed that a number of countries, including Australia, would require new legislative enactments and a new administrative structure to examine and engage in disputes relating to notified geographical indications. She was particularly concerned that, as the proposal went beyond existing TRIPS obligations and was likely to require costly new administrative structures and legislative change, a number of Members would be deterred from participation.

56. Her delegation had noted that paragraph A.1 of the revised proposal from the European Communities and their member States (document IP/C/W/107/Rev.1) provided that participation would be by voluntary declaration. Australia understood Article 23.4 to mean that countries would be able to choose whether to participate, with the implicit corollary that non-participation should not disadvantage the protection of geographical indications of nationals of non-participating Members as against those of participating Members. Australia based this on its interpretation of Article 23.4 as having the objective of facilitating existing obligations. For this reason, she was curious as to the meaning of the phrase "unless otherwise foreseen in this multilateral system" in paragraph A.3. This statement suggested to her delegation that the rights of non-participating Members under the TRIPS Agreement might indeed be prejudiced by that non-participation. This view was reinforced by the references in section C and paragraph D.4 of the proposal to "Members", as distinct from the term "participating Members", which was used extensively in other parts of the proposal. She would be interested to know what form the European Communities and their member States envisaged that the voluntary declaration would take and what would be the legal effect of that declaration. Could a Member subsequently withdraw its voluntary consent to participate and if it did, what would be the consequences in terms of both its obligation to protect and the registration of a geographical indication protected by it as the country of origin? What did the European Communities and their member States envisage that the operating rules would contain; for example, would these contain substantive obligations, or would these be purely procedural in nature? Would the operating rules have separate legal force? What would be the likely consequences of non-compliance with the operating rules? For example, would non-compliance affect the eligibility of a notified geographical indication for registration?

57. Paragraph B.1 of the revised proposal from the European Communities and their member States (document IP/C/W/107/Rev.1) provided that Members shall provide their declaration of participation "without delay". It would be helpful if the EC could clarify what this meant: did the phrase "without delay" refer to the commencement of the register and, if not, to what event did it refer? Did this mean that a Member, which chose not to participate at commencement, could not decide, for example, two-and-a-half or 10 years later that it wished to participate? How would this time-frame apply to developing country and least-developed country Members? Paragraph B.2 provided that "all" geographical indications would be notified. Would this obligate a participating country to notify all wine and spirit geographical indications that it protected domestically, even if it did not consider that the international trade significance of those geographical indications warranted international registration? What would be the effect of an unintentional failure to notify a particular geographical indication? Australia would also be grateful if the European Communities could clarify an apparent error in paragraph B.2, i.e. the reference to geographical indications for "all goods [...]"

corresponding to the definition in Article 22.1". Her delegation had clearly understood the European Communities to have noted, in its explanatory note at paragraph 2, that the current mandate only extended to geographical indications for wines and spirits; therefore she believed that the paragraph in question should read "all wine and spirit geographical indications which comply with the definition set out in Article 22.1". Paragraph 5 of the explanatory note provided that the proposal should not require Members to implement new domestic legislative or administrative structures. Paragraph B.5, however, clearly envisaged that national provisions would, at least in some cases, be necessary to implement the register domestically. These statements appeared to her delegation to be in conflict. Paragraph B.7 of the proposal provided that the Secretariat would publish and notify Members of the notification of geographical indications. This raised the question of the role that the WTO Secretariat could and would play in this process and how this would be funded. Given the voluntary nature of the register, her delegation would assume that any funding required to establish and maintain the register would be generated from participating Members. Did the European Communities envisage that fees would be levied on Members to register geographical indications, or would some form of participation fee be charged?

58. Australia would be grateful for clarification as to why section C of the revised proposal from the European Communities and their member States (document IP/C/W/107/Rev.1) referred generically to the ability of "Members" to examine the published geographical indication and to institute challenges, rather than limiting its scope to those Members participating in the system. Section C appeared to be closely linked to paragraph D.4, which also referred only to "Members". Together, these provisions suggested that any Member, whether or not participating in the system, which had not challenged a notified geographical indication within the specified time-frame, could not refuse its protection on the grounds of the provisions of the TRIPS Agreement spelt out in paragraph D.4. Australia would be grateful for clarification as to how these elements of the proposal were consistent with the voluntary notification and registration system foreseen in Article 23.4. Paragraph C.1 placed the tight time-frame of 18 months on examination of notified geographical indications by other Members. What would be the case where a Member had only started to participate in the register after publication of a notified geographical indication - would the time-period for objection by that country then run from the date of participation? Further, since the current provisions of the TRIPS Agreement did not place any time-limit on Members to deny protection of geographical indications, how was such a time-limit justifiable under the proposal? Her delegation understood the reference in paragraph C.2 to a challenge to the "protection of an individual geographical indication notified by another Member" not to be a reference to protection in the country of origin, but rather to protection in another WTO Member. This suggested that the legal effect of registration was the substantive grant of legal protection in other Members' jurisdictions. If this interpretation was correct, the proposal would clearly have a legal effect well beyond the existing obligations contained in the TRIPS Agreement - which were to provide the legal means for interested parties to prevent use. She would be interested to know the grounds on which registration could be challenged. Would the grounds for challenge correspond to the exceptions available for the protection of geographical indications under the TRIPS Agreement? If there were other grounds, how were these justified by the existing provisions of the Agreement? What would be the effect of a successful challenge? For example, would a challenge have effect in relation to all participating Members or only the Member initiating the challenge? Would registration in relation to a non-challenging Member take effect even if a particular geographical indication were still subject to a dispute between other Members? The proposal from the European Communities and their member States made the DSB the ultimate arbiter of a dispute in relation to registration of an individual geographical indication. Australia was deeply concerned that this proposal ousted from national courts and administrations the question of whether a particular geographical indication was entitled to protection in its own jurisdiction. Further, if the purpose of the register, as Australia understood it, was to provide information about geographical indications that were protected in their country of origin as a reference point for national administrations, her delegation did not see the need for a dispute resolution mechanism. Her delegation was also troubled by the high costs and possible burden on the

dispute settlement mechanism that would be involved in the adjudication of such disputes by the DSB and that this in itself might act as a deterrent to widespread participation.

59. Paragraph D.1 of the revised proposal from the European Communities and their member States (document IP/C/W/107/Rev.1) seemed to suggest that registration would still take effect even if there were one or more disputes under way and that any dispute would be referred to in that registration. This again raised the critical question of the legal effect of registration. Her delegation was particularly concerned that, if registration was intended to have legal effect in national jurisdictions, then registration could not and should not occur until all disputes had been finalized. Did the European Communities and their member States envisage that the conditions for homonymous use would also be listed on the register? Paragraph D.3 provided that registration would have the effect of providing a "presumption of eligibility" for protection by interested parties. Her delegation was unsure of the meaning or intended legal effect of this provision or of how such a "presumption" would operate in a domestic jurisdiction and would appreciate clarification of this important point. Further to her comments above on paragraph D.4, this paragraph appeared to impose additional obligations on *all* Members, whether or not they had chosen to participate in what was ostensibly a voluntary system. She would be grateful for clarification from the European Communities and their member States as to how this provision was consistent with the mandate set out in Article 23.4.

60. The representative of Korea said, in a preliminary reaction to the Hungarian proposal, that his delegation had a different view on the matter. With respect to Article 23.4, Korea wished to join other delegations in drawing particular attention to the wording of the provision in relation to the purpose of establishing a multilateral system for the notification and registration of geographical indications. Article 23.4 had the single purpose of *facilitating* the protection of geographical indications. The word "facilitating" implied that the multilateral system to be established would not generate new rights and obligations and would, in other words, not constitute a mechanism of protection, i.e. that the inclusion of a geographical indication in the system would create the obligation for other WTO Members to protect it. National industrial property administrations would be entitled to verify whether under national law the geographical indication did indeed deserve protection. Moreover, it should be noted that the protection of a geographical indication under Article 22.2 of the TRIPS Agreement did not depend necessarily on its registration. What WTO Members were obliged to provide were the legal means for interested parties to prevent the unauthorized use of protected geographical indications. Such legal means might include a registration system, but not necessarily. The consequence was that, in countries that did not adopt a registration system, geographical indications might be acknowledged only when an interested party appeared before the competent authority to enforce its rights in the geographical indication against an infringer. If the geographical indication had a foreign origin, the plaintiff would be required, before anything else, to establish that the sign in question was indeed a geographical indication. The inclusion of the geographical indication in the international system to be established by another WTO Member would facilitate the task of the plaintiff to a large extent to prove that the sign was indeed a geographical indication. "Facilitating" therefore meant that the inclusion of a geographical indication in the future system would make it easier for it to be recognized as such in other WTO Members.

61. The representative of Romania wished to reiterate the great importance her delegation attached to the establishment of a multilateral system for the notification and registration of geographical indications in line with the revised proposal from the European Communities and their member States and the comments made by them on the Hungarian proposal. Her delegation was ready to give positive consideration to the Hungarian proposal as a complement to the proposal from the European Communities and their member States, but needed more time to study it in detail.

62. The representative of Mauritius said that her delegation was not supportive of ideas that would lead to a proliferation of mechanisms with separate rules to deal with challenges. Any procedure for the opposition of registration should be the least cumbersome possible and should favour primarily a mutually satisfactory solution rather than lead to a legal dispute. Having said this, her delegation did not see the Hungarian proposal as imposing any further obligations on Members, nor as establishing a cumbersome system. Mauritius saw merit in a multilateral recourse as envisaged by Hungary, in light of the fact that the different weights of countries did not always make a bilateral solution to a dispute the preferred one. While the system to be established should initially be for geographical indications for wines and spirits, its possible extension to other product areas should be taken into account as well.

63. The representative of the European Communities wished to emphasize that nothing in his delegation's proposal implied that the proposed system would be costly and not simple. On the contrary, his delegation had drafted its proposal bearing in mind that the proposed system would be simple and not costly. However, he believed that the debate would benefit more from focusing on questions as had been posed by the delegation of Australia. He thanked Australia for these questions and said that his delegation would respond in due course.

64. The representative of the Slovak Republic expressed his delegation's support for the Hungarian proposal. The Slovak Republic, as a small country with little bargaining power, found this proposal an appropriate tool. His delegation was of the opinion that efficient opposition procedures were the cornerstone of every multilateral system and such a system for the notification and registration of geographical indications was not an exception. The Slovak Republic had generally supported the proposal from the European Communities and their member States, as it more fully fulfilled the wording of Article 23.4 and met his delegation's expectations. The establishment of a specific arbitration system as proposed by Hungary could supplement the EC proposal in a positive manner.

65. The representative of the Czech Republic said that her delegation, as it had stated at previous Council meetings, welcomed activities and steps which could contribute in a positive and constructive manner to the Council's discussions on the issue of geographical indications. Having carefully examined the proposals for the establishment of a multilateral system for the notification and registration of geographical indications, from her delegation's point of view, only a registration system could meet the requirements of Article 23.4 and not a system which merely allowed for the notification of geographical indications. The simple notification of geographical indications at the international level with significant information could be useful but was insufficient, because it would not have the necessary legal effects. Notification of geographical indications could facilitate their identification, but it would not enable their protection. Bearing in mind that the register must be useful for all Members, transparent and ensure legal certainty facilitating international trade, her delegation supported the establishment of a non-discriminatory multilateral register of geographical indications. The proposal from the European Communities and their member States continued to be a good basis for the creation of such a registration system. However, the possibility of extending the scope of the product coverage of registered geographical indications must be incorporated into it. She said that her delegation was of the view that an opposition procedure and clear arbitration provisions were needed to complement the EC proposal for a multilateral register and that the Hungarian proposal contained useful elements which needed to be discussed and clarified. However, she expressed concerns about the apparent limitation of the scope of the product coverage of the Hungarian proposal.

66. The representative of New Zealand said that, like others, his delegation continued to believe that the EC proposal, as supplemented by Hungary, went beyond the mandate and scope of what was envisaged by Article 23.4. In this regard, he referred to New Zealand's contribution to the Article 23.4 negotiations (IP/C/W/189) which noted that New Zealand preferred the collective

proposal put forward by Canada, Chile, Japan and the United States (IP/C/W/133/Rev.1), as it more fully accorded with the letter and intent of Article 23.4, as well as the fundamental principle contained in Article 1 of the TRIPS Agreement that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". He recognized that Hungary was trying to provide a mechanism by which a Member might be able to secure effective protection for a geographical indication if it believed that another Member was illegitimately using it. However, his delegation believed that the DSU provided such protection already and did not see a need for the creation of an additional process. Turning to the call by India for Members to start providing details as to why they supported certain proposals, with an eye on their own national systems for the protection of geographical indications, he wished to draw the Indian delegation's attention to New Zealand's paper, in particular paragraphs 15 to 18, which fully highlighted the fact that the concepts on which the collective proposal built were consistent with and mutually supportive of those which had shaped the development of New Zealand's system for the protection of geographical indications. He supported the comments made by Australia, Chile, Korea and the United States on the scope of Article 23.4. This provision did not envisage the creation of any additional obligations for Members in terms of the multilateral registration and notification system. It should only "facilitate" the protection of geographical indications for wines and spirits and it was only related to the wines and spirits "eligible for protection in those Members participating in the system". It should not therefore require the participation of the membership as a whole. Notwithstanding his delegation's reservations about the proposal from Hungary and without prejudice to its position on the registration and notification system itself, New Zealand found the ideas contained in paragraph 7 of the Hungarian proposal to be particularly worthy of further discussion. This paragraph proposed that, when a geographical indication had been successfully challenged, "neither the challenging Member nor any third party should be under an obligation to provide protection for it". In other words, in those instances where two or more Members had similar or identical geographical indications, none of them should be under an obligation to protect the other one(s). This idea merited further consideration. Finally, he wished to note that the European Communities had endorsed the general thrust of Hungary's proposal. Did this mean that the European Communities and their member States would be happy to change the system they had proposed and which would allow the registration of two identical geographical indications at the same time without providing for the sort of opposition procedure, in particular for third countries, in relation to the geographical indications for other products that Hungary was proposing?

67. As regards the revised proposal from the European Communities and their member States (document IP/C/W/107/Rev.1), the representative of New Zealand said that its section A.1 stated that "all Members may participate in the multilateral system of notification and registration by making a voluntary declaration to the Secretariat" and had the appearance of calling for an entirely voluntary system. If this were the case, then a number of New Zealand's concerns about the EC proposal would be alleviated. However, section D.4 of the proposal showed that it was far from voluntary and effectively nullified any notion of the system being voluntary. According to this section, those "Members who have not challenged, within 18 months, the registration of an individual geographical indication [...] shall not refuse its protection on the basis of Articles 22.1, 22.4 and 24.6 of the TRIPS Agreement". This applied to *all* Members, not just *participating* Members, and would mean that those Members not participating in the system could lose their rights under the TRIPS Agreement if they did not challenge, within 18 months, the registration of any geographical indications that they regarded as cutting across their trading interests. Accordingly, it was fairly clear that the proposal by the European Communities was *not* voluntary, because it would force all Members to review any geographical indications that might be notified so as to ensure that they did not lose any of their rights under the TRIPS Agreement.

68. The representative of Canada expressed support for the interventions made by the United States, Australia, Chile, Korea and New Zealand on this matter. Her delegation believed that Article 23.4 called for the establishment of a multilateral system which would facilitate protection of

geographical indications, but also that such a system would not establish new and additional protection for geographical indications or fail to respect national choices regarding implementation of the TRIPS Agreement. The system must not be burdensome or costly for those countries that wished to participate in it. It must be purely voluntary as well. The proposal made by the European Communities and their member States and supported by Hungary and other delegations went much beyond what, in her delegation's view, was mandated. It seemed clear that an additional process that would involve any dispute settlement system could only result in an additional burden for any country that would be participating.

69. The representative of Argentina quoted paragraph 9 of the revised proposal from the European Communities and their member States and emphasized that, for the reasons stated there, the European Communities had, obviously, not proposed additional mechanisms for the settlement of disputes. Consequently, her delegation was puzzled by the fact that the European Communities were now expressing the view that the Hungarian proposal would complement the proposal by the European Communities and would like to know from the European Communities what had made them change their mind. Her delegation continued to endorse the joint proposal from Canada, Chile, Japan and the United States, which was consistent with the spirit of Article 23.4. The basic principles of Article 23.4 were that the system to be established should facilitate the protection of geographical indications; that it should be a voluntary system; and that it should not create an additional burden. As a preliminary comment to the Hungarian proposal, she said that having a special mechanism for the resolution of disputes was obviously an additional obligation to those laid down in the TRIPS Agreement. She expressed support for the point made by Chile concerning the Lisbon Agreement.

70. The representative of Mexico said that her delegation had repeatedly stated that it was interested in making progress as regards the establishment of a multilateral notification and registration system for geographical indications for wines and spirits with a view to facilitating their protection, in line with the mandate contained in Article 23.4 and the Singapore Ministerial Declaration. In this context, her delegation was grateful for the proposal from Hungary, which made a substantial contribution to the debate. Without prejudice to the comments her authorities might have after careful study of the Hungarian proposal, she wished to convey some preliminary remarks. An opposition procedure for the resolution of disputes that might arise in relation to the inclusion of given geographical indications in the register was one of the elements that could be part of the architecture of this register. Her delegation was open to studying the various proposals in this direction, primarily because such an opposition procedure would serve to make sure that the geographical indications which might be registered did indeed comply with the definition and criteria under the TRIPS Agreement and would be suitable for protection. An opposition mechanism could also help avoid disagreements which might arise regarding given geographical indications reaching the DSB, even though this was a channel that should be left open and which should not be prejudged by any opposition mechanism that might be established. Such a mechanism should be as uncomplicated as possible, so as not to create additional burdens for Members. She noted that Hungary had emphasized the multilateral nature and *erga omnes* effect of its proposed procedure. Mexico was of the view that this was necessary in order to avoid situations where a geographical indication which had been successfully opposed by some Members had to be protected by other Members who had not had a definite opposition. Having said this, she was not in a position, at this time, to give her delegation's specific views as to whether or not the arbitration system proposed by Hungary was the most appropriate one; more time was needed to study, in particular, the implications of that proposal. Other possible options for the resolution of disputes should not be discarded either, in particular if they were familiar in the WTO environment. In this regard, for example, expert groups had been mentioned. She said that these preliminary remarks referred to a register with a limited product coverage as the Council was mandated to establish, i.e. wines and spirits. It was not possible to discuss the characteristics of the register in the abstract, i.e. without connecting it to its product coverage, nor having in mind an evolving coverage in the future.

71. The representative of Turkey, providing preliminary comments on the Hungarian paper, expressed support for the proposal from Hungary, calling it a positive and useful contribution.

72. The representative of Egypt welcomed the Hungarian paper as a positive contribution to the Council's work on geographical indications. Since the paper had just been received, there had not yet been sufficient time to reflect on it in detail; his delegation would come back to the substance of the proposal at the next meeting with any substantive comments it might have.

73. The representative of Switzerland thanked Hungary for its valuable contribution on an opposition/challenge procedure which, in his delegation's view, was a central element of a multilateral system for the notification and registration of geographical indications as envisaged in Article 23.4. Switzerland had always been in favour of a strong multilateral system. That was why his delegation shared the view that, in order to be adequate and effective, such a multilateral registration system needed an opposition procedure which was adapted to its particular requirements and apt for the resolution of challenges to registration in an expeditious and efficient way. The arbitration procedure as envisaged in paragraph 7 of the communication from Hungary was drafted with these goals in mind and Switzerland could, therefore, fully support it. As had been said by delegations, the Hungarian paper was an excellent supplement to the proposal from the European Communities and their member States. Building upon the system proposed by the European Communities, the Hungarian paper filled a gap in the revised proposal from the European Communities and their member States and went in the direction of the initial proposal by the European Communities. In Switzerland's view, Article 23.4 aimed at a system which was more than a simple database. Consequently, the system contained in the joint proposal from Canada, Chile, Japan and the United States was not fully compatible with the provisions of Article 23.4. He agreed with those delegations that had stressed that only the proposal from the European Communities and their member States combined with the valuable supplement from Hungary had the legal effect necessary to facilitate the protection of geographical indications as foreseen by Article 23.4.

74. The representative of Japan said that his delegation was still analysing the paper from Hungary, but wished to provide some preliminary comments to it. He associated his delegation with the statements made by Australia, New Zealand and the United States. In his delegation's view, the multilateral system to be negotiated under Article 23.4 should not create new obligations going beyond the TRIPS Agreement. The legal effect to be generated by multilateral registration should be determined by the national law of each Member, in accordance with the provisions of the TRIPS Agreement. In fact, the additional protection was already provided by the national law of Members. The system should also be based on voluntary participation. Moreover, the administrative burden and cost imposed by the multilateral system should be minimal. If an examination and opposition system would be incorporated into the multilateral system, such a system would, in his delegations' view, be costly and burdensome. Finally, regarding the expansion of covered products, his delegation considered it appropriate, at this stage, to separate issues concerning the multilateral system for the notification and registration of geographical indications from those relating to expansion of the additional protection under the Agreement in respect of wines and spirits to other products. Members should first focus on a multilateral system as such for the products already covered by Article 23.

75. The representative of Peru reiterated her delegation's view that it was necessary to advance effectively in the negotiations on the establishment of a multilateral notification and registration system for wines and spirits. The system to be established should not be limited to a mere database. It should indeed ensure the adequate additional protection for wines and spirits. Therefore, an opposition procedure would be of assistance in consolidating the register and in limiting registration to those geographical indications that met the requirements for protection. Her delegation wished to reflect further on the arbitration system suggested by Hungary, as it might have repercussions on the

application of the WTO dispute settlement mechanism for the resolution of disputes concerning the registration of geographical indications in the system to be established under Article 23.4.

76. The representative of Hungary was grateful for the comments his delegation's paper had elicited and, in particular, for the many positive reactions and for the readiness expressed by others to substantively discuss the issues raised. He agreed with those delegations that had expressed the view that the multilateral notification and registration system to be established should be set up in a way which would allow it to be extendable to geographical indications for products other than wines and spirits. As to the voluntary nature of the multilateral notification and registration system, he did not believe that anything in his delegation's proposal called into question the right of any Member to decide whether or not it would participate in the system. As regards the comments that had been made to the effect that the administrative burdens and costs of the system should be minimal, he wished to emphasize that administrative burdens and costs were relative. As stated in his delegation's paper, Hungary was in favour of establishing an adequate and effective register and, in order to have such a system, a multilateral opposition/challenge procedure was necessary. Without such a procedure, the register would not facilitate the protection of geographical indications and would, in fact, be rather empty; thus, the costs associated with it would not be justified. For comparison, he referred to the proposal from the Cairns Group in the Committee on Agriculture calling for perfection of the tariff rate quota administration systems and wondered what the reaction of the proponents would be if other Members would argue that they were not ready to consider this proposal because of the administrative burdens and costs that it entailed for Members. Reacting to the comment made that his delegation's proposal went beyond what was foreseen in Article 23.4 and that there was no need for an opposition/challenge procedure in the system to be established under that provision, he agreed with those delegations that had emphasized that Article 23.4 did not only call for a "notification system" but also for a "registration system" in order to facilitate protection of geographical indications in participating Members. In his delegation's view, in the context of intellectual property rights, registration was by definition something that was expected to produce some sort of legal effect and was used in this sense in other parts of the TRIPS Agreement, most notably in the Section on trademarks. In the case of a multilateral register in accordance with paragraph D.3 of the revised proposal from the European Communities and their member States, the legal effect of registration would be the presumption of eligibility of protection in the Members participating in the proposed system. Precisely because of the legal effect that was inherent in the term "registration", and therefore was intended by Article 23.4, Members should be given a possibility to challenge a notification, when they believed that a notified geographical indication did not meet the relevant requirements in the TRIPS Agreement's Section on geographical indications and when the legal effects of registration would hurt their legitimate interests. If such a procedure would not be provided for, there would not be an effective control over what was registered and an opportunity for abuse would be created. In the absence of an opposition/challenge procedure, the register would not be able to serve its objective, as set out in Article 23.4, to facilitate the protection of covered geographical indications in Members, because there would not be a procedure to sift out misleading geographical indications. His delegation, therefore, believed that an opposition/challenge procedure was an indispensable element of the system to be set up. Moreover, since the system of Article 23.4 was intended to be a multilateral one, the opposition/challenge procedure should also be of a multilateral character. It was important, as set out in his delegation's paper, to ensure that smaller WTO Members with limited bilateral bargaining power enjoyed equal opportunities to represent their interests. Equally, the multilateral nature of an opposition/challenge procedure was to prevent the potential abuse of such a procedure; it should not be left to individual Members to decide whether or not an opposition/challenge was justified. He wondered whether New Zealand could explain how Hungary's proposal would not be in accordance with Article 1 of the TRIPS Agreement. As regards the applicability of the DSU, he wondered whether New Zealand could also explain how, in its view, the DSU could be used in relation to the multilateral registration of a geographical indication notified under the system to be set up under Article 23.4. Hungary had looked into this question and, as stated in his delegation's paper, had found that the applicability of the DSU was highly questionable.

Finally, he referred to paragraph 10 of his delegation's paper, underscoring that Hungary was open to any other solution that would take care of the substantive points that his delegation had raised.

77. The representative of Bolivia first wished to put on record that his delegation's full participation in the Council's discussions on issues in which it had a great interest was seriously hampered by the fact that too many important meetings were taking place at the same time for a small delegation like his to be able to be present at all of these continuously. As an initial reaction to the Hungarian paper, he wondered about the legal consequences of this proposal, apart from the political incidence it might have. Referring to the intervention of Argentina, he said that, in his delegation's view, the question as to why not more than 19 countries had adhered to the Lisbon Agreement was a relevant one. He said that his authorities were looking into the possibility of such adherence, assessing what would be the benefits and what the drawbacks. His delegation was pleased to note that several delegations, including those that were insisting on launching a new wide-ranging round of negotiations, had stressed the need to avoid high costs and administrative burdens, in particular for developing countries and small delegations like his.

78. The representative of Australia said that it was clear that there were different interpretations of what Article 23.4 provided for. She reiterated her delegation's view that the phrase "in order to facilitate the protection of geographical indications for wines" was referring to a need to create a register only in accordance with existing obligations. To have a legal effect, which was implied by terminology such as "presumption of eligibility" in the proposal from the European Communities and their member States, raised questions about the interrelationship between or with existing provisions of the TRIPS Agreement and, in particular, those requiring Members to provide legal means to prevent misuse of geographical indications.

79. The representative of New Zealand, responding to Hungary, said that he would just note that he had not called into question the legality of the Hungarian proposal on its own. What he had said was that the proposal from the European Communities and their member States, as supplemented by the Hungarian proposal, would appear to go beyond the mandate and scope of Article 23.4.

80. The representative of the European Communities, responding to questions posed regarding paragraph D.4 of his delegation's revised proposal, said that the delegations in question read this paragraph in accordance with how it had been drafted. Nevertheless, he would like to reiterate and underline that the system his delegation had proposed did have a voluntary character, but was also one with legal effect. The proposed system was by no means in contradiction with Article 23.4, since this provision called for negotiations and negotiators could agree to whatever they wanted.

81. The representative of the United States said that the only conclusion he could draw from what the European Communities had just said was that Members were, indeed, free to volunteer to participate in the system proposed, but they were not free to avoid the obligations that that system would place on them. In other words, a Member was free not to get additional benefits, but was not free not to avoid its obligations.

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

H. IMPLEMENTATION OF ARTICLE 24.1

83. The Chairperson recalled that an initial discussion of this matter had taken place at the Council's last meeting, when the Council had received a paper jointly sponsored by the delegations of Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey, outlining the views of these delegations on the implementation of Article 24.1, in particular in regard to the extension of additional protection for geographical

indications to products other than wines and spirits (IP/C/W/204/Rev.1). He called for suggestions as to how the work under this agenda item might be pursued.

84. The representative of Switzerland said that, in his delegation's view, there were three issues to be negotiated under the built-in agenda concerning geographical indications: firstly, the issue of the register; secondly, the issue of extension; and thirdly, the review of the national legislation on the protection of geographical indications. As regards the issue of extension, the joint proposal contained in document IP/C/W/204/Rev.1, of which his delegation was a co-sponsor, presented three main arguments as to why this issue was also part of the Council's work under the built-in agenda, including Article 24.1. In addition, he advanced some of the substantive arguments which demonstrated why an extension of the additional protection stipulated in Article 23 to geographical indications for products other than wines and spirits was needed in practice and why the current discrimination of geographical indications for such other products could not be justified any longer and must therefore be remedied. In this regard, he first wished to put the issue under discussion in historical perspective. Since the Uruguay Round, the economic situation had been steadily developing. While, at that time, the focus in the discussions had been on an additional protection for geographical indications for wines and spirits, no economic and objective reasons applied today for treating geographical indications for certain products differently from those for other products as far as the level of protection was concerned. Since the adoption of the TRIPS Agreement, awareness of the need for extending such additional protection to products other than wines and spirits had increased constantly throughout the world. On the global market, geographical indications were nowadays recognized as an invaluable marketing tool in trade for any product. When discussing the issue of extension in the Council, Members should bear in mind that extension was in the interest of each and every WTO Member. This was a fact, as illustrated by Annex A of the Secretariat summary paper of the responses received to the Checklist of Questions developed by the Council under Article 24.2⁴, which contained many examples of geographical indications for products other than wines and spirits. Members should also bear in mind that extension was not a North/South issue. Any country, whether developed, developing, least-developed or a transition economy, had products which merited adequate and effective protection of their geographical indications. It was important to note in this connection that Article 24.4 to 24.9 of the TRIPS Agreement would continue to apply when the protection of Article 23 would be extended to other products. Another argument he advanced was that the insufficient level of protection afforded by Article 22 of the TRIPS Agreement and the unjustified distinction between two levels of protection for geographical indications resulted in trade distortions. At the root of GATT and WTO was the objective to avoid trade distortions and the TRIPS Agreement had also developed from Members' desire to reduce trade distortions. There was no substantive justification for differential treatment of geographical indications depending on whether they concerned wines, spirits or other products. The risk of confusion between products originating in a specific region and products using the same denomination but not having the qualities derived from that specific region was important and such confusion was detrimental regardless of the product involved, not just for wines and spirits. The trade value of a geographical indication was equally important for all products. Systemic reasons derived from the system for the protection of intellectual property rights also spoke against the application of two levels of protection differing according to the product concerned. Geographical indications were intellectual property rights standing on the same footing as, for example, trademarks, patents or copyright. In none of these other areas of intellectual property a distinction or separation into two levels of protection according to different categories of products existed. The TRIPS Agreement did not do so either. A requirement that protection against the use of a geographical indication would only be available if this *misled* the public was an element of laws against unfair competition or consumer protection laws, but extraneous to the concept of intellectual property protection. Such requirements, as were incorporated in Article 22.2 and 22.3 of the TRIPS Agreement, resulted in legal uncertainty regarding the protection of individual geographical indications in different Members. Whether the public was being misled by

⁴ JOB(00)/5619 of 19 September 2000.

the use of a geographical indication was a discretionary decision to be taken by courts and administrative authorities when questions on the protection of geographical indications and the enforcement of such protection were at stake. The problem was that the legal and administrative authorities of Members would interpret this discretionary element of "misleading the public" differently, resulting in inconsistent decisions between Members and legal uncertainty regarding the protection of individual geographical indications. Such legal uncertainty endangered and prejudiced the good functioning of trade. Finally, he announced that his delegation would submit another paper on the issue of extension prior to the next meeting of the Council.

85. The representative of India first offered his delegation's complete and unconditional support for the intervention of Switzerland. His delegation agreed that there were three interrelated issues in the area of geographical indications as part of the built-in agenda: the issue of the register; the issue of the extension of additional protection for geographical indications to products other than wines and spirits; and the issue of Article 24.2. The issue of extension was not limited to Article 24.1; there were other reasons which gave grounds for discussing this issue, such as the TRIPS Council's 1996 annual report. Having said that, he did not think that it was useful to concentrate on whether or not there was a mandate and to be legalistic on this issue. Like Switzerland, he would also like to address some of the substantive reasons as to why his delegation believed that the additional protection for geographical indications should be extended to products other than wines and spirits. It was not clear to his delegation that there were any specific qualities inherent in wines and spirits that would be absent in other products which would make it imperative to have the additional protection for geographical indications exclusively for wines and spirits. This was merely a request for clarification; his delegation did not question that such additional protection was available in respect of wines and spirits. His delegation saw a big difference between the protection offered in Article 22 and that in Article 23. Article 22 was applicable if products were falsely presented to the public as originating in a particular territory. Article 23, however, applied if the real origin of a wine or a spirit was indicated together with a geographical indication of products of another territory; if someone were to present a wine, for example, as "Beaujolais made in the United States", Article 23 would not allow this person to use the geographical indication "Beaujolais" in this way and thereby somehow give the impression to the public that the wine in question was not very different from "Beaujolais", a wine geographical indication from France. Such protection was exactly what India needed in order for the problems to be solved that had arisen in respect of "Basmati" rice. Article 22 was inadequate in that respect because, unlike Article 23, it did not protect inherent qualities that certain products had and which were bestowed on these products due to their origin, i.e. products could never have these qualities if they did not have this origin. This was the heart of the issue of extension. His delegation found it astonishing that some had argued that extension of the product coverage of Article 23 would result in further trade restrictions. Would this argument not apply with respect to any intellectual property right? He would rather argue that more consumer choice would be available. Products that resembled to some extent other products could still be made and offered to the public, but in respect of a particular product with a particular quality a geographical indication had to be allowed to indicate the origin of the product in such a way that it did not confuse the consumer. As provided for in Article 22, the use of a geographical indication should not mislead the consumer, but it should not confuse the consumer either, i.e. it should not take away from the intrinsic trade value of the product. Obviously, India was not seeking extension for the sake of extension only, but because it believed this would be of advantage to its trade interests. India had a trade interest in extension of the product coverage of Article 23, because there were products of Indian origin that would benefit from protection as his delegation understood to be the subject of Article 23 and because substantial trade losses were suffered, whether notionally or in real terms, due to the lack of the additional protection under Article 23 for these Indian products.

86. The representative of the European Communities said that his delegation had been concentrating its efforts rather on the establishment of the notification and registration system to be negotiated under Article 23.4 and had so far not been intervening in a detailed manner on the

appropriateness of an extension of the additional protection under Article 23 to products other than wines and spirits. However, after having given this matter careful consideration, the European Communities and their member States were in favour of extending this additional protection to products other than wines and spirits. The arguments advanced by Switzerland and India in this regard, to which his delegation could agree to a large extent, were convincing. Indeed, why would wines and spirits be singled out? For other products, there were also clear economic interests. There was trade at stake and, indeed, there were also trade distortions resulting from the insufficient protection granted by Article 22; producers from the European Communities had also encountered difficulties in jurisdictions of some other countries, for example regarding products such as "Parma ham" or "Parmigiano". He referred to the contribution from Australia contained in document IP/C/W/211, in particular where it described the background of the trade at stake with regard to developing countries⁵, and quoted: "For developing economies and other economies which rely relatively more for their well-being on the export of commodities such as agricultural products and processed foods, there is a strong interest in maintaining or increasing the added value for their exports which is obtained through the distinctive and appealing presentation of the goods. Given the competitive pressures in the global marketplace, it is understandable that these economies should be particularly concerned to see effective protection for the distinctive market profiles of their products, so that their unique or distinguishing properties are communicated to the consumer in an informative and appealing way. Finding the appropriate balance for geographical indications – [...] – is therefore a significant trade issue, reflecting genuine trade interests." In his delegation's view, this paragraph spoke for itself. On numerous occasions, he had heard that, rightly or wrongly, developing countries had the impression that for them, in the present circumstances, there was not yet much to gain from the implementation of the TRIPS Agreement. His delegation believed that, by making an extra effort for providing this additional protection for products other than wines and spirits, a constructive contribution to this debate could be made.

87. The representative of the Czech Republic said that the protection of intellectual property rights had a long history before the Uruguay Round negotiations. The principles addressing trade-related aspects on which the TRIPS Agreement had been built had been recognized and defined at the multilateral level before the TRIPS Agreement. Intellectual property rights comprised general exclusive rights to prevent or authorize the reproduction, adaptation, use, sale, importation and other forms of exploitation of the creation or innovation that was the subject of the right. As a matter of fact, in comparison with most intellectual property rights, which were mostly of limited duration after which they fell in the public domain, only trademarks and geographical indications might subsist indefinitely. By the conclusion of the TRIPS Agreement, undeniable progress had been made in the international protection of geographical indications, meeting the interests of a great number of countries in the promotion of their goods which were fruits of their culture, know-how and their unique blend of soil, water and climate. The area of geographical indications had not been an easy one to negotiate and Members were now being challenged concerning some remaining problems. The TRIPS Agreement laid down, as a general principle for the protection of geographical indications, not to mislead consumers and to prevent unfair competition. However, the level of protection for geographical indications was not equal for all products whose characteristics were attributable to their geographical origin and which for these reasons merited protection. Under the TRIPS Agreement, only producers of wines and spirits would have the advantage of the additional protection under Article 23 for their geographical indications, which discriminated against producers of other products than wines and spirits, for whom the protection of geographical indications was not enhanced. As a consequence, investments in production and marketing in respect of products other than wines and spirits were not sufficiently protected. However, the protection of geographical indications was of fundamental importance for producers of traditional goods, which were particularly vulnerable to imitation, counterfeiting and usurpation. Therefore, consistent and long-term protection should be available in a non-discriminatory manner for all producers of geographical indication products at the

⁵ Document IP/C/W/211, p.3.

international level, which could, in her delegation's view, only be ensured by an additional protection of geographical indications as under Article 23 and, consequently, extension of the scope of this provision to products other than wines and spirits. Extension of the scope of this additional protection for geographical indications could prevent, in a satisfactory manner, damages which some producers suffered from false, abusive or confusing use of geographical indications on foreign markets. Since geographical indications were not necessarily always known to the public at large, the public was not always necessarily deceived when such indications were used for products with another origin. However, such indications were sufficiently known in the circles concerned (e.g. traders) and it was of course not by mere chance that others were using these indications. The use of such geographical indications for products not having the characteristics attributable to geographical origin was parasitical and therefore an unfair act even when no consumer deception was involved. The introduction of the concept of "additional protection of geographical indications" only for wines and spirits was a significant departure from the principle of identical protection and legal treatment for all products as set out in the Paris Convention, the Madrid Agreement and the Lisbon Agreement. The inherently disadvantageous nature of such separate treatment in relation to products not enjoying such additional protection created problems of objectively balancing the benefits accruing to Members under the TRIPS Agreement. Additional protection of geographical indications for other products than wines and spirits would enable producers to protect their original and traditional products against counterfeiting and abusive use of traditional names within all Members without the burden of costs for registration of trademarks and for enforcing rights. Negative financial effects resulting from trademark registration rules were eliminated only for the producers of wines and spirits, because under Article 23 the translation of geographical indications into foreign languages was also protected. The legitimate claim for ensuring the same advantage for producers of geographical indication products other than wines and spirits was therefore clearly understandable. Trademarks, collective marks or trade names were good tools for the actual producers to help consumers to recognize and choose the products they considered the best among those coming from a particular region and having the same territorially defined conditions of production, but could not replace the geographical indication for these products. Bearing in mind that the right of using a geographical indication belonged to all producers within one particular geographical territory whose products fulfilled all conditions of the protected geographical indication, in her delegation's opinion only the same level of protection for all products - which implied extension of the scope of Article 23 - could ensure the main goal of the protection for geographical indications, which was to reinforce the right - unlimited in time - to use a geographical indication. Article 22 provided for not misleading consumers as to the real nature, quality and origin of the products. However, this level of protection did not address concerns of producers and did not provide protection for their investments.

88. The representative of Argentina referred to paragraph 99 of the minutes of the previous meeting of the Council (document IP/C/M/28), which reflected an intervention by Argentina which had not been worded in the way her delegation would have wanted it to be worded, in particular with regard to a sentence in which it had wanted to express surprise about comments made calling for a "pragmatic approach" and against "narrow or legalistic interpretations". Correcting this situation, she said that her delegation had wanted to say: "We do not share the tendency which has been seen in this Council to force interpretations of Ministerial Declarations, Reports or the very provisions of the Agreement, supported by insufficient legal and technical arguments. This concerns us, particularly when these interpretations come from countries which have greater responsibility in the multilateral trading system and when the interpretative laxity or, put another way, the departure from strict legal interpretation, is used in a selectively discriminatory fashion regarding the subjects under discussion."

89. She reiterated that Argentina's interpretation of Article 24.1 was that this provision concerned negotiations which would have as their subject what was entailed in the specific reference to Article 23, enhancing the protection given to wines and spirits. Responding to the delegation of Switzerland, which had said that the requirement of misleading the public established under Article 22 caused legal uncertainty regarding the protection of geographical indications in the territory of given

Members, she wondered whether Switzerland believed that the reference in Article 23.3 to consumers being misled in relation to homonymous indications also created legal uncertainty. Argentina gathered from what Switzerland was saying that extension of the additional protection for geographical indications to products other than wines and spirits, which it was looking for under Article 24.1, would render inoperative the provisions of Article 22.2, as they would have no reason to exist. How did Switzerland and its co-sponsors of the joint proposal conceive negotiations on extension as required by the Agreement? For example, there was nothing in Article 22 which indicated that its effect was subordinate to negotiations that supposedly were going to take place under Article 24.1, as many alleged, to extend protection, i.e. there was nothing in the Agreement that indicated that specific rules were transitional pending specific negotiations. In paragraph 12 of their proposal, Switzerland and its co-sponsors said that it would be illogical to limit the negotiating mandate just to wines and spirits because these products already received additional protection under Article 23 and that this would increase the imbalance in favour of these products. Did this mean that, according to those delegations' interpretation, the protection given under Article 23 to wines and spirits was a maximum standard of protection for wines and spirits? And did those delegations believe that, as a consequence, the *status quo* should be maintained as at present? Did they believe that there was no possibility to improve protection for those products in the framework of the TRIPS Agreement? The representative of Switzerland had said that the possible increase in protection for products others than wines and spirits would be safeguarded through the exemptions provided in Article 24; and that, in any case, extension to other products of the additional protection granted under Article 23 in respect of geographical indications for wines and spirits, would be covered by these safeguards. She wondered how this was compatible with paragraph 12 of the joint proposal, which said that negotiations required under Article 24.1 should cover not just additional protection of geographical indications, but also the mitigation of the exceptions to protection provided for in Article 24.4 to 24.8. Referring to paragraph 39 of Switzerland's Report to the TPRB for its upcoming trade policy review (document WT/TPR/G/77/CHE), she said that the Swiss Government, describing its position regarding a new round of multilateral trade negotiations, had stated that one of the main topics for these negotiations should be the extension of the protection of geographical indications to food products other than wines and spirits, as well as to specific industrial products. She wondered how this statement, which recognized an attempt to extend protection to food and industrial products as part of a new round, was compatible with the proposal presented in document IP/C/W/204/Rev.1, which said that the issue of extension of additional protection to products other than wines and spirits was an integral part of the built-in agenda of the TRIPS Agreement.

90. The representative of Australia agreed with Switzerland that the issue of extension was not a North/South issue. Indeed, her delegation was of the view, that all Members had a shared interest in examining the deeper policy issues behind the calls for extension of the additional protection of Article 23 to products other than wines and spirits; and a shared interest in coming to a collective understanding about how it might be possible to work towards better geographical indication protection rather than necessarily increased protection. Another comment by Switzerland had been that consumer deception was not an appropriate concept in the context of intellectual property. Her delegation found this a rather curious statement and she would just like to mention that the common law concept of "passing off" had long been used as a means of protecting trademarks in common law jurisdictions. As regards India's question as to what was intrinsic to wines and spirits that justified them having an additional level of protection, it was her understanding that the distinction in the TRIPS Agreement was the result of a deal made between certain Members at the end of the Uruguay Round, done in the political context that the conclusion of a broad round of multilateral trade negotiations represented. For Australia, this had been quite a concession at that time. As regards the paragraph from her delegation's paper contained in document IP/C/W/211 that the European Communities had quoted, she wished to emphasize the terms "effective protection" in the second sentence of that paragraph and "appropriate balance" in the third sentence. It was precisely because her delegation recognized that this was a significant issue for many Members that her delegation was

contributing actively to this discussion, even though Australia was not a *demandeur*. Australia believed that the seriousness of the issue merited a serious discussion of the policy issues involved.

91. Continuing, she said that the Australian paper, circulated at the last TRIPS Council meeting, sought to give the debate about geographical indications the greater depth and inclusiveness that it clearly needed. Her delegation was encouraged to see that it had already been cited in other fora in support of policy positions that differed from its own - which was evidence at least that Australia had succeeded in being more inclusive, even if it had not yet succeeded in convincing others of the merits of its position. More generally, she would suggest that the characterization of this issue as one that neatly divided the TRIPS Council into two incompatible camps was very likely to be misleading. It was inherently improbable that two clusters of delegations, within a Membership of some 140, had two monolithic and sharply distinct sets of interests. Advancing work on a collective understanding on this issue would require to go more deeply into the issues than had been possible in the debate so far. What was creating a sense of division were widely differing working assumptions about the prospective benefits that would flow from changing TRIPS language in this area. There was an assumption on the part of some delegations that rewriting Article 23.1 to extend it to further industry sectors would bring direct economic benefits - and presumably it was assumed also that these benefits would significantly outweigh any losses. On the basis both of Australia's practical experience, and of economic and commercial developments in many WTO Members, it was its objective judgement that this was unlikely; nor an analysis that reflected a particular Australian perspective. What was intended by the proposed rewriting of Article 23.1? Was it assumed that extending its reach to further product areas would in some way guarantee exclusive rights to control the use of a term once it had been identified and claimed as a geographical indication? To take the example in Australia's paper, if Australia were to assert rights under this provision to "Orange" as a geographical indication in relation to wine - would that override any other use of this word - either to describe the content, aroma, producer's surname, or colour of another product, or bona fide trademark use, or use of a similar sounding word in a language other than English? Would it deny others the right to use "Orange" as a generic term? She would hope not. That would be an obviously unbalanced use of the intellectual property system - to block honest traders from using a descriptive term, in good faith and in a manner already well-established in the market, when there was no evidence that any consumer had been deceived or misled as to the actual origin of the product. If "Orange" were to be used in a way that demonstrably caused deception or confusion, or in a way that amounted to unfair competition (in terms of the Paris Convention), then her delegation would expect that some form of legal remedy should be available. But it would be improper to use this mechanism to assert exclusive rights over generic descriptive terms, and to interfere with legitimate trade. It might be different with a term such as "Coonawarra", which was unambiguously an Australian geographical indication with an exclusive reference - if another producer used that term in isolation to characterize its product then it might indeed mislead consumers, and legal remedies should be available in that case. However, if "Coonawarra" went the way of such terms as kiwifruit and chinaware, and became generally descriptive of a type or style of product, then it would not be reasonable to interfere with legitimate trade in those goods.

92. Commenting on the reference in the joint paper introduced by Switzerland to the form of protection in Article 23.1 as "absolute" protection, she said that any sort of "absolute" or unqualified exclusive right should be approached by policymakers with real caution - especially if terms with potentially multiple signification and commercial use were to be claimed to have one single acceptable application. Expectations that the honest use of certain terms - where there was no direct or indirect misrepresentation and no misleading conduct - could be circumscribed or banned, were unlikely to be sustainable. This could lead to a genuine imbalance, conflicting with the very objectives of the TRIPS Agreement, which required a balance of rights and obligations. It was interesting that this debate should emerge at a time when many countries were looking to diversify their traditional economic and export bases, and were looking to the creation of higher-value niche products rather than relying on the production of raw commodities. In many cases, this called for the

more effective identification and promotion of distinctive regional identities - a point discussed in her delegation's issues paper. For Australia's neighbour Papua New Guinea, for instance, this entailed gaining greater recognition for its distinctive Highland coffees such as Sigri and Arona. At the same time, many developing countries were successfully moving into new areas of production, such as dairy products, horticulture, processed foods and beverages such as beer, which were directly targeted by proposals to restrict the use of descriptive terms. "Pilsener" beer, which was one of the terms under consideration, was produced in many countries. Dairy products such as feta and parmesan cheese were also widely produced internationally, and were important growth industries in developing countries with considerable export potential. To remove legitimate descriptive terms would be a constraint on trade, just as it would be to deny coffee growers the right to refer to arabica varieties on the basis that this term described the origin of the variety on the Arabian peninsula. This raised the question of whether attempts to rewrite TRIPS provisions threatened to cause problems rather than resolve them. For instance, in Australia, consumers benefited from a wide choice of dairy products. A popular product was feta cheese, which was variously marketed as Greek feta, Bulgarian feta and Australian feta - possibly others as well - depending on the country of origin. Should these terms be used in commerce in a misleading way, for instance, to suggest that there were already legal remedies available under trade practices legislation. A recent consent order of the Australian Federal Court under this legislation concerned labeling of Basmati rice falsely indicating to the consumer that it was of Indian origin. As the government consumer watchdog had observed in relation to this outcome "some consumers believe Indian basmati rice to be superior to that grown in other countries and are prepared to seek it out and pay a premium [...] many seek Indian-grown basmati rice over similar strains grown elsewhere". An effective enforcement mechanism was therefore available through normal consumer protection provisions. However, as the Secretariat summary paper on Article 24.2 showed, some jurisdictions would not normally recognize country names as geographical indications, which raised questions about whether some important geographical terms would be protected. For instance, according to this view, Article 23.1 would not permit Australia to restrain the use of "Australian-style wine", a description that was increasingly common in some markets. This raised interesting issues about the varieties of feta cheese that she had described earlier - would "Australia" or "Bulgaria" be accepted for protection as a geographical indication relating to feta cheese? Yet at the same time, there was a debate about whether the term "feta" should itself be claimed as a geographical indication - presumably, if that were so, under an expanded Article 23.1, it might become forbidden for many current producers of feta to describe cheese even as feta-style. It was because of the risk of unintended consequences, and because of the need for caution when absolute or unqualified rights were being asserted in a manner that would restrain economic development and impede legitimate trade, that her delegation had stressed the urgent need for an objective review of the actual nature and content of current national laws governing geographical indications. In her delegation's view, as a first step, the wide range of approaches that Members had taken in this area should be respected, as Members applied agreed TRIPS standards in a way that conformed with their legal tradition and economic profile. Before claiming that there were great deficiencies in the way geographical indications were protected under the national law of other Members, and that this could only be remedied through imposing absolute terms through revised treaty language, the wealth of information that had been provided on national geographical indication systems, at the direct request of other Members, should be looked at and considered with a view to the balancing of various legitimate interests as her delegation had set out in its discussion paper.

93. She would also like to clarify her delegation's position on the nature of the mandate on the TRIPS Council. Above all, the structure and logic of the TRIPS Agreement stressed that review of implementation - an objective, collective consideration of actual implementation of TRIPS provisions - should precede any endeavour to amend or adjust TRIPS standards. The risk that renegotiations could be based on misconceptions about how TRIPS standards had been applied was a sound practical justification for this approach. The analysis in document IP/C/W/204/Rev.1 suggested that the TRIPS Agreement had not one but two separate mandates for the TRIPS Council to undertake negotiations on the extension of Article 23.1 protection to new product areas. It seemed

improbable that negotiators would have required the TRIPS Council to undertake two parallel negotiations, under separate mandates, on the same topic. The paper also suggested that the current TRIPS text was unbalanced and had "imbalances" which were "not consistent with the spirit and basic objectives of the TRIPS Agreement" - in other words, that the negotiators had concluded a text which contradicted the objectives of the TRIPS Agreement. In fact, the balance was reflected in the fact that Article 23.1 was the consequence of the demands of one negotiating party, which had been balanced through trade-offs on other issues, as negotiations necessarily had dictated. Australia had not proposed the approach taken in Article 23.1 but had accepted it as part of the package. It would not maintain the existing balance to create absolute rights in other areas as well. What then were the mandates? Article 24.1 unquestionably concerned "individual geographical indications" - it did not concern entire product sectors or entire industries. It related to specific negotiations on the legal status of individual terms. Further, these were terms which were already protected under Article 23. Why was there no mention of the TRIPS Council in Article 24.1, unlike every other provision requiring action on the part of this body? Quite possibly, it was because it was recognized that it was unworkable and inappropriate for negotiations to be undertaken in this body over the status of individual intellectual property rights with effect in all WTO Members. In this body, it was not the universal validity of a claimed single trademark, or a claimed single patent, that was negotiated, but agreed rules under which individual Members exercised their sovereign right to accept or refuse a claimed intellectual property right. It was unlikely that a single word, which might be a geographical indication in one country (take the example of "Orange") could be successfully determined to have exactly the same primary signification to consumers in all other Members. Nonetheless, there were prospects for reaching a bilateral or multilateral agreement in other ways - for instance, one country might agree to accept Australia's claim that "Orange" was a geographical indication for wine, even though "Orange" had been used by some traders as a descriptive term, or had already been registered or used as a trademark. This would involve waiving the entitlement under Article 24 (the "provisions of paragraphs 4 to 8 below" referred to in this Article) to apply balancing safeguards against absolute geographical indication rights. Page 134 of Gervais's authoritative text on the TRIPS Agreement clearly confirmed this interpretation. This approach to Article 24.1 was hardly more attractive from a policy perspective, in that it entailed negotiations consciously to remove balancing safeguards. Nonetheless, Australia had engaged in such negotiations in a bilateral context. Her delegation was not pressing for one interpretation or another of Article 24.1 out of self interest or for a distinct motive - it was because, in the end, all collective interests were served by respectful attention to the agreed framework of rules Members were working with. Under Article 24.2, there unquestionably was an obligation to consider what the practical effect of existing rules was - whatever Members chose to do subsequently. Her delegation had continued to stress the need to do this, and to respect the fact that Members had provided detailed answers to the detailed questions of other Members, and not change the rules before their actual effect had been considered. The questions raised in Australia's issues paper were therefore pressing ones, matters that should be considered before a compelling case could be made for rewriting rules. Ultimately, some form of consensus would be necessary to move this issue forward and the best form of consensus was one based on an informed collective understanding of the issues. The current proposals simply raised the policy concerns, dilemmas and unintended consequences that she had tried to outline in this intervention.

94. The representative of Sri Lanka said that the economic and political significance of geographical indications had been growing in recent years, as the use of distinctive or quality signs had promoted the demand for products of a specific geographical region. Therefore, the TRIPS Agreement marked a major step forward in the multilateral protection of geographical denominations. Geographical indications had long been considered to be exclusively of interest to products originating in a limited number of countries, but this situation did not correspond to reality any longer. This was mainly due to the coming into force of the TRIPS Agreement. Section 3 of Part II of the TRIPS Agreement not only created obligations on the part of Members, but also presented opportunities to obtain protection for their own geographical indications. In this connection, she stressed the importance of an extension of the additional protection under Article 23 to geographical

indications for products other than wines and spirits for her delegation. Most countries were beginning to realise only now what potential geographical indications commercially had and that, in the past, this potential had often and wrongly been neglected. She referred to the paper submitted by Australia on Article 24.2 and stressed that, in particular for developing countries, the protection of their geographical indications was a life and death situation. The TRIPS Agreement went a long way in trying to ensure the authenticity of indications on wines and spirits. While setting standards for the protection of geographical indications in respect of agricultural and other products generally, aimed at preventing misleading of the public and unfair competition within the meaning of Article 10*bis* of the Paris Convention, in the case of wines and spirits the standards for protection were more stringent. Article 23.1 of the TRIPS Agreement prevented the use of a geographical indication even where the true origin of the wine or spirit was indicated. It was clear that the aim was not only to protect the consumer but to extend the protection to the purported legitimate user. The implications of this difference in approach between other products as opposed to wines and spirits were really felt by Members. The question remained whether this difference was justified. Her delegation believed that Article 24.1 was a permanent provision of the TRIPS Agreement. This did not preclude an interpretation that customary terms could permanently co-exist with corresponding geographical indications. Her delegation did not believe, therefore, that the arguments made to the effect that the provisions of Article 23 were a compromise made in the context of broad based Uruguay Round negotiations and reflected a careful balance struck as stipulated in Section 3, was in line with the spirit of the TRIPS Agreement. Since, at the WTO, Members were presumed to be making attempts to achieve symmetries in the level of development of developed and developing countries, why were countries like Sri Lanka compelled to raise the question as to why the TRIPS Agreement should not address issues concerning the asymmetrical nature of provisions in the TRIPS Agreement, in particular in the area of geographical indications. Finally, she associated her delegation with views expressed by Switzerland, India, the Czech Republic and the European Communities, in particular the arguments put forward to justify why WTO Members should engage in negotiations to extend the additional protection for geographical indications under Article 23 to products other than wines and spirits.

95. The representative of the United States associated his delegation with the intervention made by Australia. As to the product coverage under Article 23, he did not think that anyone was arguing as India had suggested that there was some inherent difference between wines, spirits and other products that made other products ineligible for protection under Article 23. With regard to the reason for the different level of protection stipulated in this provision, he quoted from Daniel Gervais' analysis of the TRIPS Agreement: "Negotiators accepted the demands of a number of wine-producing participants in the Uruguay Round, notably the European Union, that wanted a higher level of protection for wines and spirits than the standard applied to geographical indications in general." That was why the distinction existed. Changing that equation would require negotiations. His delegation did not feel that a mandate existed in the TRIPS Agreement to engage in such negotiations. Having said this, he would be happy to engage in discussions with a view to clarifying what would be the implications of an extension. However, the United States would negotiate the possible extension of Article 23 to other geographical indications in the context of a new Round, if it incorporated such a mandate. As India had indicated, it was in fact seeking a trade advantage and seeking trade advantages required negotiations, so that others who were similarly seeking a trade advantage could engage in such negotiations. It would be important, before deciding whether the TRIPS Council needed a mandate to negotiate on the extension issue, to fully explore whether or not the protection sought was actually necessary. Some delegations had already indicated what some of the implications of increasing the level of protection for other products might be. He hoped that the Council's discussions under Article 24.2 would generate a clear understanding of what protection was currently being provided under the Agreement and how that protection might in fact, if fully implemented, provide delegations the protection that they were interested in for the products under discussion.

96. The representative of New Zealand did not agree with the statement by Switzerland that there were three areas for discussion under Section 3 of Part II of the TRIPS Agreement, i.e. the multilateral registration and notification system under Article 23.4, the review under Article 24.2, and Article 24.1 negotiations on the extension of protection accorded under Article 23. While he had no problem with the way Switzerland characterized the first two areas, he could not agree that Article 24.1 established that there would be negotiations to extend the range of products afforded protection under the special, additional protection of Article 23. Some Members were suggesting to ignore the legal niceties of Article 24.1, but this was simply not possible. The WTO was, after all, a rules-based organization, which was based on the rule of law. Conflicts between Members could be the subject of dispute settlement proceedings under the DSU, in which the law would be the prime focus for any panel or the Appellate Body. In his delegation's view, the calls of these Members tended to demean the TRIPS Agreement. The TRIPS Agreement being a fundamental part of the WTO Agreement and of equal legal standing with all the other multilateral agreements that constituted the WTO Agreement, were these Members asking us to start walking away from all other legal rights and obligations Members had? In his delegation's view, Article 24.1 confirmed that Members had agreed to enter into (bilateral, plurilateral and multilateral) negotiations aimed at increasing the protection of individual geographical indications for wines and spirits conferred under Article 23. Contrary to the arguments advanced by a number of other delegations, the focus of Article 24.1 was quite limited. It did not encompass the possibility of extending the scope of products already covered by Article 23. Article 24.1 was solely focused upon those cases where additional protection could be explored for the use of such terms as "Chablis", "Burgundy" and "Champagne" - if they were not already protected - that fell within the exception of Article 24.4, which concerned the right to continued use of geographical indications. It should also be noted that Article 24.1 had been used as the basis for negotiations with the European Communities on the various wine agreements that it had been negotiating with a range of Members. And, there had never been the slightest suggestion that such negotiations should extend beyond those products already covered by Article 23. It should also be noted that Switzerland appeared to have also been engaging in historical revisionism in its overview of the history of Article 23. Throughout the Uruguay Round and since, his delegation had always seen Article 23 as providing for additional protection on top of the general rule contained in Article 22. The reason why such special protection had developed was not because wines and spirits had any inherent qualities that made them worthy of such special protection. It was because, during the Uruguay Round, Article 23 had been a compromise so as to provide the wine producing countries in the European Union with special protection for wines and spirits. Thus, any questions as to why wines and spirits deserved such special protection should be directed to these countries; New Zealand was not, nor ever would be, a *demandeur* for such special protection. His delegation agreed with others who argued that there was no reason for the discrimination between wines and spirits and all other products but, instead of wanting an extension of the protection afforded under Article 23, perhaps Members needed to explore its deletion. That would at least ensure that the general rule contained in Article 22 was the only form of protection for all products. In New Zealand's view, Article 22 provided Members with more than enough protection for their respective geographical indications and, when he heard others arguing that Article 22 was deficient, he was somewhat dismayed that no specific examples of such deficiencies could be provided. As had been obvious from the various contributions received thus far, the whole area of geographical indications was an incredibly complex one that could not be easily typecast as being an issue for, or even against, developing, least-developed and even developed countries. All needed to work together on the issues in this area.

97. The representative of Mexico said that her delegation also wished to participate in these discussions in a constructive way and try to go deeper into those issues of substance which seemed to be stopping delegations from understanding each other. As regards Article 24 and its relationship with Article 23, she wished to make a number of observations and thus to reply to some of the points that had been made in the joint proposal introduced by Switzerland. She hoped thus to contribute towards clarifying the doubts regarding the origin of these provisions and the context in which they

were to be seen. Her delegation had also analysed the provisions in question from the perspective their negotiating history. As a result, her delegation saw clearly that Article 24 represented an intrinsic balance as well as a balance with other provisions of Section 3 of Part II, in particular Article 23. Article 24 contained a balance between its different clauses, because it was aimed to address, on the one hand, the concerns expressed by a number of delegations during the Uruguay Round to the effect that the obligations to protect geographical indications, in particular those referring to wines and spirits, could affect what they considered as acquired rights at that time because of the prior use that had been made of certain terms; and, on the other hand, the wish by some other delegations to avoid future recurrence of situations where use would be made of terms which would impede the legitimate protection of geographical indications. Thus, Article 24 included, on the one hand, provisions on exceptions, i.e. paragraphs 4 to 8 of Article 24, and, on the other hand, a clause providing for the possibility of entering into negotiations in the future with respect to given individual geographical indications under Article 23 so as to improve their protection. This clearly showed that the aim of these negotiations, which could take a bilateral or a multilateral form, referred to the application of these exceptions in the light of the objective of Article 23. In other words, these exceptions might be subject to negotiations among the Members for the purpose of improving the protection given to individual geographical indications of wines and spirits. This historical background did not leave room for other interpretations such as those advanced in support of calls for broadening the scope of these negotiations. Following the same rationale, Article 24 also represented an equilibrium in relation to Article 23 as well as in relation to Article 22 to the extent that it imposed exceptions on those two Articles. Furthermore, two of the exceptions under Article 24 referred specifically to wines and spirits. Consequently, Article 23 could not be said to constitute an absolute protection, i.e. a blank cheque; neither did it represent an imbalance, when viewed in the context of Section 3 of Part II as a whole. The joint proposal introduced by Switzerland argued that the reference to Article 23 in Article 24.1 did not relate to the *products* contained in Article 23, but rather addressed the *additional protection* stipulated in Article 23. In this connection, she quoted from a study of these provisions⁶: "Some of the text forming Article 24 once again referred to engagements specifically applicable to wines and spirits. This is the case of Article 24, paragraph 1 and paragraph 4." Along the same lines, another scholar, Carlos Correa, in referring to Section 3 of Part II, had also pointed out that only issues concerning geographical indications for wines and spirits were the subject of an obligation for Members to continue to negotiate with a view to strengthening the protection granted.⁷ Looking into the background of the TRIPS negotiations, it appeared quite clearly to her delegation that the text and the context of the provisions in question did not leave room for any other interpretation, i.e. an extension of their product coverage was not provided for. Neither was there proof that, during the TRIPS negotiations, countries had insisted in the extension of Article 23 to products other than wines and spirits. The documentary evidence rather proved that there was very little interest in this topic altogether, including on the part of Members who were now in favour of such an extension; little interest in particular on behalf of developing countries. Even though the situation might have changed since, the texts with which Members were working and according to which Members were to pursue the debate were the result of negotiations and contained a negotiated equilibrium; any alteration in this situation required a mandate to do so and such a mandate had to be established in a different context. In other words, where the joint proposal introduced by Switzerland said that the issue of extension was left open to be dealt with at a later date, it did not seem to reflect correctly what had happened. In a rules-based Organization like the WTO with its dispute settlement mechanism, only the texts that had been negotiated could be lived by. Her delegation agreed with the

⁶ Horacio Rangel Ortiz (President of the International Association for the Advancement of Teaching and Research in Intellectual Property), "Geographical Indications in recent treaty law in the Americas: NAFTA, Latin American Free Trade Agreements, Mercosur, the Andean Community and the Central American Protocol" at the WIPO Symposium on the International Protection of Geographical Indications in the Worldwide Context, Eger, Hungary, 24-25 October 1997.

⁷ Carlos Correa, "Acuerdo TRIPS, Régimen Internacional de la Propiedad Intelectual", Fundación Centro de Estudios Políticos y Administrativos, Ediciones Ciudad Argentina, Buenos Aires, 1996, p.118.

view that had been expressed that, from the debate, there appeared to be some confusion as to the scope of the definition of geographical indications under the Agreement and the scope of the existing obligations. Discussing the summary paper on Article 24.2 prepared by the Secretariat would allow delving into this. Her delegation had also noted that there were many ideas as to what was precisely the definition of subject-matter that formed the basis of geographical indication protection. For the benefit of all Members, it would be useful to clarify these matters.

98. Continuing, she said that, without prejudice to her delegation's position, there were also economic aspects that to be considered before opening a broad discussion regarding the proposals to improve or extend the current protection under Section 3 of Part II. Those who advocated extension had referred to the added value of geographical indications as well as to economic implications arguing that geographical indications were important to them because geographical indications would enable them to achieve better access to export markets and better ways of marketing their products. These statements needed further thought and needed to be examined in the light of other economic criteria, in order to enable an assessment of the economic incidence of increased protection and to see whether it was worthwhile to grant it or not. The effect of increased protection on competition in markets was one of these aspects. In a recent seminar, mention had been made of the restrictive effects of the TRIPS Agreement on competition, as intellectual property rights granted certain monopolies to their right holders. This also applied in the case of geographical indications. Another point to consider in this connection was that there was a great concentration of geographical indications protected up to now in certain countries and regions and in respect of certain products. It also made a difference whether the issues involved were looked at from a producer's or a consumer's point of view. In other words, it also had to be taken into consideration what effect increased protection might have on price levels, in particular for consumer countries. In this regard, she quoted an article by Duran and Michalopoulos⁸: "It is not evident that all developing countries would benefit from this extension. This would depend on whether the country is a producer of the protected geographical indication, for example India as producer of Basmati rice, or a major consumer of the product. Furthermore, there is the case of developing countries that may have a comparative advantage in producing a like product more cheaply than the one protected by the geographical indication. Extending these rights may not be in the interest of these countries either." Many of the products envisaged for this possible extension were agricultural products and these products were extremely important for many developing countries, not only as producers but also as consumers. Moreover, improved or increased levels of protection did not automatically mean increased or improved access to export markets. There were a great number of other instruments and barriers that were in force at present for certain products in food and agricultural markets. For all these reasons, her delegation felt that there was a need to study most seriously the potential repercussions that an extension of protection might have, given that its cost may exceed any potential benefits. Perhaps, the best way forward was to analyse how the geographical indication protection regimes had been enforced in the national context up until now. The summary paper on Article 24.2 prepared by the Secretariat would be a most useful instrument in this regard.

99. The representative of Slovenia said that Slovenia was one of the co-sponsors of the joint paper introduced by Switzerland. The arguments contained in that paper expressed clearly his delegation's position on the question of mandated negotiations, i.e. as required under the three built-in agenda items concerning geographical indications: Article 23.4, Article 24.1 and Article 24.2. Moreover, the TRIPS Council had agreed that the review of the application of the provisions of the Section on geographical indications would permit inputs from delegations on the issue of scope of the additional protection of Article 23. However, due to the present difficulty of finding consensus on the issue of the mandate, Slovenia was ready, for the time being, to put aside the question of

⁸ Esperanza Durán and Constantine Michalopoulos, "Intellectual Property Rights and Developing Countries in the WTO Millennium Round", *Journal of World Intellectual Property*, November 1999, Vol. 2, No. 6, p.860.

interpretation and more than willing to engage in a substantive discussion on coverage. His delegation attached great importance to the issue of extending the protection in respect of geographical indications for products other than wines and spirits. Such extension would benefit all Members, whether developing or developed, and would not impose additional burdens on countries. There were many benefits, as protection would be extended to goods originating in a Member's territory or region therein, which had a given quality, reputation or other characteristic essentially attributable to their geographical region. This was increasingly important as exporters often marketed their products by incorporating geographical indications on their labels and in their brands so as to make them better identifiable and interesting to consumers in international markets. He also wished to highlight the point that, if all countries upheld this principle, then they would all benefit from this protection in overseas markets as well as their own domestic market. Some argued that Article 22, which provided for protection against misleading the public and unfair competition, granted sufficient protection. His delegation doubted the effectiveness of these provisions, as the phrase "misleading the public" could lead to legal uncertainty. Defining and establishing what was "misleading" were discretionary, and inconsistent decisions could become more frequent as more countries opened themselves to trade.

100. The representative of Egypt associated his delegation with the interventions made by Switzerland, India, the European Communities and Sri Lanka.

101. The representative of Romania reiterated her delegation's interest in the issue of geographical indications, in particular in the extension of the additional protection under Article 23 of the TRIPS Agreement to products other than wine and spirits. It was obvious that Members were, at present, far from a common view on the mandate provided under Article 24.1. In her delegation's view, negotiations for extension should be envisaged only after a clear common understanding of the legal framework for such negotiations had been agreed. Romania supported the views already expressed by other Members that this work could be facilitated if it was conducted in parallel to the work under Article 24.2. The review under this provision should take place in a structured manner, allowing for a better understanding of the substantive issues as well as Members' needs for extension of the additional protection to products other than wines and spirits.

102. The representative of Hungary said that his delegation sympathized with many of the convincing arguments advanced by Switzerland, India and other supporters of extension of the scope of the product coverage of Article 23. Hungary shared, in particular, the point that geographical indications were priceless marketing tools on the global market. As he had stated at previous meetings of the Council, his delegation believed that geographical indications, by identifying goods as originating in a certain territory and ensuring the consumer of the presence of a given quality, reputation or other characteristic of the good which was essentially attributable to this geographical origin, were attributes of the goods themselves. Hungary was convinced that geographical indications had considerable potential for commercial use and could be assets for all countries and believed that liberalization efforts, in particular, in the area of agriculture should be accompanied by the improvement of geographical indications. On the basis of the present discussion, and essentially since the run-up to the Seattle Ministerial Conference, for his delegation the picture was clear. The extension of Article 23 protection to products other than wines and spirits was in the interest of a large number of WTO Members from various regions of the world and at different levels of economic development. In addition, starting negotiations on the extension of the product coverage of Article 23 would be a clear step forward, i.e. a step in the direction of improving the TRIPS Agreement. In other words, this initiative was not a North/South issue, nor one that would aim at diminishing the standards laid down in the TRIPS Agreement. Against this background, he believed that the membership should take a pragmatic approach, in the clearly expressed interest of a large number of Members. Members should leave aside the question as to whether or not there was a mandate and should start negotiations on the extension of Article 23 protection to products other than wines and spirits. Reacting to a point made by New Zealand, that Article 22 protection sufficed, he said that, firstly,

such an approach would diminish the standards laid down in the TRIPS Agreement and might be the first step on a slippery slope, which his delegation would not want to take. It just had to be imagined what could happen not only to other Sections of the TRIPS Agreement but also to other Agreements, for example the Agreement on Agriculture. Secondly, there was a mandate under Article 23.4 to set up a multilateral register for geographical indications for wines and spirits. What would happen with this obligation if the approach suggested by New Zealand were to be followed?

103. The representative of Mauritius said that extending the scope of Article 23 to products other than wines and spirits was just a coherent step to be taken. It was a coherent step based on what was already in the Agreement. Article 22.1 made clear that the provisions of the TRIPS Agreement covered geographical indications for all goods. However, it was the insufficient level of protection provided by Article 22 which had led to the establishment of a higher level of protection for wines and spirits. Given that Article 22 already provided for the protection of geographical indications in respect of all goods, her delegation believed that the intention, as directed by this principle, had been that goods other than wines and spirits should be covered and this was how it read the mandate in Article 24.1. Referring to India's explanation of why Article 22 provided insufficient protection, she said that her delegation saw it differently. If Article 22 had been adequate, there would have been no need for Article 23. Her delegation did not believe, indeed, that there was any justification for a selective protection of products, the more so as the trade value of a geographical indication was equally relevant for products other than wines and spirits. It felt, therefore, that the higher level of protection currently granted to wines and spirits should be extended to other products generally. Moreover, her delegation believed that the only manner in which better protection could be provided was by reinforcing such protection and not by diminishing it. She would also like to note that one level of protection for all products would certainly provide greater predictability for trade in these products. She was not certain that she had heard any responses to the question as to why wines and spirits should be treated differently. In fact, she believed that the United States had indicated that no one was arguing that this was due to any intrinsic difference between these and other products. The justification that had been provided by many was that this had been part of a compromise. Her delegation saw this compromise as already indicated and as reflected in the mandate in Article 24.1. She noted, however, that some countries read this compromise differently. Surely, the compromise had been reached in the Green Room and many delegations had accepted it afterwards. Maybe, in the future, they would be more careful in doing so. It would be regrettable if the compromise had to be interpreted as these countries read it, because basically this would be sending the message that countries that had not been smart or prepared enough at the time to list their geographical indications should not now be given the opportunity of protecting the products in question and should, indeed, indulge in new negotiations to be able to achieve such protection. She did not have the capacity sometimes to respond to historical and legal arguments, let alone to raise them. She would like to point out, though, that a country like hers was asked in the areas of agriculture and services to liberalize and its response was that it did not think that it could actually do so in such a simple manner, because it did not have the competitive capacity to survive in a liberalized world. Realizing that it had one or two geographical indications, which could provide it with a niche market for one or two small products, it was participating in the present debate in the hope that, maybe after all, it could get some opportunities out of it. Taking a strictly legal or historical approach to this issue would not serve her country's purpose; all needed to be constructive and help each other in this matter.

104. The representative of Turkey, as a co-sponsor of document IP/C/W/204/Rev.1, fully associated his delegation with the interventions made by Switzerland, India, the European Communities, the Czech Republic, Sri Lanka, Egypt, Hungary and Slovenia. Members had been engaged in an intensive discussion on the issue of geographical indications during the past month. These discussions had also been supported by several written submissions, which had given Members the opportunity to base the discussions on a more concrete basis. He was grateful to all delegations that had expressed themselves on the subject; these contributions had rendered the discussions more fruitful. The discussion had not been carried out solely in the TRIPS Council; the issue had also

appeared on the agendas of the General Council as well as the Committee on Agriculture. Moreover, a series of informal consultations had been conducted. In this connection, he expressed his appreciation to the Chairpersons of the General Council and the TRIPS Council for their efforts to realize and sustain this process. He also expressed his appreciation for the flexibility shown by some delegations in this regard. From the run-up to the Seattle Ministerial Conference in the autumn of 1999, and from the work on implementation issues in the General Council, one conclusion that could be drawn was that the issue of extension was an important one for several Members of different levels of development, producing various kinds of products, with diverse interests, having various trade policies and all being producers and exporters of different products; it would not be possible to progress any further in the TRIPS Council without managing to find a compromise solution. In case of a failure to solve this issue in the TRIPS Council, there was a risk that the same might happen in other WTO bodies, in particular the General Council and the Committee on Agriculture. Therefore, he called upon all Members to have a more flexible and constructive approach. His delegation saw clear mandates in both Article 23.4 and Article 24.1 and wished to observe that some Members, who refused to accept that there was a mandate for extension of protection to products other than wines and spirits, interpreted the letter of these provisions too narrowly. Reading these provisions together, it should be noted that Article 23.4 was drafted in the future tense and Article 24.1 in the present tense and that those interpreting the provisions narrowly should accept that the present preceded the future. Since questions with systemic ramifications were involved, the Council should start a substantial discussion and negotiation process. His delegation would support any initiative the Chairperson might take to continue consultations on the issue and would be willing to take part in any such consultations the Chairperson might consider relevant.

105. The representative of the European Communities said that his delegation was not a *demandeur* on the issue of extension, but could fully support the delegations that were. It was clear that many delegations who were advocating negotiations on this issue were ready to start such negotiations. In this connection, he wished to point out that, as far as the multilateral notification and registration system that had to be negotiated under Article 23.4 was concerned, a real negotiation had not yet started. Moreover, had not attempts been made at Seattle to identify the need to revisit or, perhaps, update or clarify a number of agreements, including the TRIPS Agreement? In the present discussion, many complex examples had been given, but complex examples were often quoted in order to confuse rather than to clarify a debate. He, therefore, appealed to the Chairperson to try to ensure that the debate would be more focused on this particular issue. If necessary, he could of course also provide many examples illustrating how products originating in the European Communities suffered from lack of protection in other jurisdictions, but he was not sure that the authorities of the trading partners of his delegation would appreciate all these details. In conclusion, he said that there was, indeed, a need for further discussion on the substance of the issue and that it would be important for the Chairperson to look into the question as to how negotiations on it could be brought forward.

106. The representative of Canada said that, in her delegation's view, there was no mandate within the TRIPS Agreement to negotiate enhanced protection as provided for in Article 23 for products beyond wines and spirits. Nevertheless, her delegation had appreciated the discussion of the questions related to extending protection for geographical indications. Some delegations appeared to believe that there was a need to extend the protection of Article 23 to other products and had explained why, in their view, Article 22 and other provisions in WTO agreements, such as rules of origin, were not sufficient for them. It had also been helpful to be reminded of the historical significance of Article 23 and the various interpretations of leading academics on the reasons for the different treatment of wines and spirits.

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

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

108. The Chairperson recalled that, at its last meeting, the Council had been informed that the Secretariat had circulated a preliminary version of the paper that the Council had requested it to prepare summarizing, on the basis of an agreed outline, the responses to the Checklist of Questions (IP/C/13 and Add.1), in order to facilitate an understanding of the more detailed information that had been provided in these responses (JOB(00)/5619). Given that the data provided by Members in response to the Checklist was of varying degrees of comprehensiveness and detail, the note had been circulated in a preliminary form, in order to allow delegations with comments, corrections or additional information about their national practices that they would like to see reflected in the note to convey these to the Secretariat before a final version of the note would be prepared. Delegations had been asked to do so by the end of October 2000, so that the Secretariat could issue the final version before the present meeting. However, it seemed that this target date had been a little too tight, since, so far, only four of the 35 delegations in question had communicated their reactions to this request to the Secretariat, namely Japan, Mexico, New Zealand and Switzerland. The Secretariat would of course duly take these into account when preparing the final version of the note, as it would also reflect in the note the responses to the Checklist that the Council had received from Korea at the last meeting. He suggested that the period for delegations to convey, in writing, any comments, corrections or additional information to the Secretariat be extended until mid-January 2001, so as to allow the Secretariat to issue the final version of the note in advance of the next meeting. In informal consultations, it had also been agreed that Members would initiate a detailed review of the experience and practice with the application of the provisions in the TRIPS Agreement on geographical indications, on the basis of the main section headings of document JOB(00)/5619.⁹ In this connection, Members might also wish to address questions concerning the provisions of Section 3 of Part II of the Agreement themselves, as suggested by Australia and New Zealand at the last meeting (documents IP/C/W/205 and 211). He recalled that these delegations had suggested that the Council work through each of the provisions of Section 3 and review their operation and enforcement so that all Members could get a better sense of the various regimes that Members had developed for the protection of geographical indications; and that Australia had also indicated a number of specific questions that might be addressed in this connection.

109. The representative of Hungary, commenting on the paper by Australia contained in document IP/C/W/211, first commended the delegation of Australia for the obviously great efforts that had gone into the preparation of the submission. He stressed Hungary's readiness to continue the substantive, systematic review under Article 24.2 of the Agreement. As the first sentence of Article 24.2 made clear, the review was about *the application of the provisions* of Section 3 of Part II of the Agreement. Therefore, the suggestions by Australia that the Council for TRIPS, in the framework of this review, should gauge the actual benefits that had accrued under this Section of the TRIPS Agreement and should, on the basis of this examination, discuss the policy aspects of geographical indication protection, seemed to fall clearly outside of the intended scope of the review. In other words, Hungary believed that, in line with the letter of Article 24.2, the review should concentrate on the purely legal issues of geographical indication protection and the actual implementation of the provisions of Section 3 of Part II by Members. His delegation sympathized with Australia's approach that, when establishing the appropriate level and form of intellectual property protection, a balance should be struck among the various relevant interests; at the national level among the interests of inventors, authors, producers, consumers, etc.; and at the multilateral level among WTO Members. Hungary believed that this requirement was general and not unique to geographical indications. Therefore, the discussion about the creation of a balance concerning benefits flowing from Section 3 of Part II of the TRIPS Agreement, in case there was a need for such a discussion, should be put in a proper context and, in his delegation's view, would be much better

⁹ See JOB(00)/6908 of 2 November 2000, Annex II.

placed in the Article 71.1 review. Furthermore, in the opinion of Hungary, it would not be productive to examine well-known practical cases, such as the one referred to in point 4 of the Australian paper, in the framework of the Article 24.2 review. It would also be inappropriate to discuss actual and unsolved problems that might be the subject of bilateral consultations between Members or even court procedures. Lastly, he would like to register his delegation's disagreement with the notion of sequencing that was implicit in the paper from Australia and more explicit in the contribution from New Zealand contained in document IP/C/W/205, i.e. that the discussion of proposals for enhancing protection of geographical indications within the TRIPS Agreement should follow the completion of the review. Nothing in Article 24.2 said that negotiations could not be started on the extension of Article 23 protection parallel to conducting the review under that provision. The likely time required for successfully concluding such negotiations was much longer than the foreseeable time-span of the review. He would also like to point out that, according to the first sentence of Article 24.2, this review was not a one-off exercise, but only the first of a series of reviews.

110. The representative of Australia said that her delegation had been most interested to hear that those proposing to rewrite the binding TRIPS obligations on geographical indications - to create new treaty language that all would have to explain to Ministers and legislators - had taken exception in various ways to Australia's proposal on 24.2. For example, it had been suggested that it would not be productive to discuss practical examples and even that it would be beyond the mandate of the TRIPS Council to consider the impact of implementation of the TRIPS Agreement. The much-lamented failure of the TRIPS Council to reach consensus on the demands by some to extend Article 23.1 level protection to products other than wines and spirits could, possibly, be attributed to the fact that those urging an immediate change of binding international rules seemed unprepared to explore the policy basis and consider the implications of their demands. Yet, those who were proposing a comprehensive informative study that could lay the basis for consensus were admonished for being obstructive. Surely, for those making unilateral demands to impose new TRIPS obligations, there was a responsibility to explore how the existing system worked; explain the actual deficiencies they saw in national legal systems that gave effect to TRIPS rules; explain how their proposed amendments to the TRIPS Agreement would yield sufficiently substantial and widely felt net benefits to be worthy of the treaty amendment process; and indeed explain what the new obligations they were seeking to impose would actually mean in terms of domestic law; i.e. the kind of questions her delegation had posed in its paper. Anything less than this threatened to reduce the process of review to the articulation of political slogans. There had been resistance to explaining negotiating objectives in a concrete way, with reference to specific geographical indications, even though it had to be assumed that delegations had specific terms in mind that they wanted actively to prevent other Members from using. This was not an abstract exercise. If, for example, the Czech Republic notified "Pilsener" as a geographical indication of interest to it, was it seeking to engage Members in negotiations to compel the breweries in many WTO Members to cease marketing pilsener-style beer? If so, there was a need for WTO Members to know what impact this would have on their industries. This raised deeper questions, for example: would those Members, including developing countries, seeking to break into new export markets in agricultural products and processed foods benefit from the invention of exclusive rights over terms which were widely used descriptively? Was it a justifiable impediment to legitimate trade to step in between a trader and a consumer and prevent the use of terms which both parties perceived and understood as descriptive terms? Australia had continued to encourage other Members to engage in a comprehensive review of the TRIPS provisions under Article 24.2. It was not a policy priority or interest for Australia to dwell on this issue at all. For her delegation, the TRIPS Agreement locked in an important safeguard: if a trader sought to misuse a geographical indication so as to deceive or mislead the public, legal remedies must be provided. Her delegation believed that WTO Members would be doing their trade interests a much greater service if they were to focus on how best to implement this vital safeguard in actual practice, so that tangible benefits were assured. This would also be a more effective way of ensuring due respect and protection for valuable geographical indications than any abstract debate conducted without even troubling to determine whether a collective understanding existed on the terms used.

111. In order to further clarify her delegation's thinking, she said, referring to suggestions made that it was not productive to discuss specific examples, that Australia believed that it was highly misleading to speak in generalities, precisely because expectations about what would result from this process varied greatly. Whatever one's view was of Article 24.1, it unquestionably required attention to "individual geographical indications". Consequently, those who were urging work on the basis of Article 24.1 could hardly say that it was inappropriate to discuss "individual geographical indications". Her delegation's suggestions on "sequencing" had been challenged. However, Australia was not advocating that a review process should take precedence on legal or formal grounds; it was saying that it would lead to better outcomes for all. Her delegation was suggesting it as a way of cultivating consensus on substantive issues, in contrast to the process of exchanging views on pure process or procedural issues. Australia was interested in the suggestion from Switzerland that Article 22 was unsatisfactory, even though it required rigorous legal remedies in the case of misleading or deceptive misuse of geographical indications and other forms of unfair competition - the suggestion being that greater legal certainty would be achieved through the application of Article 23. However, this was to argue for the kind of absolute and unqualified form of protection that should give pause to anyone concerned to see a balanced intellectual property system. Absolute protection of intellectual property rights for the sake of certainty as an end in itself was not practiced elsewhere in the field of intellectual property, where important safeguards and fair use exceptions applied. Trademarks under the TRIPS Agreement were not protected in absolute terms - the Agreement required that there be "a likelihood of confusion" to be established for infringement to occur, even though that was short of legal certainty. Copyright was open to various forms of fair use exceptions. Patent law normally had provisions for prior use as a defence against infringement. Absolute protection should not be an end in itself.

112. Her delegation would not comment in detail on the Secretariat summary paper at the present meeting, since it was still studying the document.

113. The representative of India said that his delegation was still studying the summary paper prepared by the Secretariat. As regards the Australian paper, sharing Hungary's reaction he underlined that the first sentence of Article 24.2 made it clear that the review was about the application of the provisions of Section 3 of Part II and that it would be counterproductive to examine well-known practical cases. He also disagreed with the notion of sequencing which was implicit in the Australian paper and more explicit in the New Zealand paper.

114. The representative of the United States wished to explain why his delegation felt that products did not necessarily need Article 23 level protection in order to be protected in the way some Members sought, by providing just a few examples of non-US geographical indications which were protected effectively in the United States consistently with the provisions of Article 22 of the TRIPS Agreement. Since at least 1953, the geographical indication "Roquefort" for cheese had been protected as a certification mark in the United States and was controlled by the community of Roquefort in France. "Darjeeling" was a term identifying a blended tea containing at least 60 per cent of tea originating in the Darjeeling region of India and meeting other specifications set forth by the Tea Board of India, and had also enjoyed protection in the United States since at least 1991. The Tea Board of India had applied for and obtained this protection. "Parma ham" and "Prosciutto di Parma" were protected terms in the United States, both registered as certification marks by the Consorzio Del Prosciutto Di Parma of Italy. While registration as a certification mark was one means of geographical indication protection offered by the United States, it was not the only means. For example, in 1998, at the request of the Cognac producers of France, the term "Cognac" had been recognized by the United States as a common-law - i.e. unregistered - certification mark for brandy originating in the Cognac region of France. His delegation believed that these examples, which represented just a few of the many non-US geographical indications protected by full legal means in the United States, demonstrated that effective protection for all goods was anticipated and provided by

Article 22; and that any concerns expressed by Members about failure to receive geographical indication protection was truly a concern about failure to implement the requirements of Article 22.

115. Continuing, he said that he would like to make a number of observations based upon his delegation's review of the Secretariat's summary of the responses to the Checklist of Questions, which was a tremendously valuable document. Unfortunately, the value of this paper was significantly diminished by the absence of information from some Members, in particular certain Members who were *demandeurs* on the issue of geographical indications. He would urge those Members to provide as quickly as possible information on the systems they employed, for the benefit of the discussion on this issue. The first observation was that Table I of the Secretariat's summary paper confirmed that there were a wide variety of means that Members used to enable interested parties to protect geographical indications, as required under Articles 22.2 and 23.1. In a number of cases, Members employed more than one means to provide protection for geographical indications. In fact, Table I indicated that, like the United States, many Members provided geographical indication protection via a trademark system. In addition, some Members provided additional protection through specific systems directed at geographical indications. This variety of means of protection appeared to stem from differing purposes that geographical indications served among different Members. For some, the purpose appeared to be to prevent deception, such as "passing off", and to protect consumers so that they could be certain that the products that they bought were what they wanted. Another purpose appeared to be to establish for a group of producers of a regional product an indication of source that would distinguish their products from those of others not meeting their standards. Yet another purpose seemed to be to enable Member governments to ensure that standards established for particular products were maintained. This variation in purpose explained, in large part, why - unlike the situation with respect to copyright, trademarks or patents - no particular means for establishing a right had been spelt out by the negotiators for this new area of intellectual property. At the time of the Uruguay Round, there was no multilateral agreement to which many of the GATT Members belonged, such as the Berne Convention with respect to copyright or the Paris Convention with respect to patents and trademarks. A troubling observation his delegation made from the summary paper was that some Members might not yet be fully implementing the TRIPS Agreement with respect to geographical indications. This observation was taken with particular respect to those Members employing special systems for the protection of geographical indications. The Secretariat's summary paper made clear that some Members did not appear to take into account even the most fundamental provisions of the TRIPS Agreement, such as those on national treatment. As an example, the summary indicated that some Members did not extend "no less favorable treatment" to other Members' nationals, but rather imposed what they considered to be identical treatment. Yet, this resulted in the geographical indications of other Members' nationals *not* being protected under those systems. The summary paper candidly included Member submissions whose Checklist responses indicated that national treatment was not available to the nationals of other WTO Members absent those Members entering into a bilateral agreement.

116. The summary paper also included one Member's response noting that only geographical names were considered to be geographical indications. The summary showed, however, that most Members had indicated in their responses that a geographical indication need not be a place. It certainly would appear that Article 22.1 did not require that a term be a geographical name, but only that it be an indication that identified a good as originating in a territory. As regards the question as to what was a "geographical indication", he referred to Article 22.1, according to which "geographical indications" were "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin". He noted that Article 22.1 made clear that not all geographical terms were "geographical indications". The TRIPS Agreement indicated clearly that "quality", "reputation" or "other characteristics" were necessary to raise any indication with geographical ties to the level of a "geographical indication". It was plain from the summary that Members were not uniform in their views of what "quality", "reputation" or "other characteristics"

were necessary to establish that an indication was entitled to protection. It occurred to his delegation that WIPO might do some useful work fruitfully exploring the discussion of those issues.

117. The evidence in the Secretariat's summary paper of some Members' failure to implement fundamental requirements of the TRIPS Agreement, such as national treatment, with respect to geographical indications, suggested that those Members might not sufficiently appreciate the fact that Articles 22 through 24 of the TRIPS Agreement were not intended to be read in isolation from the rest of the TRIPS Agreement, and indeed could not be meaningfully read in isolation. Some of the responses from Members gave rise to questions as to whether all Members had understood that geographical indications were defined by Article 1.2 of the TRIPS Agreement as intellectual property. As intellectual property, he would note that geographical indications were subject to Part I and Part III of the TRIPS Agreement. For example, Article 42 required that "Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by" the Agreement. Under Article 44, right holders must have the possibility of obtaining injunctive relief, while under Article 45 it must be possible for right holders to receive damages for infringement. He raised all these points because some Members had expressed a desire to expand the scope of the Article 23 to goods other than wines and spirits. They suggested that expansion of scope was necessary because geographical indications for other goods were not receiving adequate protection. As his delegation had noted, not all Members appeared to provide TRIPS-level protection for geographical indications. For those who did appear to provide TRIPS-level protection, he wondered what specific complaints had been lodged to support any claim that goods other than wines and spirits did not receive full TRIPS-level protection. He noted, for example, that Article 22.2 required Members to provide the legal means for interested parties to prevent misleading use of a geographical indication or any use which constituted an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention. Like many other Members whose responses had been summarized in the Secretariat's paper, the United States used its trademark system as the primary means for providing Article 22.2-level protection for geographical indications. Under a trademark system, interested parties did have the opportunity - at least in the case of the United States - to oppose registration of a geographical indication or seek cancellation of it after it had been registered. As far as the geographical indication owner was concerned, the trademark (or certification or collective mark) registration provided it with access to border enforcement measures, such as the ability to stop infringing goods from entering the country. In addition, of course the geographical indication owner could obtain injunctive relief from and damages for infringing use of its trademark registration. Therefore, it appeared to his delegation to be quite premature to attack the current TRIPS Agreement as inadequate for the task of protecting geographical indications in respect of products other than wines and spirits. In Members where the geographical indication provisions of the TRIPS Agreement were fully in force, the United States expected that Members who were interested in protection for goods other than wines and spirits might in fact already be able to obtain the protection they were seeking.

118. The representative of Hungary believed that the delegation of Australia had misunderstood his intervention. He had not said that policy aspects of geographical indication protection should not be discussed in the Council, nor that the benefits flowing from Section 3 of Part II or from possibly improved protection for geographical indications could or should not be discussed in the Council. All he had done was to point out that the mandate in Article 24.2 was to have a series of reviews about the *application* of the provisions of Section 3 of Part II, the first of which was now being conducted. Therefore, the suggestions by Australia that the Council for TRIPS, in the framework of this review, should gauge the actual benefits that had accrued under this Section of the TRIPS Agreement and should, on the basis of this examination, discuss the policy aspects of geographical indication protection, seemed to be clearly falling outside the mandate and the intended scope of the review. He had also made the point that the creation of a balance concerning benefits flowing from Section 3 of Part II, if there was a need for such a discussion, should be put in a proper context and that the Article 71.1 review might be such a context. The policy implications could and perhaps should be

discussed in the framework of the negotiations that his delegation hoped would be started on the extension of the scope of Article 23. All his delegation had wanted to do was to caution the Council not to mix the two things, i.e. the mandated review with the negotiations on the scope. He had also registered his delegation's disagreement with the notion of sequencing. Finally, turning to the Secretariat's summary paper, he said that his delegation was still examining this very useful document.

119. The representative of New Zealand said that, on the question of the Article 24.2 review, his delegation continued to believe that it was necessary for the TRIPS Council to approach the review in a structured manner so that all Members had an opportunity to consider the effectiveness of *each* of the provisions in question. New Zealand had submitted a paper at the last Council meeting on the Article 24.2 review and believed that the Secretariat's summary paper (JOB(00)/5619) was a most useful contribution in this regard. Given the sheer volume of information contained not only in the Secretariat paper, but more generally in the various responses to the Checklist, he was not in a position to offer any substantive comments at this meeting. His delegation was still working its way through all the material and would revert to this at the next meeting. New Zealand looked forward to a structured review process on this issue.

120. Turning to India's question as to why wines and spirits had been accorded special protection on top of the protection already provided by Article 22, he reiterated the points that he made in this regard under the previous agenda item.¹⁰

121. Touching upon the question of "sequencing" which some Members were raising in relation to New Zealand's paper on the Article 24.2 review, he said that this term had acquired a certain status more generally in the WTO and he was not sure that his delegation's paper raised the sorts of questions that some delegations were implying. The paper simply noted that, until the Council had reviewed Section 3 of Part II in a systematic and substantive way, it would be somewhat premature for the Council to seriously consider any changes to Section 3. Such an observation was fairly sensible and realistic. The paper did not, however, try to lay down a certain sequence for the Article 24.2 review, the Article 23.4 negotiations on a multilateral registration and notification system or even the Article 24.1 negotiations whatever they might be.

122. On the question of Article 24.1, New Zealand's paper was grounded in the language of the TRIPS Agreement and, as a result, any idea of entering into negotiations aimed at extending the range of products afforded protection under Article 23 was beyond the current language of the TRIPS Agreement. This was not a matter of "sequencing", but of complying with the language of the TRIPS Agreement.

123. The representative of Australia said that she was not sure that her earlier comments had been correctly understood. In Australia's view, there was a need to look into the issues concerned in a deep and serious way, taking into account the interests of consumers and producers in all Members as well as the public interest; and a need to look at whether there was effective protection. Before moving on and doing anything else, a better understanding was needed collectively whether there was in fact a lack of adequate protection, i.e. where actual problems with the existing provisions existed. The reason for her delegation to mention specific examples had been to demonstrate that a number of Members did produce goods which came under a similar name. They should not be using these terms if there was a danger of misleading or deceiving consumers. As was evident from the Secretariat's summary paper, Australia had laws which had proved to be effective to remedy such situations. In her delegation's view, it would be helpful to examine this and other issues with the help of specific examples. The area of geographical indications was a new area of intellectual property law for many

¹⁰ See paragraph 96 above.

Members and an examination of the implementation of the provisions of the Agreement in this area required the Council to look at the national implementing legislation of a broad range of Members.

124. Responding to Hungary, she said that, in her delegation's view, the phrase "the application of the provisions of this Section" in Article 24.2 raised issues about the practical effect of the treaty language and, specifically, how Members had been applying the existing provisions. Article 24.2 did not call for superficially surveying national legislation, but for adding value and increasing Members' collective understanding about the nature of the provisions of the Agreement in this area by assessing the benefits that Members, i.e. a broad range of Members, had accrued under these provisions. Hungary's comments on Australia's paper seemed to suggest that Hungary wished to avoid such a discussion. In her delegation's view, discussing specific examples was a useful means of revealing important information concerning the application of the existing provisions. Whilst Hungary had correctly pointed out that the issue of an appropriate balance was one relevant to all categories of intellectual property, in view of the calls under Article 24.1 for an extension of the scope of the Article 23 level of protection, it was particularly pertinent to take the opportunity represented by the review under Article 24.2 to examine the issue of balance more closely with respect to the provisions on geographical indications. In this regard, she wished to note that Article 24.1 was part of Section 3 of Part II and therefore fell within the scope of the Article 24.2 review. Any suggestion to rewrite TRIPS language on geographical indications which might upset the finely tuned balance of the existing package of provisions needed to be examined from a serious policy perspective and the issues raised in her delegation's paper were central to this. On the issue of "sequencing", it might be true that there was nothing specific in Article 24.2 prohibiting discussion of various issues to do with geographical indications simultaneously; however, it seemed to Australia to be the most productive way of using the Council's time to use the opportunity that was now available to explore the important policy issues raised in the area of geographical indications.

125. The representative of Japan wished to express his appreciation for the efforts made by the Secretariat in the preparation of the summary of the responses to the Checklist of Questions. In the view of his delegation, it was important to examine how each Member was implementing the provisions of Section 3 of Part II. Information on the various ways of implementation would provide a useful basis for the further exchange of views regarding the multilateral notification and registration system to be established under Article 23.4 and in regard to a possible extension of the additional protection under Article 23 to products other than wines and spirits. Although his delegation took a cautious position in regard to this proposed extension, it was willing to participate in the discussion. Extension of protection could have a significant impact on business transactions in certain sectors. Therefore, Japan wished to examine it carefully. In order to arrive at the best solution, various options needed to be analysed. Different Members had different ways to protect geographical indications, judging from the Secretariat's summary paper and no particular way of protection should be pre-empted. The ongoing information gathering exercise based on the Checklist of Questions should be completed as soon as possible by the contribution of those Members who had not yet provided responses. The outcome of the Checklist of Questions once completed would provide a useful basis for a cross-examination of the proposed extension of additional protection to other product areas as well as of the multilateral notification and registration system.

126. The representative of the European Communities said that his delegation appreciated the efforts which the Chairperson had been and was undertaking in order to engage Members in a constructive debate. During the preceding discussions, i.e. under both the agenda item concerning Article 23.4 and the one concerning Article 24.1, these efforts seemed to have borne fruit. However, having heard the debate so far under the present agenda item, he had to express some concern with some of the comments made. Some delegations seemed to be suggesting that other delegations had been unwilling to enter into serious policy discussions on proposals that had been tabled. This was not at all his understanding of the debate that had already taken place on geographical indications at the present meeting. In this connection, he wished to recall that the Swiss delegation had offered to

present at the next meeting of the Council further arguments underlining the importance of their proposal for additional protection to products other than wines and spirits. He hoped that a positive spirit in the discussions could be maintained.

127. Responding to those delegations that had explained the protection granted in their jurisdictions in respect of products originating from other jurisdictions, he did not deny that some form of protection was being provided and that this protection might differ from the protection provided in the jurisdiction where the products originated. However, there were a number of examples where the protection granted to some of the products originating in the European Communities and their right holders was far from adequate. He would be prepared to provide more details about the difficulties encountered and the weaknesses of the protection available in some trading partners at the next opportunity. He expressed reservations with regard to suggestions made to bury the discussion with regard to the review of Article 24.2 in WIPO.

128. Turning to the summary paper prepared by the Secretariat, he said that the debate on geographical indications at the present meeting had shown that this excellent paper was of the utmost importance and usefulness. He hoped that, at future Council meetings, a discussion would take place on the contents of this document. The protection of geographical indications had been implemented in different ways by WTO Members, through general commercial law, trademark law and *sui generis* legislation for geographical indications and appellations of origin. Section 3 of Part II of the Agreement stipulated two types of protection, i.e. protection against unfair competition and protection based on exclusive rights. Some Members had used trademark law - i.e. the subject of Section 2 of Part II of the Agreement - in order to implement the geographical indication provisions also, presuming a formal parallelism between the two types of regimes. In this regard, it was not entirely clear to him how régimes based on trademark law would implement the definition of Article 22.1 of the Agreement and, in particular, the specific elements of this provision requiring that the product originated from a particular territory; that it had given characteristics; and that there was a link between these characteristics and a particular geographical area. Moreover, how would it be controlled that these elements had been respected, either at the time of registration of the trademark or of an infringement action; and how would it be controlled that the condition was fulfilled that the products in question conformed with these elements in a consistent way so as to meet the expectations of the consumer with regard to the products and the defined elements on the basis of which exclusive protection had been accorded to their name? These specifics showed the specificity of Section 3 of Part II of the Agreement and why geographical indications had their own Section in the Agreement and were not the subject of, for example, supplementary provisions in Section 2 of Part II on trademarks. Another point concerned the conclusions and elements that the Council could draw from this document for its discussions on the establishment of a multilateral register for wines and spirits. As could be observed from the responses to the Checklist summarized in the Secretariat paper, the Members that had responded were already implementing the mandatory protection existing in Article 23. Therefore, surprise could be expressed about their difficulties with the establishment of a register having the aim of providing shape to an obligation already foreseen, including in different national systems. As regards the summary paper itself, he would like to know why the Secretariat had not followed the agreed outline as well as the reason for the use of new terminology, such as "special protection" and "indication of geographical origin", which did not exist in the Agreement. In some respects, the summary paper reflected Community legislation inaccurately; he would clarify this to the Secretariat and give it his delegation's reading of its responses to the Checklist.

129. Commenting on section 5 of the paper from Australia (document IP/C/W/211), he said that, as for trademarks, the circulation of products identified by geographical indications must correspond to the common minimum criteria in order to avoid commercial distortions. This was the general philosophy of the TRIPS Agreement and of the definitions of Article 16 for trademarks and Article 22 for geographical indications in particular. These minimum standards were translated into national law, which would ensure their practical application on a case-by-case basis according to their own

characteristics. As for trademarks, the registration of a geographical indication established a presumption of validity and facilitated protection in the case of imitation. In addition, it facilitated third parties' knowledge of their existence, including for enabling them to oppose registration or to assert their specific rights, for example an earlier trademark, thus ensuring greater legal security. The role of public authorities in the protection of geographical indications strengthened the legal effect of the protection of the consumer in respect of products that had to respect a number of quality criteria and were not only to be identified as to their geographical origin. However, this was a point in respect of which the TRIPS Agreement provided an option to Members as, for example, Article 22.3 showed in respect of the ex officio refusal of trademarks containing a geographical indication. All possible conflicts between geographical indications and trademarks, descriptive terms, homonyms, etc. were already dealt with in a detailed manner by Articles 22.4, 23.3 and 24.4 to 24.8. Such situations also existed for trademarks, for example as regards conflicts between trademarks and personal names, trade names or signs. Yet, the TRIPS Agreement did not address these in a detailed manner; the exceptions provision of Article 17 seemed to suffice for Members in this regard. He wondered whether Australia could further explain the concept of "first in time, first in right", which did not appear anywhere in the Agreement; industrial property rights were product-specific and subject to the principle of territoriality. Did this concept perhaps echo the principle of "first come, first served" advanced by some in respect of Internet domain names?

130. The representative of Mexico, commenting in general terms on the Secretariat summary paper which her delegation was still analysing it in detail, said that the document would be a useful reference for the further work of the Council, since it summarized the ample information provided by Members regarding the application of Section 3 of Part II systematically and would allow the mandate under Article 24.2 to be carried out in a structured manner. The document gave a general, although non-exhaustive picture of the current situation of the protection of geographical indications. It would be most useful if the Council would get information from more Members regarding how Section 3 of Part II was being applied in their territories so as to have a more complete picture. This would be helpful in relation to the work under the various items on the Council's agenda concerning geographical indications. It was clear from the document that there was not a uniform approach in the area of geographical indications, unlike in other areas of intellectual property such as patents and trademarks. Different legal means were being used by Members to ensure the protection of geographical indications depending on their national regime. As the summary paper clearly indicated, protection of geographical indications might be provided by virtue of provisions protecting against unfair competition, consumer protection, provisions concerning the registration of trademarks as well as through food standards or standards applying to other types of products. These differences in the different legal instruments had considerable implications for issues such as criteria or conditions of eligibility for protection or the right to use a geographical indication as well as its scope of protection and the means of making this effective. What had perhaps drawn her delegation's attention the most was that this variety of approaches also brought with it a considerable variety in definitions. This seemed to show a significant amount of subjectivity and confusion in the application of the definition of Article 22.1 of the Agreement. Similarly, the list of examples in Annex A of the summary paper showed that some of the items mentioned were protected by geographical terms, such as "Champagne", while in other cases the terms that appeared to be protected were composed of a common name and a geographical name, for instance, "ham from X". In other cases, protection was given to product names, such as "viande de porc", i.e. pork meat. This raised questions as to what delegations were really referring to in terms of what was eligible for geographical indication protection and whether some of the matter that had actually been referred to by delegations would not concern, for example, the area of rules of origin or that of plant variety protection, rather than that of geographical indications. She believed, therefore, that the Council should have a more in-depth review of what were the different elements involved in defining geographical indications, in order to better understand what the discussion was about. This would be particularly relevant in connection with the debate on the proposals for extending the product coverage of Article 23.

131. The representative of Argentina said that, in her delegation's view, Article 24.2 as it appeared in the Agreement responded to a reality at the time of the Uruguay Round negotiations and still valid, namely the multiplicity of national systems of protection and the fact that there was no international harmonization in this respect. This fact led to the inclusion of a provision which established that it was necessary to review Section 3 of Part II. With respect to the review required under Article 24.2, she agreed with New Zealand's approach advanced in its document on the matter, which highlighted the principle of territoriality and the rôle of the national standards of the protecting country with regard to what geographical indications were eligible for protection under the Agreement. On the other hand, New Zealand had mentioned the need for discussions to be held in a structured manner covering each and every one of the provisions of Section 3 of Part II. It had been a surprise to her delegation that, in the debate on Article 24.1, it had appeared that some delegations which had, earlier on, asked for a substantive debate now seemed to be reluctant to examine how the obligations under Articles 22 to 24 were being applied. Her delegation agreed with those delegations that had mentioned that the debate on geographical indications was not a North/South debate. The doubts expressed about extension of the product coverage of Article 23 came from different regions of the world and from Members with different levels of development. The arguments that had been put forward in the debate on Article 24.1 as to why it would be necessary to extend the product coverage, in particular those linking the extension issue to further liberalization in the area of agriculture, raised the question as to whether such an extension was actually perceived by some as a protectionist instrument. Many of the points made went beyond intellectual property considerations merely. Solid arguments had been made both in the debate under the various agenda items concerning geographical indications at the present meeting regarding the history of the TRIPS negotiations. Economic arguments had been made regarding the trade impact of an extension of the product coverage of Article 23 could have, in particular, for developing countries; however, many delegations which supported the calls for such an extension had not mentioned any concrete benefits for, in particular, developing countries and least-developed countries that would flow from extension, nor why Article 22 type of protection would be insufficient. In this connection, she looked forward to the paper that had been announced by Switzerland at the present meeting during the discussions on Article 24.1.

132. Continuing, she said that, if the Council would start analyzing the Secretariat summary paper, nothing but a complex discussion was to be expected. The subject of geographical indications was complex. WIPO, in one of its publications, had explained that with the exception of industrial designs, the protection of geographical indications was the most complex one among the categories of intellectual property, with a large variety of concepts and relatively new in the framework of international negotiations. The Secretariat paper clearly demonstrated this. As explained by Mexico, there was no harmonization in definitions and Members had the flexibility permitted by the TRIPS Agreement to establish their own mechanisms of protection. In respect of common names, such as "vin" or "viande de porc", her delegation was not sure what the eligibility criteria were to protect these as geographical indications. There would seem to be a need for specification, particularly since, in other languages, "wine" or "pig meat" could be freely used. She wondered why Members had also provided examples of geographical indications not yet under protection in their systems but still the subject of pending applications. As regards the concerns expressed by some delegations that Article 23 discriminated against certain products, she concurred with what had been said by the United States and New Zealand. Agreeing to Article 23 had been a major concession for Argentina in the negotiations of the Uruguay Round. Argentina had had a systematic interest in the problem of discrimination before, during and after the Uruguay Round. Discrimination still existed in areas of interest to Argentina. The TRIPS Agreement was part of a balance in the framework that had resulted from negotiations in which countries had won and lost at the same time. She expressed support for the document of New Zealand and reiterated her delegation's position that the Council did not have a mandate, at present, for negotiations concerning any extension of the additional protection under Article 23 to products other than wines and spirits.

133. The representative of Australia said that she would respond to the question from the European Communities after having consulted her authorities. The discussions under the various agenda items on geographical indications at the present meeting had been most constructive and useful in advancing everyone's understanding of the provisions of Section 3 of Part II. Her delegation also looked forward to the paper announced by Switzerland during the discussions on Article 24.1.

134. The representative of New Zealand said that, in view of comments that had been made, he wished to reiterate the point that his delegation had made earlier on, namely that the concept of "sequencing" had taken on a life of its own in a whole range of WTO bodies in recent days, such as in connection with the DSU review or the discussions on implementation issues in the General Council. His delegation was concerned that it now appeared to be intruding into other areas of the WTO's work where it was not really that relevant. The issue looked at now was the Article 24.2 review. The Council had agreed to conduct a review pursuant to Article 24.2. There could be no disagreement about this. All his delegation was trying to do was to suggest a logical and reasonable way to go about this review.

135. The representative of Bolivia said that the Secretariat summary paper allowed Members to see that geographical indications were a subject of interest for many Members. Bolivia was a member of the Andean Community and, consequently, its legal regime for the protection of geographical indications was governed by the relevant Andean Community decisions including, in particular, Decision No. 486 of the Commission of the Cartagena Agreement Establishing the Common Industrial Property Regime, which would enter into force on 1 December 2000. He wished to stress the importance for his delegation of geographical indications, not just those for wines and spirits but also those for other products, and its support for the joint paper that had been introduced by Switzerland under the previous agenda item. He would also like to leave on record that the extension of the Article 23 type of protection to other product areas was an issue to be discussed within the framework of the TRIPS Council, i.e. within the framework of intellectual property. For his delegation, it would be difficult to establish a link between the issues under discussion in the TRIPS Council and negotiations ongoing in other WTO bodies.

136. In response to a comment made during the informal consultations that had been held on the matter, the representative of the United States said that he did not want to leave Members with the impression that the United States was asserting that a trademark based system was the only system that gave rise to TRIPS consistent protection for geographical indications. What he had drawn the attention to was that there was a full range of methods that Members employed to provide TRIPS consistent protection. His delegation's only concern was that Members, whatever method they chose to employ to protect geographical indications, ensured that the system employed provided all the protection set forth in the TRIPS Agreement, both in terms of Section 3 of Part II on geographical indications and the Sections in Part III on enforcement.

137. The representative of Switzerland said that the Secretariat's summary paper created a valuable basis for a catalogue of the various systems of protection put into place by Members which had responded to the Council's Checklist of Questions and as such allowed for comparison among them. In his delegation's view, the document provided a good picture of where national systems for the protection of geographical indications differed among Members, even though only 35 Members had responded to the Checklist up to now. There was a great diversity in systems of protection available and in place, including as to the level of protection provided and the variety of terminology used. Since the Secretariat paper summarized these systems in a systematic way, it was therefore not always easy to understand a particular element of a particular system of protection referred to under a particular heading without considering it in the context of a Member's system of protection as a whole. Consequently, it was often indispensable to consult the replies of Members to the Checklist on which the summarized information had been based. However, in any event, the document showed how different the existing national protection systems were in practice. In implementing Section 3 of

Part II of the TRIPS Agreement, some countries had incorporated different levels of protection, with a higher level of protection for wines and spirits, while others had specified a higher level of protection for all products either unconditionally or with certain conditions. The delegations of India and the Czech Republic had already stressed this point in their communications that had been circulated as Job No. 4486 of 4 August 1997 and Job No. 5023 of 16 September 1997. In various countries, protection for geographical indications was available under laws against unfair competition, laws for consumer protection or trademark laws. However, in his delegation's view, it would be recommendable to accept geographical indications as the true intellectual property right they were and to protect them by establishing a proper *sui generis* intellectual property right. The many differences between Members' ways of protecting geographical indications as shown in the Secretariat's summary and analysis as well as the complexity of these diverse systems had made his delegation realize how important it was to set a uniform level of protection for geographical indications at a multilateral level. Various international agreements regarding geographical indications (e.g. the Madrid Agreement or the Lisbon Agreement) had been in existence for years, but none of these international instruments taken individually or together had achieved the goal of ensuring a uniform and coherent level of protection for all geographical indications which satisfied all interests. Only by achieving this goal could the lack of transparency and predictability be overcome and could it be ensured that right holders could know or quickly ascertain to what protection they were actually entitled in each WTO Member. His delegation therefore favoured a uniform and coherent level of protection in the TRIPS Agreement, i.e. at the level actually granted for wines and spirits.

138. As regards the communications from Australia and New Zealand, his delegation considered these welcome contributions to the work of the Council on the issue of geographical indications as a whole. He was pleased to see that there was a growing conviction that the protection of geographical indications was an important issue. The only crucial divergence of views seemed to be whether the issue was part of the built-in agenda or not. On the question of how to proceed in the discussion on the extension issue, Switzerland shared the views expressed in both papers on the desirability of a substantive and systematic review of the actual forms of implementation and enforcement of the provisions of Section 3 of Part II of the TRIPS Agreement in Members' national laws. Such a review would enable a better understanding of the various regimes that Members had developed and implemented for the protection of geographical indications. However, such a review should not be a prerequisite for the TRIPS Council to address other issues mandated to the TRIPS Council under Section 3 of Part II, such as the establishment of a multilateral register or the extension of additional protection to geographical indications for products other than wines and spirits. According to New Zealand's paper, it would be premature to address the issue of extension of protection prior to an assessment of the actual disadvantages of the current provisions in respect of wines and spirits. In Switzerland's view, however, the extension of this protection to geographical indications for products other than wines and spirits was of benefit to all Members. Switzerland would therefore like to request New Zealand, or any other Member, to precisely pinpoint any present or expected disadvantage originating from the current additional protection granted to geographical indications for wines and spirits or from an extension of the latter to other products. Switzerland did not share the narrow reading of Article 24.1 by New Zealand and a few other delegations, which reduced the built-in agenda work under this provision for a better protection of geographical indications solely to a few specific geographical indications for wines and spirits, and considered it therefore necessary to emphasise once more that such a reading, in its view, led to a limitation of the mandated negotiations inconsistent with the spirit and objectives of Section 3 of Part II of the TRIPS Agreement.

139. The representative of Venezuela said that this subject should be dealt with in a balanced and comprehensive way and in accordance with the different elements and mandates of Section 3 of Part II of the TRIPS Agreement. Venezuela had expressed the wish that negotiations for the adoption of a multilateral system of notification and registration for geographical indications for wines and spirits should be extended to other products. Fundamentally, Venezuela was of the view this could contribute to the development objectives of many Members, in conformity with the Decision of the

General Council in February 2000, under which, in the review process, the Agreement's impact on development had to be taken into account. Geographical indications stimulated investment and were important for the strengthening and the development of small and medium-sized enterprises, in particular handicraft industries, adding value to production through their prestige and reputation in national and international markets. Furthermore, geographical indications permitted the promotion and protection of "autochthon" products and processes of production, which now risked being extinguished; and could contribute to the national and international renown of a specific region, thus strengthening its touristic attraction. The Government of Venezuela, through an institutional work coordinated by the Ministry of Production and Trade, the Intellectual Property Office, the State Government and other public and private organisms, had initiated important promotion activities concerning geographical indications which had started to have important results. Recently, the denomination of origin of "cacao de Chuao" had been registered and its publication included in the Bulletin of Industrial Property N° 443 of the *Servicio Autónomo de la Propiedad Industrial (Sapi)* of 21 November 2000. Producers had been advised to constitute a "Regulatory Authority" for the maintenance of the quality rules concerning the denomination "cacao de Chuao". In addition, action had been taken to achieve the acknowledgement of the denomination in the Andean Subregion and Venezuela hoped to do the same at the international level. A procedure concerning the establishment of a denomination of origin for a spirit called "cocouy pecaya" was on-going and peach producers from a specific region in the center and north of Venezuela interested in this denomination of origin had been contacted. Studies had shown other agricultural and handicraft products for which geographical indication protection would be useful.

140. The representative of Chile said that the delegation of Mexico had raised a number of the points that his delegation wished to highlight too. Basically, they focused on the content of the summary paper prepared by the Secretariat, which was an extremely interesting document and, in his delegation's view, established which should be the main tasks that the TRIPS Council should focus on in the review of Article 24.2. He felt that, on the basis of this document, there were basically three elements that should give rise to an in-depth discussion aimed at clarifying the difficulties that the Council had been grappling with lately. Firstly, there was the concept of "geographical indication" as defined by various countries. This was also the subject of a study in WIPO's Standing Committee on Trademarks, Industrial Designs and Geographical Indications. The second element concerned the different systems of protection, their scope and their enforcement. The third element, which needed to be looked into further, concerned the products and terms to be protected. All these topics were extremely rich and defined the broad range of products that countries wished to protect. As Mexico had put it, there were phrases that referred to a specific area but also absolutely common nouns, and various combinations of these in-between. There were general geographical indications like "made in [specific country]" or terms such as a common phrase combined with the name of a place, for example "apples from [given region]". Sometimes, the geographical indication might be rather vague, such as "apples from the north". In other cases, a product was linked to a very specific and circumscribed location.

141. In response to comments made with regard to the Secretariat summary paper, the representative of the Secretariat said that, while the structure of the summary paper did not follow exactly the same order as the outline, the Secretariat considered it to be in line with the spirit of the outline. The Secretariat had not considered the outline to be a rigid straightjacket, provided that all the issues identified in the outline would be covered; when dealing with a large body of material, to some extent the material itself dictated the structure of logical presentation. As regards terminology, he referred to paragraph 5 of the summary paper, which explained that the Secretariat had sought to avoid the use of terms that occurred in the Agreement if these might be interpreted as implying that the Secretariat was making statements about whether a Member was or was not in conformity with its legal obligations. For that reason, the summary paper used the term "indication of geographical origin" and not "geographical indication", which term was the subject of a legal definition in Article 22.1. He recalled that the summary paper currently before the Council was a preliminary

version of the paper, for reasons explained in its paragraph 4, and that delegations had the opportunity to indicate any factual corrections necessary. Of course, as pointed out in paragraph 6 of the summary paper, the paper was not a substitute for the information provided by Members in response to the Checklist. For anybody who wanted to get a picture of a particular country's system, the best place was to go the responses to the Checklist from that country.

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

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

143. The Chairperson said that, since its previous meeting, the Council had received new papers from Brazil (document IP/C/W/228) and Japan (IP/C/W/236). Following a request that the TRIPS Council had received from the Special Session of the General Council concerned with implementation matters and as Members had agreed during informal consultations that he had held on 31 October 2000¹¹, the TRIPS Council had met in informal session to discuss the issue of the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD).

144. The representative of Brazil, introducing his delegation's paper, said that the document concerned Brazil's position regarding different elements of the review of Article 27.3(b) of the TRIPS Agreement and that he would explain the context of the paper and highlight its main elements. It was a well-known fact to Members that Brazil attributed a high priority to the review of Article 27.3(b) of the TRIPS Agreement. After a number of TRIPS Council meetings, his delegation felt that it would be useful to draft a paper that not only would elaborate Brazil's position on the different issues related to the review of Article 27.3(b), but would also point to possible outcomes. The document had been drafted taking into account opinions from a broad range of governmental and non-governmental representatives as well as views expressed by other Members. However, the document should be considered as a first contribution of Brazil to the review of Article 27.3(b). Taking into account the developments in the review exercise, Brazil might provide further clarifications and complementary information to the issues contained in its paper. While referring to the minutes of the Council's meeting of 21 March 2000, in particular the Chairperson's checklist of the main issues that had arisen in the discussions concerning the review of Article 27.3(b) as reflected in paragraph 54 and footnote 5 of document IP/C/M/26, he said that Brazil considered that the substantial discussions that had occurred on the basis of that checklist in the course of the year had shown that all Members benefitted from a more structured discussion.

145. Regarding the link between the provisions of Article 27.3(b) and development, Brazil wished to reiterate the necessity of ensuring that the review of Article 27.3(b) took into account the needs of developing country Members. On this issue, Brazil endorsed some of the views that India and the African Group had already presented in their previous papers. Given the cross-cutting nature of the issue, it might be useful for Members to take stock of the development elements relating to each of the other issues being taken up in the review.

¹¹ See JOB(00)/6908 of 2 November 2000, Annex II.

146. As regards technical issues relating to patent protection under Article 27.3(b), Brazil believed that Article 27.3(b) should preserve Members' flexibility to exclude patents on plants and animals. However, clarification was necessary to establish a more precise definition of terms such as "micro-organisms", in order to determine the scope of patentability under Article 27.3(b), as that term had different purposes according to whether it was used in a scientific, legal or market context. Brazil did not attempt to suggest a definition of "micro-organisms" in its paper, but pointed out that the absence of such a definition could pose problems of legal uncertainty as regards the scope of patentability under Article 27.3(b). The meaning of the notion of "micro-organism" was far from consensual among the scientific community. As regards plants and animals, there were several "borderline" categories of life forms that could either be classified as micro-organisms or as plants or animals. If the limits to the scope of patentability under Article 27.3(b) were not clarified, there could be potential conflicts among Members that had different interpretations of the concept of "micro-organisms". This issue was also related to the distinction between inventions and discoveries. While some Members had underlined that patentable micro-organisms should be new, involve an inventive step and be capable of industrial application, there was evidence that patent offices in some developed countries did not necessarily follow such guidelines. Moreover, they tended to accept overly broad patent claims in relation to genetic resources. In his delegation's view, this would affect the interests of developed countries themselves, as these patents would restrict access by research institutes to the micro-organisms. Such patents would also be in conflict with the principles of the CBD, as its Contracting Parties had sovereign rights over their *in natura* genetic resources.

147. On technical issues relating to *sui generis* protection for plant varieties, Brazil was of the view that the review of Article 27.3(b) should preserve Members' flexibility to decide on the most effective means of *sui generis* protection for plant varieties. Even though Brazil was of the opinion that the UPOV system could be considered as one of the references under the review of Article 27.3(b), it did not follow that this system should be considered as the only one to fulfil the criterion of effectiveness set out in Article 27.3(b). International instruments such as UPOV 1978, UPOV 1991, the FAO International Undertaking on Genetic Resources and the CBD as well as national systems were useful references in respect of *sui generis* systems for the protection of plant varieties.

148. Brazil attached special importance to the issue of the relationship to the conservation and sustainable use of genetic material. His delegation believed that one of the crucial elements of the review of Article 27.3(b) was to ensure that the TRIPS Agreement and the CBD were mutually supportive. In the absence of clear standards to define the scope of patentability of micro-organisms and a framework in the TRIPS Agreement that clarified the relationship of that Agreement with Members' obligations under the CBD, implementation of the TRIPS Agreement could result in conflicts with the CBD. With a view to avoiding conflicts in the implementation of both instruments - and, what was more, to ensure their mutually supportive relationship - Brazil considered that amending Article 27.3(b) of the TRIPS Agreement to accommodate principles of the CBD would be a necessary outcome of the review of that provision. Failure to clarify this relationship could turn out to be detrimental to both instruments. His delegation proposed that Article 27.3(b) include the requirements of: (a) the identification of the source of the genetic material; (b) the related traditional knowledge to obtain that material; (c) evidence of fair and equitable benefit-sharing; and (d) evidence of prior informed consent from the Government or the indigenous community for the exploitation of the subject-matter of the patent. An interpretative note to Article 27.3(b) should also be made in order to clarify that discoveries or naturally occurring material shall be excluded from patentability. Meeting these requirements would not be more burdensome than any other regular requirement in the already existing patent application procedure. Several countries had already established such requirements in their national legislation as a means of implementing the CBD. His delegation's proposed amendment would have the clear benefit of providing a predictable environment for governments, investors, traditional communities and researchers. As a consequence, research and development in biotechnology in developing countries would be encouraged, which

would be in line with the objectives of the TRIPS Agreement to promote technological innovation and transfer and dissemination of technology.

149. Brazil also referred in its paper to the relationship with the concepts of traditional knowledge and farmers' rights. Protection of traditional knowledge should be seen from two complementary perspectives. On the one hand, the review of Article 27.3(b) should ensure that traditional knowledge was not patented without due regard to the principles of prior informed consent and of fair and equitable benefit-sharing. On the other hand, Brazil was open to discuss adequate ways of developing a *sui generis* system to protect traditional knowledge at the multilateral level. In view of its link with development issues, the review of Article 27.3(b) was an adequate exercise to discuss the establishment of a *sui generis* protection system. However, the review of Article 27.3(b) was not the only forum where the establishment of a *sui generis* system to protect traditional knowledge could be discussed. Neither was Brazil suggesting at this stage that such a system was a necessary outcome of the review. There was a need, though, for a synergy between the TRIPS Council and other fora such as the CBD, WIPO, the FAO and UNCTAD.

150. The representative of Japan, introducing his delegation's paper, said that the document addressed the six items listed in footnote 5 to paragraph 54 of document IP/C/M/26. With regard to the link between the provisions of Article 27.3(b) and development, he said that "development" involved a wide variety of issues, including the environment for attracting investments of particular countries. The question of patentable subject-matter represented only a small fraction of those issues. In view of the fact that most of the technologies protected by intellectual property rights were in the possession of the private sector, technologies would be transferred in the most efficient manner if they were transferred through a market mechanism. Adequate intellectual property protection of technology was an important premise based on which the private sector concluded licensing agreements of its technology. Without incentives to the suppliers of technology, technology transfer would not be facilitated. Appropriate intellectual property protection in turn would give large benefits to recipients/users of technology, because they would eventually become the producers of subsequent technology. This would be of particular importance for recipients and users from developing countries. Japan was one of the countries that had made the transition from a developing to a developed country and, based on its own experience, Japan attached great importance and valued adequate intellectual property protection. In the late 1880s, Japan had started to introduce legislation on the protection of intellectual property. These early movements had resulted not only in a quick catch-up by Japan with the advanced technology of developed countries, but also in promotion of Japan's own research and development activities beyond the contemporary state-of-the-art technology of developed nations. In the 1920s, a Japanese inventor had gained a considerable royalty from a company in a developed country for his invention. Based on the royalty income, he had become an entrepreneur and established a company that had since become a world-famous Japanese car manufacturer. His company had been one of the first in Japan to be founded based on royalty-income. From early stages of development, many Japanese companies had started to introduce patented technologies from developed countries. In the 1950s and 60s particularly, many important state-of-the-art technologies had been introduced in Japan from developed countries in exchange for large royalty payments. However, the costs had paid off, because those technologies had boosted industrial development and promoted research and development in Japan. The delegation of Japan was aware that its country's experience was not the only model to be followed. Nevertheless, it hoped that its experience might provide something useful for other Members.

151. With regard to technical issues relating to the distinction between micro-organisms and plants and animals, the African Group had stated in its paper that incongruencies were raised by the artificial distinction made between plants and animals, which might be excluded from patentability, and micro-organisms which could not be excluded. In response to the concerns relating to those incongruencies, his delegation wished to point out that the notion of categorizing life forms into plants, animals and micro-organisms was widely accepted in international conventions, including the

CBD. Also the general definition of "micro-organisms", as seen in the dictionary, should suffice for distinguishing plants and animals generally from micro-organisms for the purpose of the discussion in the Council. With regard to the distinction between inventions and discoveries, in response to concerns expressed by the African Group and India, he said that, in Japan's patent practice, mere discoveries not involving human intervention were not considered patentable subject-matter. Merely discovering naturally occurring things like an ore or natural phenomena were not considered inventions. If the subject-matter involved human intervention, such as isolation or purification, and if the isolated or purified subject-matter was not of previously recognized existence, then it was regarded as an invention. If naturally occurring things such as chemical substances or micro-organisms had, for the first time, been isolated artificially from their surroundings in nature, then they were considered inventions. A gene, if isolated and purified from the originating life form, was also considered an invention as a particular kind of chemical substance. In order to be patentable, inventions also had to be new and, if an invention was known to the public, it would not be new and was therefore unpatentable. However, the mere fact that micro-organisms or a gene had existed in nature did not mean that they had been known to the public.

152. With regard to technical issues of *sui generis* protection for plant varieties, Japan was of the view that it was essential for agricultural development to promote the breeding of new varieties with excellent characteristics in productivity, quality, disease resistance and to protect them by plant breeders' rights and/or patent rights. A system for the protection of plant breeders under the UPOV Convention would be an "effective *sui generis* system" for the protection of plant varieties as set out in Article 27.3(b) of the TRIPS Agreement. The African Group had stated in its paper that the protection of plant breeders' rights raised the following problems: first, the relationship between the protection of plant breeders' rights and the protection of farmers' rights; and second, the exemption allowing other breeders to use protected varieties for further breeding. As for the first issue, under Article 15(2) of the 1991 Act of the UPOV Convention, traditional farmers' practices could be allowed within reasonable limits in each country. In relation to the second issue, under Article 15(1) of the 1991 Act of the UPOV Convention, it was free for others to use protected varieties for further breeding in order to promote breeding. In Japan's view, the system for protecting plant breeders' rights under the UPOV Convention maintained a proper balance between breeders' benefits and farmers' rights.

153. With regard to ethical issues related to the patentability of life forms, Japan wished to note that, in general, a patent did not guarantee the patent holder unfettered exploitation of the patented invention. A Member might legitimately enforce its national law to prohibit patentees from exploiting patented inventions for various reasons, including ethical ones. Therefore, there was no need to exclude inventions from patentability in order to prevent their exploitation. That was the reason why Article 27.2 provided that Members could not exclude from patentability an invention merely because the exploitation of such an invention was prohibited by their law. The African Group had expressed the following concerns: firstly, that patents for research material might restrict further research; secondly, that the cost of drugs kept escalating due to the required system of patent protection; and thirdly, that research increasingly targeted products for the affluent rather than for the general public health. Regarding the first point, the delegation of Japan wished to refer to the WTO panel report on *Canada - Patent Protection of Pharmaceutical Products*, which stated that use of a patented product for scientific experimentation was one of the exceptions to patent rights under Article 30. In addition, consideration should also be given to the "other side of the coin", i.e. that patents over research material would promote the R&D of research materials. As regards the question of drug prices in relation to patent protection, while it was important to ensure adequate access to drugs, it was also important, from the viewpoint of public health and nutrition, to promote the development of new drugs. Attention should also be drawn to the actual link between patents and drug prices. It was reported that the link between patents for drugs and their price was weak or in many cases non-existent, due to price levels being determined by many other factors. As regards the impact of patents on the allocation of research resources and funds, it could generally be said that, if the needs

of society were greater, research satisfying these needs was more profitable. Therefore, such research, particularly that conducted by the private sector, would tend to target products that addressed greater needs. If private sector research was not targeted to particular products which nevertheless needed research, then the public sector should step in to target such products through funding or research. India had raised the concern that patents could also have the danger of causing economic motives to supersede ecological ones. Japan wished to point out that the patent system encouraged people to develop, among others, environmentally-sound technologies. The patent system was neutral to ecological concerns. In response to the concern expressed by some Members that the effects of patent rights would extend to original life forms when the invention was part of the life form, he said that, under the patent practice of Japan, patent rights did not extend to the original life form from which a patented gene was obtained.

154. Regarding the question of consistency between the TRIPS Agreement and the CBD, some Members had insisted that there existed a necessity to harmonize the approach of the TRIPS Agreement with that of the CBD. In Japan's view, the TRIPS Agreement and the CBD were mutually non-exclusive. Because of the totally different objectives and the flexibility of the provisions of the two instruments, it would be unlikely that one would conflict with the other when implemented. The CBD required its Contracting Parties to take "legislative, administrative or policy measures as appropriate" to implement its provisions. There were a variety of ways to implement the provisions of the CBD and Contracting Parties were permitted to take specific measures, as far as they deemed them appropriate. Japan had been fulfilling its obligations under the CBD concerning technology transfer, mainly by means of education, training and joint R&D, conducted by both the public and private sectors. Japan had also been fulfilling its obligations in respect of benefit-sharing under the CBD, mainly by means of governmental fundraising and governmental fund granting activities, through bilateral, regional and other international organizations. Meanwhile, Japan had been fully implementing the TRIPS Agreement as well. Therefore, it believed that the TRIPS Agreement and the CBD could be implemented in a non-conflicting manner. A certain degree of flexibility existed for appropriately implementing the CBD. For the mutual benefit of developing and developed countries, it was desirable to explore, in the relevant international fora the most appropriate ways of implementing the CBD in a manner consistent with the TRIPS Agreement.

155. As regards the proposal, in the context of the CBD, to oblige Contracting Parties to require patent applicants to disclose the origin of biological resources and associated traditional knowledge used in inventions, Japan's view was that this would go beyond what the Contracting Parties were obliged to do. The CBD left the specific ways of implementation to the discretion of each Contracting Party. The same applied to the proposal to oblige WTO Members to require patent applicants to disclose the origin of biological resources used in inventions. Such an obligation would go beyond what Members were obliged to do under the TRIPS Agreement. At the TRIPS Council meeting in September 2000, India had suggested a connection between Article 29.1 of the TRIPS Agreement and the proposed disclosure requirement of the origin of any biological resources used in inventions. By stating that a problem arose if patent offices did not seek such disclosure, India seemed to be suggesting that Article 29.1 mandatorily required applicants to disclose the origin of biological resources. Japan could not agree to that view. The first part of Article 29.1 dealt with the "enablement requirement". It related to the disclosure requirement for the purpose of ensuring that a disclosure was sufficient to enable a person skilled in art to "carry out" the invention disclosed in the patent application. It was not for the purpose of ensuring "access control" or "benefit-sharing" in relation to biological resources. Therefore, India's assertion was true only to the extent that the proposed requirement of disclosing the origin of any biological resources was sought in relation to the "enablement requirement to carry out an invention". On the other hand, if the proposed requirement was not sought for the purpose of ensuring sufficient disclosure enabling a person skilled in the art to "carry out" the invention, it would be an additional requirement and go beyond the scope of Article 29.1. Under the patent laws of most Members, the "enablement requirement" for "carrying out" an invention using biological material was ensured by means of the "depository system". Under

Japan's Patent Law, if an invention was related to a micro-organism that was *not easily accessible* by a person skilled in the art, the patent applicant must deposit the micro-organism with an International Depository Authority under the Budapest Treaty, or another appropriate depository authority, and submit to the relevant patent office a certificate issued by the relevant depository authority. This was a measure to ensure that a person skilled in the art could "carry out" the invention based on the description in the patent application together with the actual micro-organism that had been deposited. On the other hand, if a micro-organism was easily accessible by a person skilled in the art, the applicant was not required to deposit the micro-organism, but simply required to describe how the invention could be carried out by using the known and publicly accessible micro-organism. Japan took the view that this depository system was sufficient to satisfy the obligation concerning the "enablement requirement" under Article 29.1 of the TRIPS Agreement and further requirements would be beyond the obligations under that provision. The same argument would apply not only to biological resources but also to associated traditional knowledge. To the extent that the proposed requirements went beyond the obligations of the Members under Article 29.1, some Members might instead wish to modify the TRIPS Agreement to introduce these new requirements. However, Members should exercise caution in this regard, since the relevant provisions struck a balance between the rights and obligations of inventors, applicants and third parties and were the result of long-term negotiations in the Uruguay Round. Firstly, the new requirement would have an impact on the balance described in Article 62.1, which stated that, while Members could require compliance with procedures and formalities as a condition of the acquisition of patents, such procedures had to be *reasonable* ones. The question as to whether they were reasonable or not should be left to Members. Keeping that in mind, Japan was of the view that requiring patent applicants to disclose the origin of any biological resource and associated traditional knowledge could be unreasonably burdensome to patent applicants and would upset the present balance. Secondly, if a new, additional requirement was sought only for particular inventions that used biological resources, its conformity with Article 27.1 would need to be examined; this provision stated that any requirement for obtaining patents should be imposed, in relation to any invention, in an equal manner, regardless of the field of technology. It could be generally said that an invention that used a biological resource belonged to particular types of technological fields such as biotechnology or pharmaceuticals. In Japan's view, a heavier burden should not be imposed on any particular field of invention. The aforementioned requirement for a "depository system" in respect of inventions that related to micro-organisms as had been adopted by many Members would be consistent with the Article 27.1 requirement of non-discrimination; this was because the depository system was aiming at compliance with the "enablement requirement" under Article 29.1 and that requirement applied equally to any invention in any field of technology.

156. As regards the suggestion by some Members that an enforcement mechanism at the WTO was required to ensure benefit-sharing, authorisation of access to genetic material and contractual agreements between developing countries and entities seeking their genetic material, Japan was of the view that it seemed that the proposed introduction of such new provisions regarding benefit-sharing into the TRIPS Agreement went beyond the obligations under the CBD. A general way of benefit-sharing would be a contractual arrangement concluded between the country offering biological resources and public and private entities that wished to access such resources. Some countries had proposed the introduction of an international obligation of monetary benefit-sharing requiring patentees to pay royalty fees to the holders of biological materials if the patented invention exploited these materials. However, it had to be noted that exploitation of the same biological resource could result in inventions of varying economic value; they could have a high value or no value. This fact demonstrated that the economic value of a patented invention was largely attributed to the inventive efforts of the inventor as well as the commercialisation efforts by the patent holder. The economic value of an invention was not largely attributed to the biological resource *as such*. Of course, the value of the biological resource as such should be recognized and compensation should be paid for its access and use. For the sake of balancing the benefits of holders of biological resources

and inventors/patentees, benefit-sharing should be determined on mutually agreed terms and the conditions of payment should be determined by the contract concluded at the time of access.

157. With regard to the relationship with the concepts of traditional knowledge and farmers' rights, some Members had proposed to examine the possibility of protecting traditional knowledge and even suggested the establishment of a new *sui generis* system for the protection of traditional knowledge, which would be different from a *sui generis* system for the protection of plant varieties under Article 27.3(b). In Japan's view, if the Council were to discuss this issue, first a number of preliminary questions had to be answered, in particular as to the definition of traditional knowledge and of its ownership. This exercise should be carried out by collecting and analysing examples. Consideration should also be given to the question as to how traditional knowledge could be protected under the existing framework of legal protection, for example, for patents, trade secrets and private contracts. Discussions on traditional knowledge should not prejudice the establishment of new intellectual property systems for the protection of traditional knowledge. WTO Members should also closely follow future discussions at the "WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore", which was due to begin operations in the spring of 2001. As regards the concerns that had been expressed that patent rights were being obtained for subject-matter covered by traditional knowledge of third parties, he said that, under the patent laws of many Members including his country, the prior art against which inventions had to be examined as to whether they met the conditions for patentability was not only constituted by earlier disclosures in writing, but also by what was already publicly known or had already been used anywhere in the world. Therefore, traditional knowledge, most of which travelled by word of mouth, was recognized as prior art under the patent laws of many Members. Even if a patent right was mistakenly granted in respect of traditional knowledge, this could be revoked through post-grant opposition procedures. As regards farmers' rights as described in FAO Resolution 5/89 of 29 November 1989, this concept had been incorporated into a composite draft text in the framework of the revision of the International Undertaking on Plant Genetic Resources in harmony with the CBD. According to Article 15.2 of the draft text, it would be each Party's responsibility to realize farmers' rights. Japan supported this approach and was of the view that WTO Members should closely follow the discussions on the revision of the International Undertaking at the FAO.

158. The representative of the European Communities said that his delegation had commissioned a study by an independent consultant, whose report was now available and accessible on the website of the Commission's Directorate General responsible for trade. The study identified the linkages between intellectual property rights and biodiversity-related issues. It also contained comments on a number of technical and financial assistance programmes launched either by the Commission or by some of the member States of the European Communities and formulated a number of proposals for action. The study reflected the views of an independent consultant and was currently being examined by the Commission together with the member States. In the first section of the study, the consultant identified the stakeholders in the debate on TRIPS and biodiversity, both at governmental and intergovernmental levels; these included, for example, the WTO, WIPO, the CBD, the FAO, UPOV, transnational business associations such as UNICE, the International Chamber of Commerce, associations of pharmaceutical producers, associations of plant breeders, and non-business NGO's such as World Wildlife Fund, Third World Network, Greenpeace, CIEL, etc. For each of these organizations, the report outlined their structure, membership, activities, position and influence. The second section of the study examined the interaction between the CBD and the TRIPS Agreement and offered a systematic analysis of the often opposed views of the various stakeholders regarding that relationship. It showed that, while the two treaties might not conflict in a legal sense, complex policy conflicts could arise out of their existence and implementation. These emerged from differing views and concerns on social and economic issues. The third section of the report identified initiatives where the Commission and certain member States provided technical and financial assistance to developing countries on intellectual property rights and biodiversity issues. The last section contained a number of recommendations from the independent expert. The study was believed to provide a

useful basis for undertaking further work and a number of issues that had been raised in the study certainly required further in-depth work, such as in relation to a possible obligation to disclose the origin of genetic resources. The European Communities' also had the intention to organize a workshop, probably during the first part of next year, in which governments and non-governmental organizations could participate. He expressed some concern regarding the multiplication of fora that all dealt to a larger or lesser extent with the relationship between the TRIPS Agreement and biodiversity. As regards possible further work on this matter, the European Communities believed that it was important to make a distinction between the implementation of existing TRIPS commitments and what possibly could be done in the context of a new round. The relationship between the CBD and the TRIPS Agreement had been addressed in the context of Article 27.3(b) at previous meetings of the Council and what his delegation had said in that connection at the meeting of the Council in June 2000 remained valid. In the view of the European Communities and their member States, the CBD and the TRIPS Agreement were mutually supportive and neither of them ran counter to the objectives of the other. The link between the two instruments did not fall within the scope of the review of Article 27.3(b).

159. The European Communities and their member States were still studying the papers introduced by Brazil and Japan. He wished to note, however, that paragraph 21 of Brazil's paper indicated that the TRIPS Agreement and the CBD should be mutually supportive and promote the sustainable use of resources, and caution against the far-reaching proposals that had been made in the paper, in particular as to an amendment of Article 27.3(b). Such proposals raised an important procedural issue. Given that the European Communities and their member States were still in the process of examining substantive issues in the area of Article 27.3(b), including with regard to the link between the CBD and the TRIPS Agreement, it was premature for the European Communities and their member States to pronounce themselves on the possible need to look for any amendments of Article 27.3(b). As regards the paper tabled by Japan and the intervention made by Japan in introducing it, he wished to underline that, in the view of Japan, the TRIPS Agreement and the CBD were mutually non-exclusive. It was striking that, after having developed a number of most useful ideas and concepts in the paper, Japan came to the conclusion that there was no need to modify the TRIPS Agreement. With the papers submitted by various Members, the "Checklist of Points Made" prepared by the Secretariat and circulated as document JOB(00)/7517, the documents from other intergovernmental organizations and the interventions made by delegations over the last few months, the Council had a significant amount of material before it, of which he hoped advantage could be taken in order to take the debate further.

160. The representative of India agreed with the view that the Council had sufficient material before it with all the documentation available. He would come back to the Japanese intervention at a later stage. However, India's preliminary reaction was that it was extraordinary that Japan suggested that India's suggestions would go beyond the CBD. Japan had gone further and interpreted Article 29 in such a way that India's suggestion would go beyond Article 29 and was outside the scope of the review of Article 27.3(b). India held the view that it was important to engage in the discussion with an open mind instead of taking a legalistic approach. The Brazilian paper built upon the submissions that India and the African Group had made earlier and upon comments that other countries had made orally. India fully shared the conclusions arrived at by Brazil. What was useful about the Brazilian paper was that it laid out the issues item by item, captured well the points that had been made by a number of delegations under each of those items, and clearly pointed to the possible directions in which the TRIPS Council could move. For example, Brazil was correct in stating that the link with development merited further discussion. This was also an overarching issue, and in particular relevant to *sui generis* systems for the protection of plant varieties, inasmuch as developing countries needed to bear in mind different policy prescriptions. India agreed with Brazil's observation on the need to preserve whatever flexibility there was in Article 27.3(b), as applied most importantly in relation to *sui generis* systems under Article 27.3(b). Finally, India agreed with the suggestions that Brazil had made regarding adjustments that were needed to Article 27.3(b).

161. His delegation had noted the suggestion made by the United States that the term "micro-organism" should be interpreted according to the principles of international law, i.e. according to the dictionary meaning of the word. In his delegation's view, the term "micro-organism" was obviously intended to have a special meaning in the context of patentability. The examples in the dictionary to explain the term, for example bacterium or virus, did not necessarily concern patentable micro-organisms. In order for a micro-organism to qualify as patentable, it had to embody an invention and not merely be the subject of a discovery. Therefore, India considered Article 31(4) of the Vienna Convention on the Law of Treaties relevant; the negotiating history of Article 27.3(b) would show that the negotiators had considered a number of definitions, but had not been able to agree to any. It was not sufficient to rely on the ordinary meaning of the word applied. His delegation agreed with the statement in the United States paper that, in order to be patentable, a micro-organism could not be as it existed in nature. However, the example used in paragraph 8 on page 3 of the United States paper confused the issue. He wondered whether the patent in that example concerned the process of developing a culture of the bacterium capable of producing recoverable quantities of BU38319 or the bacterium itself. Obviously, the bacterium itself existed in nature and was, therefore, not new. It was only the culture that did not exist in nature. Another question his delegation had with regard to this example was whether the test of inventiveness was to be applied to isolating the bacterium or to developing a culture for producing adequate quantities of BU38319. Given the techniques available today, India would argue that the task of isolating the bacterium would not satisfy the inventiveness test.

162. Regarding the section of the United States paper which listed a set of criteria which would constitute an effective *sui generis* system for the protection of plant varieties, he said that, while it was true that those and, perhaps, other criteria could be useful for drafting national legislation that would comprise an effective *sui generis* system, the standards under national law might not necessarily follow the standards for patents contained in Section 5 of Part II of the TRIPS Agreement. This would particularly be so for countries that would not opt either for patents or for a combination of systems including patents, but for a *sui generis* system *per se*. In such cases, what was protected would not be "patentable subject-matter" as indicated in the title of Article 27. Further, the scope and level of protection provided for in Section 5 of Part II of the TRIPS Agreement would also not be applicable to such a *sui generis* system. What would be relevant in such a system would be that the scope and level was clearly defined and the protection given at that scope and at that level constituted "effective" protection. India felt the necessity of giving this clarification to the United States paper, because what followed in later paragraphs of the paper appeared to indicate that the scope and level of protection available for patents under Section 5 of Part II of the TRIPS Agreement would be relevant for the effectiveness of a *sui generis* system. For example, the United States paper stated, firstly, that the system would apply to plant varieties throughout the plant kingdom. This appeared to be an incorrect interpretation of the provision, as the scope of protection would not be determined by Article 27.1. Moreover, some existing *sui generis* models, which appeared to be effective models in view of their long use, did not apply to the entire plant kingdom, e.g. UPOV. Secondly, the four determinants of entitlement to protection stated in the United States paper were novelty, distinctiveness, uniformity and stability. This again went beyond what had already been established as the determinants of entitlement to protection in existing models such as, for example, the UPOV system, where novelty was not a criterion in a strict sense. Further, a Member might wish to entitle a farmer's variety for protection under its *sui generis* law. Such varieties might not be new, but might be the result of the effort of the farmer to improve plant varieties. Such protection might, on the other hand, be based on other *sui generis* systems like the IUPGR or the CBD. Thirdly, the United States paper restricted protection only to breeders or others specifically entitled either through contracts or law of succession. This position again restricted the scope of protection that could be available to Members. For example, Members might wish to include protection for plant varieties developed by farmers on which rights arose through tradition and not through contracts or succession. Fourthly, while the national treatment provisions would apply to *sui generis* systems generally, existing practices in *sui generis* models, including the practice of reciprocity, would not be deemed to be

lowering the level of protection or the effectiveness of the *sui generis* system. Lastly, the United States paper suggested a term of protection of at least 20 years. In India's view, this was again an incorrect interpretation of Article 27.3(b). The level of protection for patents provided for in Section 5 of Part II of the TRIPS Agreement, including Article 33, did not apply to plant variety protection. Further, effective *sui generis* models, for example the UPOV system, had a different term of protection. The United States believed that the term of protection for trees should extend for at least 25 years but, in India's view, that was an incorrect belief. In discussing the limitations on rights in plant varieties, the United States paper stated that farmers could save seed for purposes of re-seeding on their own holdings for the following years. There was nothing in the TRIPS Agreement to indicate any such parameter for limitations on the rights. India believed, for example, that farmers could not only save seeds but also exchange, barter or even sell them, except through a commercial marketing infringement by using the brand of the plant breeder who had protected his right under the national law. This was necessary because farmers needed to be encouraged to invest in plant variety development through a process of natural selection over generations on their own fields for adapting plant varieties to local conditions while ensuring productivity. His delegation agreed with the position of the United States that cancellation of the right should be possible, if a right holder failed to fulfill its responsibilities laid out thoroughly and transparently under the law maintaining the rights. It was obvious that one of the responsibilities of the right holder was that the variety should show the performance that it was claimed to have. In cases where the right holder did not discharge his responsibilities, the law could also provide for compensation to the user of the variety.

163. Regarding ethical considerations, the basic point made by the United States was that a patent on a life form did not provide ownership of that life form to the patentee. That was correct. However, the United States went on to say that the patent would give its owner the right to prevent others from taking certain actions in relation to a protected invention. Consequently, nobody else would be able to "work" that life form. This would be particularly true where "broad" patents were granted, a practice quite common in patent offices of developed countries. Nobody, whether an individual or State, should be provided with such an exclusive use of a life form which virtually brought one life under the control of another. No doubt, technological development necessitated research, including research in areas connected with life forms. The tricky part was the commercialization of life. It was for this reason that India, among others, had called for a complete ban on patents on life forms. It was for this reason again, India believed, that those who had researched the "Genome Project" had undertaken not to seek a patent on the results of their research. India was not against encouragement of such research and in fact would urge the international community to invest more State funds into such projects, so that the research was undertaken for altruistic objectives rather than mercantilist objectives that commercial research might be driven by.

164. Regarding patents related to knowledge and practices of indigenous people, India's view had already been presented in its paper circulated as document IP/C/W/161. According to the United States paper, the fault (relating to bio-piracy) did not lie with the patent system, but with the inaccessibility of the (traditional) knowledge involved beyond the indigenous community. This would be a tenable proposition only if humanity needed only patents, to the exclusion of traditional knowledge, for its progress. Obviously, that was not true, as had been shown beyond doubt not only in the WTO and other, more relevant, intergovernmental organizations but in the literature in general on the subject. Hence, it was the responsibility of the WTO to harmonize the objectives of the TRIPS Agreement with the larger objectives of progress of humanity, including through the conservation and growth of traditional knowledge. With reference to the patent on the healing properties of turmeric, the United States paper stated that the patent system, in that case, had worked as it should. This was again an untenable position on the following grounds. Firstly, it was admitted that the patent had been granted where none should have been. Patent systems all over the world needed to gear up to such contingencies. India had proposed certain solutions in this regard in paragraph 7 of document IP/C/W/161. Secondly, such instances of wrong patents arose generally in cases of traditional knowledge accessed from developing countries. In consonance of the commitment for

special and differential treatment to the developing countries in the Preamble of the WTO Agreement as well as the TRIPS Agreement, it was Members' duty in the WTO to correct this imbalance. In this regard, suggestions were already on the table in the General Council as part of the implementation concerns of the developing countries. Thirdly, while it was true that the Internet and other technological advances had made dissemination of knowledge easier, this facility was relevant more for the developed countries, which had the resources, than the developing countries and their peoples. For example, indigenous communities could hardly be expected to access the Internet or rummage through data available in patent offices to determine whether their knowledge was being purloined or not. Hence, a preventive system of denial of patents based on traditional knowledge was required, rather than a post facto damage containment effort through revocations. In addition, revocations cost a lot of money and time, which was not abundantly available to developing country Members, not to mention their indigenous peoples themselves. Lastly, such a damage containment system would always fall behind the efforts of patentees who had a purely commercial interest, rather than research objectives. In fact, there were many other patents based on traditional knowledge which had been pointed out to the Indian Government, and maybe to other Governments as well, but the Government might not have the capacity to fight each and every case. This was evident at least in one case where it had been a non-governmental organization rather than the Government, who had successfully challenged a neem-based patent in the European Patent Office. The suggestion to document data on traditional knowledge was well made and the Government of India was taking steps in that direction and would urge others to do so. However, documentation was a relevant means only for traditional knowledge already in the public domain in a given society. It was not a solution for traditional knowledge that was closely held by indigenous communities or local peoples. Documentation of such knowledge would divest these communities and peoples of their right to get rewarded for their knowledge and would, in fact, institutionalise pilferage. Certainly, this was not an objective of patents, the TRIPS Agreement or WTO Members. Hence, a means of rewarding traditional knowledge holders had to be developed hand in hand with the development of private commercial rights or patentees under the TRIPS Agreement. India would urge the TRIPS Council to take note of the deliberations in the UNCTAD Expert Meeting on Traditional Knowledge held from 30 October to 1 November 2000.

165. The United States had pointed to Article 22.1 of the CBD, which stated, *inter alia*, that the provisions of the CBD shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity. Enough literature was available to indicate the damage that was being caused to biological diversity and associated traditional knowledge. The fact that both the CBD and the WTO were engaged in harmonizing the conflict between the TRIPS Agreement and the CBD pointed to the seriousness of the issue. If still a necessity was felt to identify such damage, the TRIPS Council could ask the Secretariat to extract the relevant information from the literature. The reference to bio-piracy in a monogram by ActionAid entitled "Crops and Robbers - Bio-piracy and the Patenting of Staple Food Crops", dated 25 November 1999, was an example. The United States had gone on to refer to principles of international law, thus taking a legalistic view of a serious problem like bio-piracy and conservation of biological diversity. A legalistic view would rather seem to be the domain of the WTO dispute settlement system, not of the TRIPS Council. In this regard, he wondered whether the Biosafety Protocol or the upcoming revision of IUPGR would prevail over provisions of the TRIPS Agreement. In view of all these considerations, India had made a limited proposal, as reflected in document IP/C/W/161, that patent applications should disclose the source of origin of biological material or associated traditional knowledge used in the inventions they disclosed, in order for domestic mechanisms to ensure the prevention of bio-piracy as well as the installation of benefit sharing mechanisms. It was India's belief that Article 29 of the TRIPS Agreement already permitted this.

166. Regarding access to genetic resources and benefit-sharing, the United States had mentioned that India's suggestion, if it were to be implemented, would be a nightmare for all concerned. India believed that adding an additional item in a patent application form should cause little difficulty either to patent offices or to patent applicants. So far as benefit-sharing mechanisms were concerned, nobody was arguing that patent offices had to enforce such mechanisms. These mechanisms would have to be and were being installed in national laws and would have to be administered and implemented by national biodiversity authorities. A clear example had been given in India's paper circulated as document IP/C/W/198. The United States paper argued that effective obligations for ensuring benefit-sharing must arise at the beginning of the process rather than at the point of commercialization. It was submitted that national access legislation would certainly be beneficial in that regard. However, biodiversity could be accessed in various ways and it might not always be possible to detect illegal access or to even regulate legitimate access. For example, how could it be ensured that a person did not put a herb in his or her pocket and carry it away to a research facility for commercialization? Similarly, how could it be ensured that traditional knowledge was not obtained without reward from innocent indigenous people and commercialized without sharing benefits? For that reason, collection of information at the point of commercialization was also necessary. Such information would enable national authorities to determine whether benefit-sharing mechanisms through contracts or otherwise as required under national laws had been entered into or not.

167. He also wished to reconfirm his delegation's views expressed in document IP/C/W/161 and its comments on the Chairperson's checklist of the main issues that had arisen in the discussions concerning the review of Article 27.3(b) as reflected in paragraph 54 and footnote 5 of document IP/C/M/26. His delegation would urge other countries also to give their views on this checklist in order to further the discussion and evolve a consensus on the review.

168. The representative of Singapore said that his delegation would shortly circulate a non-paper on Article 27.3(b) among Members.¹² He expressed support for Japan in relation to the issue of access to genetic resources. Singapore was a party to the CBD, which recognised the sovereign rights of States over their natural resources and stated that the authority to determine access to genetic resources rested with national governments. Existing genetic resources had provided the basis for biotechnological innovations. The availability of the genetic resources, the efforts to discover those resources and the further efforts to create something new out of those resources all contributed to the value of new products derived from genetic resources. Therefore, the principle of benefit-sharing on a commercially viable, transparent and fair basis could not be objected to. However, the CBD also left it to States that were Contracting Parties to decide the terms of access to their genetic resources, e.g. whether to require prior informed consent or not. Some countries had enacted legislation to regulate access to their genetic resources; others had not. That flexibility should be retained. To use the TRIPS Agreement to enforce such benefit-sharing arrangements might not be the best way to proceed, as it could mean negotiating a common arrangement to apply to all countries. This was because countries concerned would want to set up different benefit-sharing arrangements to respond to different national priorities.

169. Regarding the overall review of Article 27.3(b), many issues were involved. In relation to exclusions from patentability, as a general principle, Singapore recognized that many biotechnological innovations had significant medical and industrial applications and clearly had social and commercial value. Therefore, it was only fair that the intellectual property created by research and development in biotechnology be recognized and protected through patents. The criteria for patentability were contained in Article 27.1 of the TRIPS Agreement: the subject-matter of a patent must be new, involve an inventive step and be capable of industrial application. Singapore believed that biotechnological innovations deserved patent protection in the same manner as other areas of science

¹² Advanced copies of this non-paper were made available at the meeting. The non-paper was subsequently circulated as (JOB(00)/7853).

and industry. Accordingly, under the Singapore Patents Act, micro-organisms, plants and animals were patentable. The Patents Act also provided for the patenting of plant varieties. Article 27.3(b) made a distinction between the level of protection to be given to micro-organisms and that for plants and animals. It currently provided for the patentability of micro-organisms and non-biological and essentially microbiological processes. Given the fact that patents had already been awarded to micro-organisms in a number of countries, the review of Article 27.3(b) should not lead to a lowering of intellectual property protection for biotechnological innovations. Singapore thus saw the status quo as the starting-point. Therefore, his delegation would like the Article 27.3(b) review to focus on whether patent protection should be extended to all new inventions of plants and animals.

170. Some Members had pointed out shortcomings in the patent system in respect of the granting of patents for mere discoveries of existing organisms or genetic information, or of naturally occurring substances; or for "prior art" that was not widely known, e.g. traditional knowledge. Such concerns were valid but should be addressed in a technical manner by looking at ways of improving the patent examination process, e.g. opposition procedures, and by applying rigorously the criteria of novelty, non-obviousness and industrial utility in relation to patent applications. In this regard, his delegation wished to note that WIPO was now embarking upon initial discussions on the possible harmonization of patent laws that could eventually minimize disputes over the award of patents. The field of biotechnological patents was a new one and it was, therefore, not surprising that various difficulties were being encountered in applying the standard test of patentability. However, oppositions to the way patents had been granted in certain instances should not mean that patents should not be granted at all for inventions relating to plants and animals.

171. The representative of Thailand reiterated that his delegation, as to the procedure to be followed in the review of Article 27.3(b), subscribed to a more focused and structured discussion as outlined by the Chairperson at the meeting of the Council in March 2000 and reflected in paragraph 54 of document IP/C/M/26, on the understanding that the list of issues mentioned in footnote 5 to that paragraph was non-exhaustive and without prejudice to Members' positions.

172. Regarding the substantive issue of *sui generis* protection for plant varieties, Thailand continued to believe that, as long as Article 27.3(b) required Members to provide protection for plant varieties, the choice of such a system as currently available under Article 27.3(b) had to remain open so as to allow each Member to opt for a patent system, an effective *sui generis* system or a combination of the two and develop the system in furtherance of the objectives and principles contained in Articles 7 and 8 in a manner that was consistent with the Agreement. The meaning of the word "effective" in Article 27.3(b) needed to be clarified. Although the Agreement already allowed general exceptions to exclusive rights, there was no risk in adding express provisions permitting specific exceptions to plant varieties. These exceptions should cover, as a minimum, the rights of farmers, in particular, to sow and share harvested seeds of a protected variety; communities' rights; and compulsory licensing, where plant varieties were not available on reasonable commercial terms, in the case of a national emergency, or for public non-commercial use. It should also be put beyond doubt that Members were not under an obligation to protect all varieties in the plant kingdom. It should be clarified that, when they applied these exceptions and limitations, Members were in compliance with the requirement to provide for an effective *sui generis* system of protection. Article 27.3(b) did not refer to the UPOV Convention and much less so to any particular Act of that Convention. Thailand would not accept any attempt to add such a reference. Members were free to choose a model other than the UPOV system and should remain free to do so.

173. Regarding the issue of the relationship to the conservation and sustainable use of genetic material, he said that Article 27 recognized the right of Members to provide patent protection in respect of plants and animals. However, where inventions had been developed using genetic resources from another Member's jurisdiction, Article 27.3(b) should expressly recognize the right of that Member to control access to and use of genetic resources from within its jurisdiction and to

receive compensation for revenues derived from inventions using those resources. Some countries had indicated concerns, for example, that the requirement to identify the source of genetic resources in patent applications would cause legal and administrative problems. Thailand believed that Members first needed to reaffirm the rights of Members over their genetic resources and recognise the principle of benefit-sharing under the TRIPS Agreement. Thereafter, administrative difficulties could be discussed, for example how to ensure that requirements would not create problems or unduly complicate patent examination procedures, especially where it might be difficult to prove the actual origin of genetic resources and where more than one country might claim ownership of such genetic resources. As indicated by Brazil in its recent paper, such additional requirements might be imposed only when they were necessary or when there were reasonable grounds to believe that certain patent applications did not respect national legislation on the protection of biodiversity.

174. Regarding the issue of access to genetic resources and benefit-sharing, Thailand shared the view of the United States that those who wanted to share in the benefits derived from genetic resources should be encouraged to enter into contractual arrangements with those who owned those genetic resources before using the genetic material. Such contracts should also cover benefit-sharing. For example, Thailand had established a National Biological Resource Center and was in the process of drafting a Model Material Transfer Agreement. When this system would be in place, any person who wished to benefit from Thailand's genetic resources would have to enter into an agreement with that Center.

175. The representative of Peru first wished to commend the Secretariat for the "Checklist of Points Made" circulated as JOB(00)/7517 and reserved the right to comment on the papers submitted by Brazil and Japan after her authorities would have had time to study them carefully. Peru agreed with Brazil on the approach and the elements to be taken into account in reviewing Article 27.3(b). As stipulated in Articles 7 and 8 of the Agreement, the protection of intellectual property rights should promote technology transfer and development. These criteria should also be borne in mind when reviewing Article 27.3(b). As to the protection of micro-organisms, it was necessary to limit and clarify the scope of protection to avoid interpretations that were over-permissive. Likewise, it was necessary to make sure that micro-organisms for which patents had been granted actually met the conditions of novelty and of inventive step and had not just been found in nature and, consequently, just represented discoveries. It was also necessary to maintain the flexibility provided by Article 27.3(b) with regard to the establishment of a *sui generis* system of protection for plant varieties. Agriculture and food security of many developing countries depended upon traditional practices of farmers in keeping and exchanging seeds. Any limitation of these practices could have serious implications for these countries. Measures should also be adopted to ensure compatibility between the TRIPS Agreement and the CBD, in particular with regard to Articles 8(j), 15 and 16 concerning the protection of traditional knowledge and the regulation of access to genetic resources. These were valuable elements of heritage which should be adequately protected, in particular to avoid their illicit appropriation and unauthorized use. Responding to the comments made by developed countries that it was premature to consider protection at the international level, given that the issues involved, which were still being studied, were complex and there was not yet much practice under national legislation, her delegation wished to recall that the majority of developing countries had not had legislation at the end of the Uruguay Round in many of the areas that were now governed by the TRIPS Agreement. Nevertheless, legislation had been enacted during the transitional phase with a view to complying with the commitments that had been made and, while developing countries had made great efforts, often, legislation enacted had been considered insufficient. Now, there was one area that was of great interest to developing countries, i.e. that which concerned the protection of traditional knowledge and access to genetic resources. Such protection did not exist at the multilateral level and it was, therefore, high time to start a serious and substantive debate on appropriate ways of ensuring such protection.

176. The representative of Switzerland said that his country was party to both the TRIPS Agreement and the CBD and continued to be of the view that the TRIPS Agreement and the CBD were mutually supportive. These international instruments could not only be interpreted and applied in a manner which would avoid conflict between the two, but complemented each other. While each focused on its own specific policy area, both instruments ultimately served the same overall goal of promoting well-being and welfare. In his delegation's view, the work under each of these instruments should focus on the primary competence of the institution responsible for it and respect, similarly, the competence of the other institution by showing consideration for decisions taken in the other institution. He reiterated his delegation's view that the relationship between the CBD and the TRIPS Agreement should not be dealt with in isolation, but should be addressed within the wider context of the relationship between the WTO on the one hand and multilateral environmental agreements on the other hand. Only such an approach would allow problems that might arise to be addressed adequately.

177. His authorities were studying the documents which had been submitted in relation to the review of Article 27.3(b) recently. His delegation had noted with interest the various initiatives taken at the national and regional levels and would comment on them in substance at the Council's next meeting.

178. As regards the review of Article 27.3(b) generally, his delegation was of the view that the next step to be taken should be for those Members that had not yet submitted information on the application of the provisions of Article 27.3(b) in their territories to do so. This would provide the Council with a more comprehensive basis for its work on the matter and, therefore, be indispensable for the review as foreseen in Article 27.3(b). Switzerland shared the opinion expressed by many Members that Article 27.3(b) did not only call for a review of the implementation of its provisions, but also for a review of the substance of the subparagraph itself. However, this implied only two issues, i.e. the scope of the option in Article 27.3(b) to exclude from patentability "plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes"; and what Article 27.3(b) required in respect of *sui generis* systems for protection of plant varieties. All other issues mentioned in documents submitted to the Council such as, for example, issues related to genetic resources, traditional knowledge or farmers' rights were, in the view of his delegation, beyond the scope of the review of Article 27.3(b) and he would, therefore, not comment on them in this context. He wished to note, however, that his delegation shared the view that issues such as farmers' rights, traditional knowledge, access to genetic resources and benefit sharing were of the greatest importance and express its satisfaction that other international fora, such as the CBD, the FAO and WIPO were currently addressing those issues. In particular, WIPO's "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore" would provide an important forum to discuss such issues to participants with know-how in intellectual property. He also said that a review of the substance of Article 27.3(b) did not imply a revision of the provision. Of course, the outcome of such a review could be that there might be a need for a revision of Article 27.3(b) but, since a substantive review had not really started yet, no such conclusion could be drawn at this stage.

179. Regarding the issues that did, in his delegation's view, fall under the review of Article 27.3(b), Switzerland would be ready to carefully look at any adequate and effective *sui generis* system for the protection of plant varieties developed by a Member. However, it considered the provisions of the 1978 and 1991 Acts of the UPOV Convention to adequately address many of the concerns raised in the papers of, for example, India, Peru or Mauritius on behalf of the African Group. Both UPOV Acts granted ample flexibility to take into consideration national interests and needs. For example, both Acts allowed States to introduce in their national laws the farmer's privilege, according to which farmers could replant propagating material they had harvested on their own holdings. Moreover, the

UPOV system required Member States to provide for the breeder's exemption referred to, for example, in paragraph 3 of the paper of the African Group.

180. Finally, with respect to the option for Members under Article 27.3(b) to exclude from patentability plants and animals other than micro-organisms, his delegation held the view that Article 27.3(b), in its current wording, would adequately enable Members to take into consideration their specific national interests and needs when implementing the relevant provisions. The Council should bear this in mind while reviewing Article 27.3(b).

181. The representative of the United States said that his delegation had still not seen any paper submitted to the Council, nor heard any intervention made in its meetings, which identified one single inconsistency between the TRIPS Agreement and the CBD. According to Brazil, in order to avoid conflicts, which had yet to be identified, it was necessary to amend the TRIPS Agreement. His delegation found it difficult to agree with this logic. The intervention made by Japan was quite persuasive. Japan, being party to both the TRIPS Agreement and the CBD, had stated that their implementation of the two instruments had not given rise to conflicts between the two. The Secretariat checklist of points made contained in document JOB(00)/7517 left Members with a rather different impression of the debate in the Council regarding as to whether there was a conflict between the CBD and the TRIPS Agreement and did not represent a balanced picture of that debate. The arguments put forward had been listed in such a way as to suggest that there was a conflict between the two, while there were two opposing views in this regard. In its present form, the document would not provide the right picture to the General Council of the debate in the TRIPS Council on the issue of the relationship between the TRIPS Agreement and the CBD. In this regard, he wished to note that, when the Council had met to discuss, in informal mode, the relationship between the TRIPS Agreement and the CBD, in view of the request it had received from the Special Session of the General Council concerned with implementation matters, instead, Members had addressed the various interpretations of Article 27.3(b). He expressed the hope that the Chairperson's report to the General Council regarding the TRIPS Council's discussion on the matter would factually state that the TRIPS Council had engaged in a discussion on the issue; that there was no consensus in the TRIPS Council about the actual relationship between the TRIPS Agreement and the CBD; and that the TRIPS Council would continue to discuss the issue. This would be the only fair way of conveying to the General Council the work that had been undertaken in the TRIPS Council. If Members were interested in more detail on the positions that individual delegations had taken and the points that they had made, the minutes of the TRIPS Council's meetings were available as well as the papers that had been submitted.

182. He said that responses to the various questions that had been posed to his delegation would be provided in due course, while noting that, in many instances, the questions stemmed from a clear misunderstanding of the points that the United States had been trying to make.

183. He joined the delegation of Switzerland in urging developing country Members to submit information to the WTO on the manner in which they had implemented the provisions of Article 27.3(b), so that the Council could have a more complete picture of the implementation of these provisions. Several delegations had criticized that the information contained in the Secretariat's synoptic tables circulated in the summer of 1999 described primarily the laws and practices of developed countries. That situation could be remedied if developing countries which were currently obligated to fulfil the requirements of Article 27 provided information regarding their implementation, using either the suggested list of questions prepared by the Secretariat (document IP/C/W/122) or the questions used by some developed country Members (document IP/C/W/126).

184. His delegation appreciated the paper submitted at the last meeting by Mauritius on behalf of the African Group. It believed that the work of the Council could move forward more efficiently if Members provided views in writing so that other Members could have an opportunity to consider

these views in depth, which would not always be possible on the basis of statements made in Council meetings and later reflected in the minutes. In the African Group's paper, which addressed the link between the obligations of Article 27.3(b) and concerns about development, it had been said that the former were detrimental to the latter. Nothing, in the view of his delegation, could be further from the truth. Full implementation of the obligations under the TRIPS Agreement by developing countries would build confidence among investors, both domestic and foreign. Investment and innovative and creative businesses in those countries would provide an opportunity for economic returns, because potential competitors, rather than copying, would have to invest in their own innovative and creative activities. It was this kind of investment that would stimulate economic growth and encourage the transfer of technology.

185. In his delegation's view, the exceptions of Article 27.3(b) were not necessary. His country's Patent Law did not contain exceptions for plants and animals and provided for patents for inventions in all fields of technology if the inventions were new, industrially applicable and involved an inventive step. The United States would urge other Members also not to avail themselves of the exceptions allowed under Article 27.3(b).

186. He reiterated that discoveries of a naturally occurring plant or animal or even micro-organism would not be patentable, because they would not be new. To be patentable, the plant, animal or micro-organism would have to be altered by the hand of man.

187. His delegation believed that other issues raised in the African Group's paper had already been addressed in detail in the two papers that his delegation had introduced in the Council. He would urge the Members of the African Group to review these papers and, if questions were to continue, to articulate such questions in further papers so that the discussion could lead to greater understanding on both sides.

188. Finally, he expressed his delegation's disappointment regarding the non-paper submitted by India at the last meeting. Rather than taking into consideration the views expressed by others, including those of the United States, India's non-paper merely restated arguments expressed in its earlier papers submitted to the Council and the Committee on Trade and Environment. The delegation of the United States believed that those arguments had already been refuted or were negated by the text of the TRIPS Agreement itself.

189. The representative of Australia, reacting to the various issues related to the interaction between biotechnology and intellectual property to which delegations had referred to in the debate, said that her delegation believed that the differences of public policy perspective had been greatly overstated, particularly in some of the reporting on the work of the Council. There was no objective evidence of a sharp dichotomy of interests in this field. A large number of WTO Members were wrestling with the same basic policy issues concerning the interaction between the intellectual property system and biotechnology and looking for practical solutions. It was neat and perhaps tempting to assume that the world was divided into two on the issue. However, that assumption could, in itself, impede positive progress on the interlocking issues that arose as it would deny an opportunity to benefit from each other's practical experience.

190. The view had been advanced that the text of Article 27.3(b) as it stood was unsatisfactory and that it was a matter of immediate priority to amend it; negotiations should commence in earnest on a host of proposals aimed at bringing about mandatory exceptions on the scope of patentable subject-matter, new mandatory conditions on the grant and exercise of both patents and plant variety rights, and the creation of new forms of intellectual property, specifically for traditional knowledge. Others had advanced that it was necessary to look at how Members had applied their national intellectual property systems to the domain of biotechnology within the general framework of existing TRIPS standards; that a checklist approach should be employed so as to guide the work of the

Council by the actual content of national laws, rather than debating the matter in a largely abstract way. Australia had suggested that the Council look at its broader mandate under Article 71 and at how Members had undertaken intellectual property policy processes in active endeavours to secure the expected benefits according to general policy themes. From Australia's perspective, the overall policy objectives were shared with many other delegations. Those objectives had already been set out and endorsed in the TRIPS Agreement and in complementary legal instruments such as the CBD. The question was whether these objectives could be achieved in a top-down way by modifying prescriptive treaty language before the effect of the current settings had been assessed in a collective manner. In Australia's view, embarking on negotiations for new treaty language such as modified TRIPS rules on patents would pre-empt and impede the policy development process by moving attention away from the areas where solutions needed to be found. Moreover, in whatever way the mandate under Article 27.3(b) was to be interpreted, it could not possibly entail a wholesale re-examination of the range of TRIPS provisions that had been touched upon in the debate. For instance, questions had been raised about the application of the criteria of novelty, inventive step and industrial applicability in the biotechnology domain (Article 27.1); the very definition of an invention (Article 27.1); other public policy exceptions to patentability such as for ethical, environmental or public health reasons (Article 27.2 and 27.3(a)); the nature of the patent right and exceptions to it, including for research and development (Articles 28 and 30); the patentee's disclosure obligation (Article 29); compulsory licensing and government use (Article 31); misuse of patents to restrain technology transfer and engage in anti-competitive practices (Article 40). Other forms of intellectual property such as geographical indications, collective marks and copyright had been used in various ways to protect traditional knowledge and cultural heritage and, therefore, were also directly relevant to the broader debate. To suggest that all the interlocking issues could be dealt with in the context of the Article 27.3(b) review, however generously that might be construed, had the effect of artificially constraining the range of available policy responses to those somehow related to the scope of patentable technology. Presumably, those who were seeking an early modification of treaty language were favouring the Article 27.3(b) review as the locus for the debate, because that might provide a mandate for the immediate changes to TRIPS standards that they placed priority on. In her delegation's view, however, regardless of the text of Article 27.3(b), forward movement on the issues raised was dependent upon the conscious cultivation of consensus, which could only occur if there was a common appreciation of the nature of the problems that should be addressed and a clearer sense that the measures proposed were the most effective way of dealing with those problems. Domestically and internationally, Australia was actively involved in a range of policy analysis and development processes that directly dealt with concerns as had been raised under Article 27.3(b): i.e. what was a workable mechanism for benefit-sharing in relation to genetic resources that took account of indigenous interests and concerns; how to ensure that agricultural producers gained equitable access to the benefits of gene technology; how would an intellectual property system within the TRIPS framework respond to the need to protect expressions of indigenous culture and duly recognize and reward those working within those traditions. Australia had the additional concern that infringing reproduction of indigenous artworks had been made in overseas jurisdictions, in apparent contravention of international copyright standards. The experience of Australian right holders had also been the subject of case studies in the framework of WIPO in approaches to protect traditional knowledge reflecting the range of practical mechanisms that had been applied. Australia would not claim to be at the cutting edge of policy-making in each of those areas; such processes could be slow and did not always yield immediate solutions. However, as far as the intellectual property system was concerned, each of the processes had explored a wide range of practical options and policy-making choices within the general framework of the TRIPS Agreement. They were, in effect, part of Australia's modest attempt to implement and make use of TRIPS standards in a way that promoted the TRIPS objectives and the broader public policy interests that arose under the item. Consequently, in her delegation's view, a circumspect approach was necessary to the various proposals that TRIPS provisions should be modified before there had been a collective consideration of the actual nature of their implementation. Her delegation's approach was not to disparage the general policy concerns behind the proposals made.

191. Fundamental questions had been raised, such as: what would be the social and economic benefits of a mandatory global ban on patenting of inventive micro-organisms? Would such a ban lead to a reduced incentive for conservation and for benefit-sharing arrangements with researchers? In the meantime, while negotiations on these issues proceeded, could Members not be overlooking immediately available practical mechanisms to achieve their policy goals? Many of the issues raised did not seem to concern deficiencies in TRIPS rules but questions about their implementation. For instance, the question had been raised in the Council and elsewhere as to whether the patent system was inappropriately extending patent rights to genetic materials that already occurred in nature. A number of individual patents had been the subject of much controversy. From a patent law point of view, this raised a host of questions. How had the definition of "invention" been applied? Had an individual patent been granted which was not novel, lacked an inventive step or was not in its full scope of claims capable of industrial application? Was the patent right as granted actually enforceable in a way that would cause a negative impact? Did the nature of the patent right as granted actually amount to ownership of or control over the genetic material as such or did it concern its application in a specific technological context? Did the actual technological subject-matter of a patent fall under a possible exception under Article 27.2, 27.3(a) or 27.3(b)? Each of those questions concerned the implementation of existing TRIPS rules. The concern widely expressed in the international debate, that some patents were granted for claimed inventions that actually lacked inventive step or were obvious, represented an implementation issue and not a matter for renegotiation. For these reasons, Australia strongly advised Members to look at these implementation issues in a holistic manner. For practical as well as conceptual and legal reasons, it was mistaken to attempt to resolve such issues in the narrow confines of the Article 27.3(b) review. It could not be determined what the actual effect of TRIPS provisions were until it was understood how they had been implemented at the national level. Sharing the experiences of practical implementation was a task the TRIPS Council should take up immediately in line with its important obligation under Article 71.1. Even in relation to the subject-matter of Article 27.3(b), Australia believed that the interests of all Members would be served by considering what choices Members had made in implementing the TRIPS Agreement at the national level. For example, there had been considerable discussion about whether or not the term "micro-organism" should be allowed to stand in the TRIPS text as a point of distinction between optional and required patentable subject-matter or whether concerns about its definition should lead to a modification of the TRIPS Agreement to exclude patenting of organisms. Individual Members determined and applied the term in their national jurisdiction in accordance with Article 1.1. It was noteworthy that the term "micro-organism" was the direct subject of an entire treaty, the Budapest Treaty, which did not seek to define the term. The fact that there was no one definitive determination of what that term should mean in the TRIPS context made it no different from any other term in the Agreement. For example, the fundamentally important term "invention" was left to Members to determine according to their own national law. It would be helpful for the Council to consider what approach had been taken in each Member's legal framework to determine the nature of inventions in the biotechnology domain. Such a flow of information would be a useful basis to achieve a collective understanding of the nature of the provisions under discussion and for clearing up concerns or grey areas. That was why Australia had been advocating the active collection and dissemination of such information regarding the review under Article 27.3(b) and it was unfortunate that the information so far collected was dominated by the approach taken by a relatively small number of WTO Members. Australia supported the continuation of work on the review agenda and supported the suggestion that developing countries and transitional economies respond to the survey of national laws in connection with Article 27.3(b). The TRIPS Council should also monitor developments in other international fora which had overlapping (WIPO) or complementary (CBD) competencies. Many broader issues which had been raised in other fora such as the CBD, the FAO and WIPO, were not intellectual property questions as such, but rather related to domestic regulations and access regimes. A way forward might be to clearly define the concerns in an intellectual property context, determining where and how they might fit in with other initiatives and developing a shared understanding of practical or domestic measures to address these concerns. In Australia's experience, much of the work on addressing concerns should be done at the domestic level, and the exact choice of policy instrument

was a domestic matter for national and provincial governments. That was not to say, however, that these issues were not valid subjects of international concern and should not be considered in multilateral processes. Australia believed that genuine solutions could only be found after the range of existing domestic options has been understood. In order to help the Council understand those domestic options, the Australian delegation invited the Andean Pact countries to describe their experience in carrying out the new intellectual property system to be introduced under the Andean Community Decision 486, in particular in relation to Articles 15, 26(h), (i) and (j), 75(g), (h) and 136 (g).

192. The representative of India was surprised that some delegations were arguing that the TRIPS Agreement and the CBD were either mutually non-exclusive or mutually supportive or that both Agreements had their own domains. Did the CBD itself not contain a provision to the effect that intellectual property should not run counter to the objectives of the CBD? Would more than 100 countries have signed on to the CBD with that provision in it, if they had not at least contemplated circumstances where intellectual property rights ran counter to its objectives? Examples included patenting of genetic resources and lack of benefit-sharing. Some were arguing that it was up to national governments to ensure that intellectual property rights did not run counter to the objectives of the CBD. However, people could take biological resources out of a country and, therefore, some cooperative effort at the international level was needed to ensure that intellectual property rights did not run counter to the objectives of the CBD.

193. The representative of the United States said that, just because there was a provision in the CBD that imagined that there could be a conflict, did not mean that one existed. He did not consider this evidence of a clear conflict between the TRIPS Agreement and the CBD. Article 16(2) of the CBD stated that in case of the access and transfer of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognized and were consistent with the adequate and effective protection of intellectual property rights. Therefore, all that had to be done had to be consistent with the TRIPS Agreement. This showed that the CBD itself recognized that the two instruments should be mutually supportive and were not in conflict.

194. The representative of Brazil, in response to the comment made by the delegation of the United States in connection with the first sentence of paragraph 21 of the Brazilian paper that so far there was no evidence of conflicts between the TRIPS Agreement and the CBD, said that the paragraph as a whole gave well-known examples of patents granted in respect of genetic resources that should serve as such evidence. If those well-known cases were not enough, there were some 20 less famous cases of patents that had been issued in respect of genetic resources pertaining to African countries. He referred to the website address "www.grain.org", which contained extensive reports on situations of bio-piracy in Africa, Asia and Latin America. Discussion on the implications of the provisions of Article 27.3(b) for the provisions of the CBD could focus on conflicts between the two, could focus on synergy between the two, or could do both. He did not think that the Council should embark upon a thorough examination of cases concerning patents on genetic resources that could be questionable from the point of view of implementing the CBD. His delegation's paper approached the matter from the perspective that the TRIPS Agreement and the CBD were not mutually exclusive, but that there could be conflicts at the level of implementation which required a systemic solution in the context of the review of Article 27.3(b). In that regard, Brazil would suggest exploring the synergy between the TRIPS Agreement and the CBD. In reply to comments made by Switzerland that genetic resources did not fall within the scope of Article 27.3(b), his delegation wished to point out that plants, animals and micro-organisms were genetic resources.

195. The representative of Korea informed the Council that the Korean Biotechnology Institute affiliated to the Government agencies was conducting a study project whose aim was to survey genetic resources in Korea and abroad as well as regulations and systems of other Members related to their protection, use and access. This project, which was quite comprehensive in scope, was

scheduled to be completed by the end of this year. After the systematic study and analysis of the final report of the project in consultation with expert groups, Korea would expect to come up with clearer policy objectives and positions in this area which would certainly enable it to intervene in forthcoming sessions on important subjects like genetic resources and the relationship between the protection of traditional knowledge and intellectual property rights.

196. With regard to the relationship between the CBD and the TRIPS Agreement, it had been Korea's consistent position that both treaties were mutually supportive. It was no doubt that each instrument had its own objectives and areas of responsibility. In this connection, the delegation of Korea associated itself with the view expressed by the Japanese delegation in its paper. However, it felt that there could be a possibility for conflict at the level of implementation. To its knowledge and as indicated by the delegation of the United States, empirical data which could prove this possibility had not yet been accumulated. Therefore, it would be premature, at this point in time, to discuss the possibility of amending the TRIPS Agreement in this connection. Rather, the Council would need to seek a solution to avoid such a possible conflict within the framework of both instruments. For Korea, it would be essential to have an exchange of information between the Secretariats of the CBD and the WTO. In this regard, it appreciated the effort of the Brazilian delegation to introduce information as to what had been discussed and decided within the CBD into the WTO discussion.

197. The representative of Venezuela expressed the view that the Brazilian communication (document IP/C/W/228) was a most useful document, not only because its structure would enable the Council to discuss in a systematic manner the varied and complex problems related to Article 27.3(b), but also because it had clearly highlighted the interests and concerns that the delegation of Venezuela shared in relation to these issues.

198. With regard to the issue of the review of Article 27.3(b) and development, her delegation wished to recall that, according to the mandate given by the General Council in February 2000, the reviews foreseen under the WTO Agreement must be implemented taking into account the development dimension. The review of any provision of the TRIPS Agreement should be undertaken within the general framework of the principles and objectives of the Agreement, as established in Articles 7 and 8. In this perspective, she drew a parallel with Article IV of the GATS regarding the participation of developing countries. In the context of the TRIPS Agreement, it would be useful to examine how the reviews under that Agreement, and in particular that of its Article 27.3(b), could yield satisfactory results in areas of intellectual property that were of interest to developing countries, such as the protection of traditional knowledge held by indigenous and local communities.

199. As for technical issues related to patents, Venezuela agreed with India that the TRIPS Agreement provided that patent protection should be granted to those products that met the three conditions for patentability: novelty, inventive step and industrial application. However, the Agreement did not define the three concepts. Therefore, it would be up to domestic laws and practices of the national patent offices to define the level of protection; in this regard, many differences between countries existed. Some of the problems resulting therefrom had been highlighted by India, the African Group and Brazil. On the other hand, although the TRIPS Agreement laid down the obligation to provide patent protection for micro-organisms, microbiological processes and non-biological processes, it did not define any of these concepts. As Brazil had said in its document, these were defined in a completely different manner according to the context in which they are used - scientific, legal or commercial. That would create uncertainty as to implementation of the obligations of the Members concerning this provision. In that regard, her delegation agreed with Brazil that clarification of these provisions would not be superfluous, but would be necessary to determine the scope of the exceptions of Article 27.3(b).

200. With regard to technical issues related to *sui generis* system of protection for plant varieties, her delegation was of the view that the review of Article 27.3(b) should not reduce the margin of flexibility for Members to comply with their TRIPS commitments. In this regard, she expressed appreciation for the comments made by the delegation of the United States in document IP/C/W/209, in which the United States did not appear to be insisting on having the 1991 Act of the UPOV Convention as the basis for the protection of plant varieties, but to be contributing to the discussion by describing what, in its view, would form the elements of an effective system of protection. However, the references related to these elements were extracted from the United States Patent Law and repeated the provisions of the 1991 Act of the UPOV Convention. If these criteria were to be adopted, this would reduce the flexibility for the *sui generis* system option and might not be adequate for most developing countries. As several developing countries had mentioned in the TRIPS Council, they would be inclined to adopt national laws that would include *sui generis* protection for plant varieties and would be adjusted to the specificities and needs for development and national objectives of agricultural policy, such as food security. In this regard, Venezuela agreed with Brazil that international instruments other than the 1991 Act of the UPOV Convention were also relevant to the review process of Article 27.3(b), including the FAO International Undertaking on Plant Genetic Resources and the CBD. Venezuela also agreed with Brazil that the WTO should take part in inter-agency international efforts in order to establish a coherent and harmonious link between all these instruments.

201. As regards the link between the review of Article 27.3(b) and the conservation and sustainable use of genetic material, as well as its link with the concept of traditional knowledge and farmers' rights, Venezuela believed that it would be important to clarify the link between the TRIPS Agreement and the CBD so that both instruments could be complementary in their implementation. For Venezuela, there was no incompatibility between these two instruments and the provisions of the new Andean Decision 486 on Industrial Property as well as Decision 391 on Access of Genetic Resources were examples of how both instruments could be implemented in full harmony. In Venezuela's view, the protection of industrial property should take due account of the protection and respect of the genetic and biological heritage as well as of traditional knowledge of indigenous, Afro-American and local communities. For these reasons, the grant of patents for inventions based on material obtained from this heritage or from that knowledge should be subject to the condition that this material had been obtained in conformity with the requirements of national laws and relevant international treaties. In document IP/C/W/228, Brazil had highlighted three aspects of the relationship between traditional knowledge and Article 27.3(b), which her delegation considered of utmost importance for the organization of the work of the Council: i.e. how to prevent the granting of patents on elements of non-authorized traditional knowledge; how to document this knowledge; and how to establish a *sui generis* system for its protection. Venezuela held the view that clarification of the link between the CDB and the TRIPS Agreement would require adjustment of the latter so as to improve, at the international level, the efforts that had been made nationally and regionally in order to implement Article 8(j) and other provisions of the CBD. Thus, the TRIPS Agreement would incorporate the fundamental principles of the CDB: i.e. the principle of the sovereign rights of the State in respect of genetic resources; prior informed consent; and equitable sharing of benefits. The incorporation of these principles into the TRIPS Agreement would not necessarily increase the cost for patent applicants; and they would be vital for achieving invaluable environment objectives. As regards the protection of traditional knowledge pertaining to indigenous and local communities, due to the limits of the intellectual property system to protect many elements of such knowledge, Venezuela believed that developmental objectives could be achieved if the review of the TRIPS Agreement could result in the adoption of a *sui generis* regime which included minimum levels of protection for such knowledge as it had done for other areas of knowledge and technology. The work carried out by other international organizations could also be a useful contribution to the TRIPS Council's discussions on the review of Article 27.3(b).

202. In response to comments made by Australia, she said that Decision 486 of the Andean Community would come into force on 1 December 2000. Therefore, there was not yet any information as to the practical enforcement of this Decision. Venezuela was aware of the work in other international organizations such as the Intergovernmental Committee of WIPO. National and regional experiences in the area of the protection of traditional knowledge would be voiced in the forthcoming meeting of that Committee and the work there could also be useful for the work of the TRIPS Council.

203. The representative of Malaysia, noted that the review of Article 27.3(b) focused heavily on the scope of patentability, the protection of traditional knowledge and rights indigenous peoples, and an effective *sui generis* system for the protection of plant varieties. The scope of the patentability of plants and animals as well as of the exceptions allowed under Article 27.3(b) had been debated on the basis of legal, economic, ethical and religious grounds. Some Members had urged the patentability of life forms to be excluded on ethical grounds as well as on the ground that, as they were naturally occurring, life forms were discoveries and not inventions. There were also issues linking patentability with development. In her delegation's view, all these issues could be further explored in the review process of Article 27.3 (b).

204. Her delegation agreed with the view that the flexibility that existed under Article 27.3(b) to exclude certain plants and animals from patentability should be maintained. However, it would be open to work towards clarifying the terms "micro-organism" or "microbiological process". Patentability was determined by the notion of invention. The three tests of novelty, inventive step and industrial application had been interpreted differently and there were disputes on whether some patents granted concerned discoveries or inventions. Malaysia believed that greater clarity regarding the test of novelty would better serve the current review under Article 27.3(b).

205. Regarding the protection of traditional knowledge and rights of indigenous peoples, while discussions were ongoing in other fora as well as in the WTO, Malaysia was of the view that, at the national level, Members party to the CBD could demonstrate the importance of this concept by enacting national legislation that incorporated the relevant provisions to the CBD. Malaysia believed that, if this became part of national legislation, it could receive wider international recognition.

206. Malaysia supported the view that there was a need to maintain flexibility regarding the choice of an effective *sui generis* system to protect plant varieties. Clearly, the issue of farmers' rights versus breeders' rights would have to be balanced in such a system. The UPOV system was not necessarily the only efficient system for plant variety protection and had not been recognized as such under the TRIPS Agreement. The flexibility accorded in Article 27.3(b) should therefore continue to be maintained in the selection of an effective *sui generis* system.

207. The representative of Bolivia agreed with the main points contained in the Brazilian submission and also expressed support for the intervention by the representative of Venezuela. As he had already stated under agenda item G, Bolivia had not been able to participate fully in the Council's discussions during this meeting on issues in which it had a great interest, because too many other important meetings were taking place at the same time for a small delegation like his to be able to be present at all of these continuously. Therefore, it would be important to his delegation, if a factual summary could be prepared of the points made when the Council had met to discuss, in informal mode, the relationship between the TRIPS Agreement and the CBD. Such a request was not a novelty in the WTO since, for example, in the framework of the Working Party on GATS Rules, a factual summary had been prepared by the Secretariat concerning an informal meeting that had taken place on 27 September 2000 as well as a summary by the Chairperson concerning an informal meeting on 3 November 2000.

208. The representatives of Brazil, India and Peru expressed support for the suggestion from Bolivia. In addition, the representative of Brazil said that the TRIPS Council had already used a checklist approach before, for example, in connection with the review under Article 24.2.

209. The representatives of the Canada and the United States said that their delegations could not support Bolivia's suggestion. The representative of Canada said that the majority of the points made during the discussions on the matter during the meeting would be reflected in the minutes, which should provide a comprehensive understanding of the key substantive points.

210. The representative of Bolivia regretted that there was no coherence in the positions of certain delegations who, in the General Council, repeatedly stated their understanding for the situation of small delegations, but, in subsidiary bodies, expressed a different position. As his delegation was being prevented from having information on debates that had taken place in the WTO in informal sessions, his delegation would have to review its position as to whether it should accept at all that informal meetings be held. This was yet another example showing that internal transparency in the WTO still left a lot to be desired.

211. The Chairperson proposed that he be authorized to report to the Special Session of the General Council concerned with implementation matters on the issue concerning the relationship between the TRIPS Agreement and the CBD, and other implementation issues that had been referred to the Council, on his own responsibility.¹³

212. The Council took note of the statements made and agreed to proceed as proposed by the Chair and revert to the matter at its next meeting.

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

213. The Chairperson recalled that Article 71.1 required the TRIPS Council to review the implementation of the Agreement after the end of the five-year transition period provided for in Article 65.2. The Council had had a number of discussions on how it should approach this general review of the implementation of the Agreement. At the Council's last meeting, the discussion had focused on papers received from the delegations of Australia and India setting out those delegation's thoughts in some detail on this matter. At the previous meeting of the Council, he had expressed the hope that it would be possible for the Council to take some decisions at the present meeting on how it would organize the review under Article 71.1. However, in informal consultations that he had held on this matter, it had become clear that there was not as yet a sufficiently complete picture of the thinking of delegations to permit it to take such decisions. However, in these informal consultations, it had appeared acceptable to delegations for the Council to agree on a target date prior to the Council's first meeting in 2001 for the submission of suggestions both on the approach that it should take to the review and the specific issues that delegations would wish to see taken up in the review. He suggested that the Council set this target date at the end of February 2001. Although such a target date did not of course rule out subsequent submissions, he hoped that it would yield a more complete picture of the views of delegations both on approach and issues, so as to allow the Council to work out, at its meeting in April 2001, a way of initiating the actual review.

214. The Council agreed to proceed as proposed by the Chairperson.

215. The representative of Malaysia, speaking on behalf of the ASEAN Members, said that Article 71.1 unquestionably provided a mandate for a review of the implementation of the Agreement. It set out clear procedures and the scope for this review, which many would agree was due to be initiated by the year 2000. In terms of scope, the review was to consider implementation of the

¹³ See document IP/C/21.

Agreement taking into account the experience that Members had gained in implementation. The next step for the Council would be, "having regard to the experience gained in its implementation", to review it two years later and at identical intervals. She recalled the decision of the General Council dated 7 February 2000 which had agreed that mandated reviews should address the impact of the agreements concerned on the trade and development prospects of developing countries. The Council should devote time at subsequent meetings to this issue in conjunction with consideration of other mandated items, such as those concerning geographical indications, Article 27.3(b) and non-violation complaints. The review should determine how the provisions of the Agreement were consistent with, and promoted, the objectives and principles of the Agreement, namely the promotion of technological innovation, transfer and dissemination of technology, promotion of public interests in sectors for socio-economic and technological development, and the promotion of public health and nutrition.

216. The representative of the United States said that the paper submitted by Australia (IP/C/W/210) tracked the thinking of his own delegation to a substantial degree. As Australia had noted, Article 71.1 directed the Council to review the implementation of the Agreement when the transition period for developing country Members ended, i.e. on 1 January 2000. The Council was already undertaking reviews of legislation implementing TRIPS obligations by developing country Members and newly acceded Members adding to the considerable amount of material already produced regarding implementation by developed country Members. In addition to that information, the Council had available Members' submissions under Article 24.2 regarding geographical indications and under Article 27.3(b) regarding the protection of plants and animals under their patent laws and practices. At the completion of the developing country Members' reviews, the Council should have a clearer picture of implementation and, at that point, it would be appropriate for the Council to begin its review of the functioning of the Agreement in the light of the experience gained in its implementation. As part of that review, the effect that implementation had had on development should certainly be examined. Article 71.1 also authorized the Council to review the Agreement in the light of any relevant new developments that might warrant modification or amendment of the Agreement, as pointed out by a number of delegations at the previous meeting. The Council should avoid reinventing the wheel and, where possible, should use information available in other fora, particularly WIPO, to carry out its work. This structure would enable the Council to carry out its responsibility in a more effective and efficient manner.

217. The representative of Korea reiterated his delegation's support for the approach set out in the Australian paper, which clearly set out the nature of the review mandate under this provision: its structure, its scope and a possible approach for present and future standards in respect of intellectual property rights. Thus, there would be four key sectors for possible consideration by the Council in the context of this review. His delegation had benefited greatly from the informal survey of the notifications of legislation under the Agreement and the Council's review thereof, which had been drawn up by Australia at the request of APEC.¹⁴ He suggested that the Secretariat might prepare a background note on the basis of that informal survey, which could help developing country Members which were yet to go through the procedures in question. Regarding the scope of the review, he expressed support for the suggestion that the Council have a discussion on measures to counter anti-competitive abuses of intellectual property rights under Article 40, in respect of which insufficient notifications had been received, as pointed out by Australia. His delegation was also in favour of a discussion on the relationship between intellectual property rights and standardization, which had emerged as a controversial issue. Finally, the Council needed to ensure that the review of the implementation of the Agreement under Article 71.1 would not duplicate the review of national implementing legislation notified under Article 63.2.

¹⁴ See Australia's intervention under agenda item F above.

218. The representative of Australia said that the mandate under Article 71.1 represented both a historic opportunity to promote the objectives of Article 7 at the level where it counted, i.e. where these objectives had been implemented in national intellectual property laws, and a firm obligation to carry out a comprehensive review of how the Agreement had been implemented. Her delegation had set out in its paper (IP/C/W/210) its views on how this mandate could be discharged in a way that would also address major intellectual property-related issues jointly confronting Members, and that would go beyond issues of whether specific articles had been implemented and involve a broader engagement of the intellectual property system. The Council should not let this opportunity pass and should take a broad and inclusive view so as to allow a more fruitful consideration of these issues. As a matter of practical reality, the derivation of benefits from the intellectual property system, and even its appropriate balancing and calibration to match national social, economic and development issues, involved much more than the basic framework for intellectual property protection established in line with the TRIPS Agreement. There was a wide range of factors: policy choices made within the TRIPS framework; related regulatory systems; choices about the relative allocation of resources; capacity development and application of training resources; awareness raising and intellectual property education. Members were, perforce, accumulating a rich body of experience in each of these domains about the optimal implementation of intellectual property law. It would be most unfortunate, if this unique opportunity to draw on this pool of expertise were to be passed up by the Council. Certainly, there had been considerable focus on how laws and legal and administrative systems had been developed and adapted to meet the standards of the TRIPS Agreement. The review of national intellectual property systems by the Council had addressed this mostly in a piecemeal manner, due to its question-and-answer format. Consequently, there had been little consideration of how implementation had been undertaken as an overall exercise. As an illustration of how this had occurred in one jurisdiction at least, Australia had distributed an informal paper on how it had approached the TRIPS implementation process, focusing on legal and administrative issues that had arisen and practical lessons that had been learnt. This paper had originally been developed for APEC partners, but had also been distributed by her delegation to Members as an appendix to a technical assistance manual on notification and review of TRIPS legislation in 1999.¹⁵ Her delegation was happy to make further copies available to any delegation. One of the practical lessons had been that domestic legal reform and implementation of TRIPS standards could be merged; it was possible in some instances to use the process of TRIPS implementation to accommodate in parallel a domestic process of intellectual property law reform. The story had not concluded with the initial phase of TRIPS implementation. Since Australia had formally complied with its basic TRIPS obligations, there had been a continuing process of review and reform of the intellectual property system, always intended in one way or another to ensure that the protection of intellectual property rights would do what it was supposed to do in the terms of Article 7, i.e. to ensure that it would promote social and economic welfare; that it would offer mutual benefits to producers and users of technology; and that it would ensure a balancing of rights and obligations. In this sense, TRIPS implementation could be seen as an ongoing task, one entailing continual development of the legal and administrative mechanisms necessary to derive the benefits of the intellectual property system. This was not an easy task, but one that could be facilitated by learning from the experience of many other countries that were going through similar processes, engaging in similar debates and looking for similar solutions. In its paper, her delegation had highlighted a number of areas where various domestic reviews and inquiries had been underway in Australia and where the issues canvassed were of relevance to concerns similar to those raised by many delegations in relation to the TRIPS Agreement. In general, the subject areas to be addressed were: the interaction between intellectual property law and competition policy; intellectual property and access to genetic resources and access to the benefits of gene technology; intellectual property rights in traditional and cultural contexts; and intellectual property in the digital environment. In each case, Australia had been dealing with questions of effective implementation, application and management of TRIPS standard-intellectual property rights in a way that sought to ensure that the objectives set out in Article 7 would be effectively met. Her

¹⁵ See Australia's intervention under agenda item F above.

delegation would like to promote the full exchange of experience of practical solutions in these areas in the expectation that this would facilitate a better outcome for all.

219. The representative of India said that Members' approaches to the review under Article 71.1 were evolving. His delegation wished this review to be broad, inclusive and flexible. He agreed with Korea that the Council should bear in mind not to duplicate the reviews of national implementing legislation notified under Article 63.2.

220. The Council took note of the statements made.

L. NON-VIOLATION COMPLAINTS

221. The Chairperson recalled that, at the previous meeting, the Council had received a formal submission from Australia (IP/C/W/212) and a non-paper from Korea (JOB(00)/6166). In the further exchange of views that the Council had had on the matter, Members had also referred to the earlier papers submitted (document IP/C/W/191 from Brazil, Canada, the Czech Republic, Hungary and Turkey; and document IP/C/W/194 from the United States).

222. The representative of Hungary expressed surprise and disappointment that despite the interest shown by almost the entire membership, as reflected in the statement of the Chairperson of the General Council at its meeting of 17 October 2000, the letter on implementation from him to the Chairperson of the Council for TRIPS failed to call on the Council to come to an early understanding on the scope and modalities of non-violation complaints pursuant to the TRIPS Agreement and report back to the General Council and also failed to urge Members to exercise due restraint in the meantime. Before commenting on the useful contributions submitted before the last meeting of the Council, his delegation would like to make some general remarks. He referred to paragraph 42 of the Appellate Body report on the first Indian patent case (WT/DS50/ABR), which stated: "Whether or not 'non-violation' complaints should be available for disputes under the TRIPS Agreement is a matter that remains to be determined by the Council for TRIPS pursuant to Article 64.3 of the TRIPS Agreement. It is not a matter to be resolved through interpretation by panels or by the Appellate Body." Whilst he acknowledged that this comment had been made during the five-year period established by Article 64.2, his delegation believed that the Appellate Body's report thus gave two important pointers as to the intent behind Article 64.3. Firstly, it was a question and not a given whether or not non-violation complaints should be available for disputes under the TRIPS Agreement; and, secondly, the development of scope and modalities, if any, should be resolved through direct discussions among the entire membership and not through interpretation by panels or the Appellate Body. Hungary was taking part in this discussion exactly on this basis: the examination of the possible scope and modalities did not prejudice whether or not this remedy should be available under the TRIPS Agreement. In its view, it was exactly on the basis of this examination that the membership could collectively determine whether or not this remedy should be available.

223. Turning to the definition of a "measure" his delegation had doubts as to whether the acts of private parties (paragraph 7 of the Korean non-paper) should be taken into account, in addition to national laws and regulations and possibly other legally enforceable government actions, in the consideration of the existence of a measure. Both Article XXIII:1(b) of the GATT and Article 26.1 of the DSU spoke about government measures, i.e. the application of measures "by another contracting party" and "by a Member" respectively. Accordingly, as shown in paragraph 32 of the Secretariat background note (IP/C/W/124), in order to mount a successful non-violation case under GATT, it seemed to be essential that the complaining party show the existence of a measure attributable to the respondent party. Korea, in paragraph 8 of its non-paper, had said that the Council "may" consider "the scope" of the subject matter of non-violation complaints under the TRIPS Agreement, but Hungary would go a step further and say that, in line with Article 64.3, the Council not only "may" but rather "should" consider the possible scope of these complaints. At present, his delegation tended

to agree with Korea that the scope of the non-violation remedy under the TRIPS Agreement should be carefully and narrowly defined to prevent possible abuse, provided of course that the Council agreed about its availability. He also wished to refer, in this connection, to the Australian submission and agreed with the view that the wording of Article 64.3 suggested that the scope could be limited. His delegation also tended to agree with Korea that the difficulty of applying the concept of non-violation in the TRIPS context was perhaps most apparent when examining the benefits that Members could reasonably expect under the Agreement. His delegation also shared Korea's view, as expressed in the last sentence of paragraph 10 of its non-paper that, in order to ensure legal consistency and predictability, it was essential that there be a common understanding among WTO Members as to what the concept of benefits meant in the context of the TRIPS Agreement. In Hungary's view, some important pointers could be found in Article XXIII of the GATT, in the DSU and in GATT/WTO jurisprudence. Article XXIII of the GATT and Article 26 of the DSU tied benefits to contracting parties/Members. Therefore, as Australia pointed out in section C of its paper, the resultant benefits from TRIPS standards should be those that accrued to WTO Members and should not be mixed with the interests of individual private right holders in the exploitation of their intellectual property rights. The Appellate Body report on the first Indian patent case stated, in paragraph 36, that the concept of the protection of reasonable expectations of contracting parties relating to market access concessions had been developed in the context of non-violation complaints. The problem here, as set out in detail in document IP/C/W/191, which Hungary had jointly submitted with Brazil, Canada, the Czech Republic, the European Communities and their member States and Turkey, was that the TRIPS Agreement was not a market access agreement as such. The Agreement set out minimum standards, which were not similar to tariff concessions, or specific commitments under the GATS. Therefore, it would seem logical that the benefits that Members could reasonably expect from the standards laid down in the TRIPS Agreement were different in nature from the benefits that accrued to them under the GATT or the GATS. In this connection, he underlined that Article XXIII:3 of the GATS limited non-violation complaints to benefits accruing from specific commitments undertaken by Members. Regarding the concept of "competitive relationships", as Korea had stated in paragraphs 13-14 of its non-paper and could be seen from paragraphs 35-45 of the Secretariat background note, panels dealing with non-violation cases had so far concentrated on whether, as a result of a conforming measure that could not have been reasonably anticipated, the competitive relationship between products or services had changed, nullifying or impairing the benefits accruing under the given agreement to the complaining party. Given the different nature of benefits that could reasonably be expected from the TRIPS Agreement, in Hungary's view, it was doubtful whether, and if so, to what extent, the concept of competitive relationships was applicable in the TRIPS context. The examination of this question was of special importance because it could shed light on whether there was a genuine need for a non-violation remedy under the TRIPS Agreement. Korea, in paragraph 12 of its non-paper, had raised the question of how the objectives and principles of the TRIPS Agreement as stated in Articles 7 and 8 were relevant to the concept of benefits. Hungary believed that the question was pertinent and that the Council should carefully consider the possible implications of the introduction of the non-violation remedy in particular with respect to Article 8. He agreed with Australia that the Council should take a look not only at the definition of benefits or reasonable expectations but also at how their nullification and impairment or the impediment of the objectives of the TRIPS Agreement could be assessed and how their extent could be determined. These questions were obviously very complex and needed serious consideration. Finally, he wished to mention that in accordance with Article 64.3 the Council should also discuss the availability of "situation complaints" under the TRIPS Agreement and their possible scope and modalities. The Council should also examine the possibility of bringing a case under the TRIPS Agreement citing the impediment of the attainment of any of its objectives. He had not seen these elements in Korea's non-paper. When discussing these issues, the Council should not lose sight of the fact that even the GATS (in Article XXIII), which obviously was an agreement with more of a market access character, did not allow Members to bring a situation complaint or a case citing the impediment of any of the objectives of that Agreement.

224. The representative of Korea said that his delegation's non-paper was designed to provide inputs into the discussion by identifying a number of elements that might be considered in the discussion on the scope and modalities of non-violation complaints. It was not intended to prejudge the outcome in any way. It had been prepared on the basis of an analysis of the TRIPS Agreement, panel reports and the negotiating history of the TRIPS Agreement. At the Council's previous meeting, the European Communities had enquired about the origin of the concept of "competitive relationship", and the Hungarian delegate had briefly touched on this concept at the present meeting. It was a concept used consistently in GATT panel reports dealing with non-violation complaints with regard to the third requirement, namely nullification or impairment of a benefit as a result of the application of a measure. It should be demonstrated that the competitive position was being upset by the application of a measure not reasonably anticipated. This concept was also well set out in section III.A.5 of the Secretariat's background note (IP/C/W/124) and in greater detail in the panel report on the Japanese film case (WT/DS44/R). He would respond to the specific enquiry made by the representative of Hungary in due course.

225. The representative of Malaysia, speaking on behalf of ASEAN Members, said that the non-violation provision in the TRIPS Agreement was based on Article XXIII of the GATT, which provided for complaints based not on failure to fulfil obligations, but on nullification or impairment of benefits, or an impediment to the attainment of an objective, due to the application of a measure whether or not it conflicted with the Agreement, or the existence of any other situation. This provision had introduced an element of uncertainty into the settlement of disputes under the TRIPS Agreement, as the TRIPS Agreement was a minimum standards agreement different from those on goods or services where there were negotiated concessions. Hence, the nature of complaints that could be brought before a panel was unclear. The Australian and Korean submissions had pointed out that key concepts, such as "benefits", "nullification or impairment" and "measure" were still unclear and needed further clarification. Other concepts, such as the "existence of any other situation" and the "attainment of any objective of the Agreement", whether they referred to the TRIPS Agreement or included other agreements needed to be clarified. In this context, as far as the TRIPS Agreement was concerned, there was acknowledgement of the need for clarification regarding Article XXIII:1(b) and 1(c) of GATT 1994, and in this respect the modalities and scope for non-violation complaints was seen to need further examination. The TRIPS Agreement was hesitant in allowing the application of non-violation complaints without due thought on the scope and modalities. The Australian and Korean submissions had provided some elements to be discussed as to the scope of non-violation complaints. These concerned, first, the exceptional nature of the non-violation remedy. It had to be recognized that the remedy was only to be used under certain qualified circumstances as provided by Article XXIII:1(b) and 1(c) of GATT 1994. What did "measure" refer to in this context? Did it have a broader meaning than government instituted measures? Did it only cover TRIPS-related measures? If not, would it affect the sovereign rights of government to legislate in non-TRIPS areas? Did the "existence of a situation" include a situation that had not occurred as a result of any government measure, or did it refer to a situation brought about by a measure unrelated to the implementation of the TRIPS Agreement? Did "nullification of a benefit" apply to benefits accruing to Members or to right holders? Issues surrounding an impediment to attainment of any objective of the Agreement bore examination as this related closely to Article 7 of the Agreement. Korea's non-paper looked at the importance of Articles 7 and 8 as they related to non-violation complaints and socio-economic policies. Australia and Korea had cited a number of Articles in which non-violation complaints should not be sustainable, as they related to exceptions or limitations to intellectual property rights, such as Articles 13, 17, 24, 26.2, 30 and 40. This proposal merited further consideration, together with other provisions, such as Articles 21, 27.2, 27.3 and 31. ASEAN's contention was that the application of non-violation complaints should not: undermine sovereign rights to legislate or regulate for various valid legal, economic and development reasons; should not change the balance of the TRIPS Agreement; should not result in new responsibilities that had not been negotiated; and should not result in impediments to the use of legitimate TRIPS measures, such as compulsory licensing.

226. The representative of Australia said that his delegation's interest in promoting substantive TRIPS Council work on this issue was well-known. Its paper already illustrated that there were useful clarifications that could attract a consensus, even though this was an intrinsically difficult issue. Whilst thinking on this issue was still at an early stage, he urged delegations to consider the recommendations in Australia's paper as a way of advancing towards substantive outcomes. Korea's non-paper was a further valuable contribution to the debate. Such contributions were more likely to advance Members' collective interest rather than relinquishing the Council's mandate and letting the issue be determined by default.

227. The representative of India reiterated his delegation's view that non-violation could not apply under the TRIPS Agreement. His delegation had just received Hungary's paper and its initial reaction to it was favourable. The Council should consider the questions it raised about governments versus private parties, competitive relationships and the link to Article 8.

228. The representative of Switzerland said that the expiration, at the end of 1999, of the five-year period under Article 64.2 meant that non-violation complaints were possible under the TRIPS Agreement since the beginning of 2000. However, his delegation took a cooperative approach as regards the Council's further discussions examining scope and modalities and the fact that no consensus had been reached on scope and modalities during the five-year moratorium should not be interpreted as preventing the Council from continuing this discussion. In 1999, the Council had begun to examine the scope and modalities of non-violation complaints, but the issues involved had not yet been dealt with in a conclusive manner. Moreover, the modalities of situation complaints had thus far not been discussed at all. If Members still had legitimate concerns or believed that some areas remained unclear, such as those mentioned in Canada's paper (document IP/C/W/127), then the Council should address these concerns in order to find adequate solutions. With such a discussion, and further inputs from Members, the Council could undertake valuable work, rather than leaving these important questions to be resolved by the dispute settlement mechanism. Given the concerns among Members about outstanding issues, the lack of clarity regarding the application of non-violation and situation complaints, and the possible benefits of such complaints in the TRIPS context, debate on the relevant modalities should continue. As long as these issues remained under discussion in the Council, Switzerland believed that Members should exercise due restraint in having recourse to Article XXIII:1(b) and 1(c) of GATT 1994 in the TRIPS context.

229. The representative of the United States reiterated his delegation's view that the moratorium on filing non-violation complaints under Article 64.2 had expired at the beginning of 2000. The Council was not required to produce recommendations on the scope and modalities of non-violation complaints. Article 26 of the DSU and past GATT/WTO practice provided sufficient guidance to panels and the Appellate Body to handle any non-violation complaint that might be filed. The elements listed by Australia in its paper (IP/C/W/212) were considerations which a panel or the Appellate Body would take into account as a matter of course. For example, a non-violation complaint lodged under the TRIPS Agreement could not impair the consistent application of another WTO agreement, as Australia's paper implied. Article 3.2 of the DSU expressly provided that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Article 3.5 also provided that "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements." Given that the Marrakesh Agreement was the result of a single undertaking, it was highly unlikely that even absent this express language in the DSU a panel would determine that something a Member had agreed to under one part of this single undertaking would nullify or impair benefits accruing under another part of it. Moreover, given that an essential element of a successful non-violation complaint was that the action could not have been foreseen at the time the benefit was negotiated, it would be obvious that if any WTO agreement provided for an action, that action was

foreseen at the time of negotiations and the non-violation complaint would fail. The distinction between violation and non-violation complaints had been sufficiently defined by panels under the GATT and the same principles would be applied with respect to complaints under the TRIPS Agreement. The guidelines given by previous non-violation cases and by Article 26 of the DSU would be applied by future panels with the same thoroughness and thoughtfulness as ever. For these reasons and those set out in the two contribution from the United States under this agenda item (IP/C/W/194 and informal document No. 4437 of 26 July 1999), no purpose was served by further discussion of scope and modalities; the Council should devote its precious time to carrying out its responsibilities under other provisions of the built-in agenda.

230. The representative of Hong Kong, China recalled that, at the Council's meeting in June 2000, his delegation had expressed the view that the Council should continue the debate on the scope and modalities for non-violation complaints. It had supported document IP/C/W/191 by the European Communities and co-sponsors, in particular the suggested follow-up action in paragraphs 12 and 13 of that paper. Both the Australian and Korean contributions provided useful inputs to the discussion on the scope and modalities for non-violation complaints, but neither addressed the fundamental question as to whether the non-violation complaint was relevant to the TRIPS Agreement. Hong Kong, China shared the view expressed in IP/C/W/191, and by Hungary at the present meeting, that the TRIPS Agreement was not a market access agreement as such. He supported the Hungarian intervention on a preliminary basis and might revert to it at the next meeting. The TRIPS Agreement was intended to set minimum standards for intellectual property protection. That was very different from the notion that the TRIPS Agreement was a market access agreement. Under Article XXIII of the GATT, the "benefit" accruing to a Member had traditionally been a reciprocal trade concession negotiated, which later proved to have been negated by non-tariff barriers or other policy measures adopted by a contracting party. On the other hand, the TRIPS Agreement protected the intellectual property rights of nationals of other Members. It was difficult to see the analogy between a tariff concession negotiated for the mutual benefit of contracting Members, where each gave away the right to impose whatever tariff it could otherwise have imposed, with the simple multilateral recognition of rights of nationals under the TRIPS Agreement where nothing was given away. In sum, his delegation had serious doubts that the TRIPS Agreement was a market access agreement. It was dangerous to drift down the road to a legal remedy like the non-violation complaint which was created to deal with the negating of tariff concessions.

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

M. ELECTRONIC COMMERCE

232. The Chairperson recalled that, in July 2000, the General Council had agreed to invite the TRIPS Council and three other subsidiary bodies, namely the Council for Trade in Goods, the Council for Trade in Services and the Committee on Trade and Development, to pick up where they had left off in their work on electronic commerce within their respective spheres of competence, to identify cross-sectoral issues, and to report back to the General Council at its regular meeting in December 2000. At the previous meeting, the Council had heard an update from WIPO on the work of that Organization in connection with electronic commerce and had an initial discussion on the matter. Since then, two papers had been received, one from the European Communities and their member States (IP/C/W/224), and another from Australia just prior to the meeting.¹⁶

233. The representative of Australia said that the paper she had just submitted updated the paper that her delegation had submitted in 1999 (IP/C/W/144). It included a number of suggestions that could be studied further in the coming months and then taken up in the TRIPS Council's final report to

¹⁶ Subsequently circulated in document IP/C/W/233.

the General Council. The paper and the suggestions contained in it were intended to be consistent with and support the approach outlined in the Council's earlier Progress Report of July 1999 (IP/C/18) as well as the recent communication from the European Communities and their member States.

234. The period since the effective conclusion of the TRIPS Agreement and the present day had seen the emergence of electronic commerce as a global phenomenon, with fundamental impact on the administration, definition and enforcement of intellectual property rights, the opportunities for their commercial exploitation, mechanisms for distributing due rewards for creative endeavour, and the possibilities of advancing related public policy objectives such as technology transfer and dissemination, education, access to new technologies, and infrastructure development. In her delegation's view it was curious that the TRIPS Council had been virtually silent on the substance of this issue, with the exception of a very general interim report sent to the General Council last year. Even in the absence of the overall electronic commerce work programme, it would have been incumbent on the TRIPS Council, under Article 71, to take account of the enormous impact of technological developments on the legal and administrative framework of intellectual property protection. Because it involved the impact of new technologies, there was a possibility that consideration of electronic commerce issues could be seen essentially as dividing industrialized and developing countries. However, the more the issue was examined, the more it became apparent that the interests of all WTO Members were engaged in some way. For example, the explosive growth of digital communication and information technology, and the increasing affordability of such technology, was placing information on technological solutions in patent documentation within the reach of millions who earlier had lacked any prospect of access to such information, frequently in jurisdictions where no patents applied to that technology. At the same time, there were concerns voiced in international debate that the patent system could work against the growth of electronic commerce, and the entry into international markets by small enterprises, if the key technologies for internet trading were rendered effectively inaccessible by the operation of the patent system. Overall, the advent of electronic commerce had not circumvented the basic rules and principles of intellectual property, but it could create new challenges for their effective and balanced application. Her delegation's paper sought to explore some of the key areas in which this challenge arose. It was intended to fit in with other contributions on this topic. In particular, the European Communities' useful submission (IP/C/W/224) set out many relevant issues about the TRIPS Council electronic commerce programme and further study areas, although there was one minor point of emphasis on which her delegation would differ.

235. She said that a practical starting point for discussion in the TRIPS Council's work programme was to confirm that existing TRIPS rules were technology neutral. As such, they were equally applicable to the digital environment and to the paper world. The electronic commerce work programme might also be an opportunity to clarify the application of some of the existing rules, so that they were applied consistently in the digital environment. She agreed with the European Communities that consideration should be given to new international standards that had been developed since the TRIPS Agreement had been concluded. For example, regard could be had to the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the WIPO work on cyber-squatting and domain names. While there were some areas where consideration should be given to recently developed international norms, it was important to note that existing TRIPS requirements were applicable to the digital environment. Examples of such TRIPS provisions were the principles of national treatment, MFN treatment and exceptions to exclusive rights. These principles lent themselves directly to application in the digital world to promote economic and social development. The TRIPS electronic commerce work programme might consider whether existing provisions needed to be adapted or extended. Any such consideration should be consistent with the objectives of the TRIPS Agreement and other international standards. Consideration of electronic commerce implications would be beneficially focused on clarifying and exchanging experience on the application of existing technology neutral norms (rather than focusing on assumed "shortcomings"). Further, Article 71.1 reinforced the need to keep track of developments to ensure that the balance of

interests in TRIPS was appropriate. Not keeping track of such developments would put Members' policy interests in the hands of others.

236. As regards classification of products, she said that trade in intellectual property products via electronic means challenged the traditional distinction between goods and services. Transactions in, for example, software products over the Internet, could be classified as trade in a good, a service, or even both. There was an increasing, highly valuable, set of cross-border transactions involving intellectual property. These included financial transfers for licence fees or royalties paid for the use of intellectual property. Such transactions were not necessarily captured by either goods or services. A useful classification option had been proposed by Indonesia and Singapore in a paper prepared last year, being a category of trade in intellectual property. While the overall issue of classification cut across the WTO, the TRIPS Council should keep these issues under consideration, especially that some international intellectual property transactions could be considered as an object of trade in themselves.

237. As regards enforcement at the border, she said that one of the broader benefits of the electronic commerce work programme would be to promote understanding of how electronic commerce technology could facilitate trade and reduce the transaction costs and administrative overheads. It might be valuable to consider practical linkages between border control measures for the enforcement of intellectual property rights and trade facilitation. Coordinating intellectual property border control measures and trade facilitation via electronic commerce technologies could ease the administrative burden of customs procedures and focus border enforcement efforts. Information systems combining these elements could benefit all Members. Enhancing border control through such technology could also increase compliance with national laws implementing substantive TRIPS provisions. Members should consider ways in which electronic commerce technologies could be used to enhance border enforcement as a means of facilitating TRIPS compliance.

238. As regards international cooperation on enforcement, she said that a number of enforcement issues raised by electronic commerce were essentially practical in nature. Members would benefit from sharing their national experiences and exploring practical options for addressing enforcement issues. In this context, it was worth noting Article 69 of the TRIPS Agreement, under which Members had agreed to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. She suggested that Article 69 should be interpreted to include infringements occurring in the electronic environment. The Secretariat could coordinate the exchange of national experiences about the use of electronic commerce to facilitate trade in infringing goods. The collation of information on practical problems experienced by Members would be useful for both ongoing discussions on how best to tackle the issues and for training and awareness-raising activities.

239. As regards the issue of jurisdiction, she said that electronic commerce had stimulated the growth of borderless or virtual transactions and the growth of trade in IP-rich products. These transactions had raised questions about the continuing efficacy of territorially-based jurisdiction. Conflict between jurisdictions was not a new problem; however, the scope for intellectual property right infringement would grow. The greater spread of TRIPS-consistent intellectual property systems and more convergent national systems should assist to ease these problems. The TRIPS Council should continue to monitor developments in the question of determining the scope of national jurisdiction in relation to intellectual property rights in the digital environment. In this respect, regard might be had to the upcoming joint meeting of WIPO and the Hague Conference on Private International Law to discuss intellectual property issues related to international enforcement of judgments.

240. As regards patents, access to technology and the administration of intellectual property rights, she said that the growth of electronic commerce had seen the development of new business methods

and models for the digital environment. Issues had been raised about the patentability of new on-line business methods. As part of the continuing review of TRIPS implementation, Members could be encouraged to exchange information about the operation and use of patents in the digital environment. Electronic commerce technologies had vastly improved global access to technological information in patent documentation. Improved access, coupled with TRIPS requirements for disclosure of technological information, facilitated the flow of technological information and reduced costs. This was in line with the fundamental objectives of the TRIPS Agreement. Electronic commerce technologies were also being used to practical advantage to improve the administration of intellectual property rights. This was occurring through improved communication of information between national and international intellectual property offices, and increased public access to that information. Electronic commerce was providing useful ways of reducing the costs and administrative burden of implementing TRIPS obligations for the administration of intellectual property rights. She suggested that appropriate recognition of the advantages of electronic commerce in this area should be made in the final report to the General Council. Further, she considered that a useful outcome from the work programme would be to encourage Members to maximize, wherever possible, the opportunities presented by electronic commerce to facilitate access to technology and the administration of intellectual property rights.

241. As regards anti-competitive practices in the digital environment, she said that electronic commerce potentially raised anti-competitive issues particularly in relation to intellectual property licensing arrangements. It was important that the intellectual property system functioned effectively as a means of promoting technology transfer, especially considering the infrastructure concerns of developing countries. There were possible instances of anti-competitive behaviour in relation to some online licensing arrangements such as click-through licences for the use of some websites. Such licences could be anti-competitive under some national laws and might also conflict with permitted exceptions in domestic legislation intended to balance rights and obligations in a TRIPS framework. Member countries should be encouraged to exchange information about developments relating to anti-competitive issues in the digital environment.

242. As regards a linkage of new copyright treaties to the TRIPS Agreement, she said that electronic commerce had reached its current significance almost entirely since the conclusion of the TRIPS Agreement. As a result, the substantive TRIPS provisions on copyright did not fully address issues arising in the digital environment. Development of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) had in part been prompted by this lacuna in the TRIPS Agreement and the Berne and Rome Conventions. In this respect, it was worth noting Article 71.2 of the TRIPS Agreement, which provided an accelerated amendment process for higher levels of protection accepted in other multilateral agreements. The intention of this provision seemed to be that, where new international intellectual property standards emerged and were universally accepted, the TRIPS Agreement should be amended in response to such developments. Members should consider means to recognize the WCT and WPPT principles in the context of the TRIPS Agreement. Further, the TRIPS Council should make a statement that explicitly recognized the relevance of the WCT and WPPT to copyright and related rights in the online environment.

243. As regards the WCT and harmonization of national laws, she said that countries could make a practical contribution to copyright protection on-line by bringing their laws into line with the WCT and WPPT. An example of the way in which national legislation could be amended to take account of the WCT, and to address digital copyright issues generally, was Australia's recently enacted Copyright Amendment (Digital Agenda) Act. The Digital Agenda Act adopted standards set out in the WCT and the WPPT. The legislation updated the existing copyright law framework to take account of new technologies. As the main features of the Act, she mentioned, firstly, that it introduced a new technology-neutral right of communication to the public. This would apply to works made available on the Internet and other on-line services, as well as works transmitted to the public. The new right would replace and extend the existing technology-specific broadcast right and

the cable diffusion right. Secondly, the legislation provided reasonable access for copyright users, including libraries and educational institutions, to copyright material in electronic form (including material available on-line). Australia's approach had been to replicate the balance struck between the interests of owners and users that applied in the print environment. The amendments extended the existing exceptions to the new communication right whilst also introducing some new exceptions. An example of a new exception tailored for the on-line environment was the exception for temporary copies made in the process of a communication. Such temporary copies would not infringe the reproduction right. The exception covered temporary reproductions made in the caching process as part of an Internet transmission, or when browsing or viewing a document on-line. It aimed to ensure the efficient operation of technical processes that underpinned new technologies, such as the Internet. Thirdly, the legislation limited and clarified the liability of carriers and ISPs for copyright infringements done by third parties using their facilities. Carriers and ISPs would not be liable for infringing activities where they had not determined the content of the communication. Similarly, they would not be liable for infringing activities where they had merely provided the facilities involved in the infringement. Fourthly, the legislation provided two new enforcement measures, so that copyright owners could effectively enforce their rights in the on-line environment. The legislation provided sanctions against the dealing in, and manufacture of, devices for the circumvention of technological protection measures. It also provided sanctions against the intentional removal or tampering with electronic rights management information. Finally, a new statutory licence would be introduced for retransmission of free-to-air broadcasts made by, for example, pay-TV operators. The scheme would provide equitable remuneration for owners of underlying copyright material contained in free-to-air broadcasts, such as the owners of rights in TV scripts, sound recordings and music.

244. As regards the management of intellectual property rights, she said that electronic commerce could bring the benefits of intellectual property protection to a wider range of beneficiaries through more effective distribution of royalties. Technology might provide a cost-effective and technically feasible means of collecting and distributing revenue from international markets for right holders. This was of particular importance to performers, composers and artists in developing countries. These peoples' works were attracting increasing interest in international markets, but they might not have been receiving due rewards due to the lack of the necessary infrastructure. The progressive implementation of the TRIPS Agreement was steadily increasing the legal scope for administration of copyright and related rights. The electronic commerce work programme could reflect the special needs of developing countries and consider how the strengthened legal framework could be complemented by enhanced administration of rights. It could encourage technical cooperation with the aim of extending the benefit of collective mechanisms for the administration of rights.

245. As regards trademarks in general and well-known marks in particular, she said that judicial authorities in many countries had been considering issues raised about the use of trademarks on the internet. Greater information exchange and coordination of legal developments in the area would be beneficial. The work programme should take note of the value of greater exchange of information on this issue. Further, the Council should continue to monitor developments in this area, including WIPO's work on trademarks and well-known marks, with a view to possible further substantive consideration of the issue.

246. As regards Internet domain names, she said that the issue of trademarks and Internet domain names had been the subject of much consideration by WIPO. WIPO was an accredited provider of dispute resolution services under the Uniform Dispute Resolution Procedure in relation to trademark-based domain name disputes. Since the introduction of this process, there had been less opportunity for bad faith cyber-squatting of trademarks in the generic top-level domains .com, .org and .net. WIPO had begun a further investigation of the need for protection against bad faith domain name registrations of identifiers other than trademarks. This study was focusing on the bad faith, abusive, misleading or unfair use in the domain name system of personal names, International Non-proprietary Names for pharmaceutical substances, names of international intergovernmental

organizations, geographical indications and trade names. This study was of interest to Members, given the TRIPS provisions dealing with geographical indications and the incorporation by reference of Paris Convention provisions dealing with abbreviations of international intergovernmental organizations. Members might also be interested in the consideration of these issues where the current development of domain name policies might affect the future allocation of rights in countries where Internet access was developing. WIPO had also instituted a programme aimed at country code top-level domains. This programme included advice on the design of registration policies to take account of intellectual property rights and advice on, and provision of, dispute resolution services. In light of these developments, the TRIPS Council should take account of WIPO's work in its consideration of domain name issues. Consideration should be given to whether and how it might be appropriate to take account in the TRIPS Agreement of the outcomes from the WIPO processes. It was important to note that intellectual property rights, in particular trademarks, geographical indications and the names of international organizations, continued to be defined, exercised and enforced at the level of domestic law. The TRIPS Agreement provided the legal framework underpinning these rights internationally. Members would have a collective interest in ensuring that the relationship between domain name arbitration mechanisms and national intellectual property law within the TRIPS framework was clearly understood and articulated. Further, Members would have an interest in ensuring that the overall legal framework was developed in an inclusive manner.

247. The representative of Japan said that intellectual property issues related to electronic commerce should be categorized broadly into two different areas. The first category had a horizontal or cross-sectoral nature. The question of classification, i.e. whether computer software transmitted on-line should be treated as goods, services or intellectual property, was an example of a cross-sectoral issue. The question of international jurisdiction and choice of law was another example of a cross-sectoral issue. This question was under discussion in the Hague Convention on Private International Law and in WIPO. At the same time, this question should be analysed also by an appropriate forum in the WTO, e.g. an ad hoc task force under the General Council, not only from the perspective of private international law, but also in regard to its implications for the development of electronic commerce. The second category of issues was specific to intellectual property rights. The intellectual property specific issues in the context of electronic commerce should be dealt with in the TRIPS Council. For example, the question as to what kind of exploitation of intellectual property rights on the Internet constituted an infringement of intellectual property rights should be discussed in the TRIPS Council.

248. The representative of Hungary said that his delegation was interested in moving forward with the important work on intellectual property and electronic commerce. The submissions from Members and the background note prepared by the Secretariat provided a wealth of information for the Council to discuss in the coming year. In Hungary's view, the paper from the European Communities and their member States gave a fair account of what had happened so far in the WTO and in other fora and succinctly informed Members of the priorities and the position of the European Communities. In the coming period, the Council for TRIPS should pay, in line with the WIPO "Primer on Electronic Commerce and Intellectual Property Issues" and the objectives outlined in the Council's progress report to the General Council (IP/C/18), adequate attention to issues related to trademarks, in particular in relation to domain names, as well as to problems related to the protection and enforcement of geographical indications and industrial designs. It might be desirable to discuss liability of intermediaries in relation to electronic transmission of products protected by copyright. The Council should engage in a substantive discussion on these matters, which should be adequately structured and avoid duplication of work.

249. The representative of the European Communities wished to underline the suggestions at the end of his delegation's submission, indicating that there was a need for the TRIPS Council to identify whether or not there were shortcomings in the TRIPS Agreement resulting from developments in the area of electronic commerce, taking into account the work undertaken in WIPO. In this respect, it

was obvious that the Council should look into the new international treaties which had been concluded under the auspices of WIPO. The Council should also examine how possible shortcomings should be addressed in the Agreement. He welcomed the paper tabled by Australia which his delegation was still analysing.

250. The representative of India said that he was not yet in a position to react to the communications from Australia and the European Communities and their member States. He requested the Chairperson, therefore, to keep his report purely factual, without committing in any way other delegations to the views expressed by Australia and the European Communities and their member States.

251. The representative of Korea expressed his delegation's support for the principles, observations and approach advanced in the submission from the European Communities and their member States (IP/C/W/224). His delegation would not object to the suggestion that the Council should be given the task of identifying shortcomings in the TRIPS Agreement resulting from new technological developments, but it should first collect information on the present situation in each Member. This could be done either as a joint project with WIPO or on the basis of responses provided to a checklist of questions. The Council could build on such information when reviewing the relationship between electronic commerce and the relevant provisions of the TRIPS Agreement and clarifying the provisions in line with any decisions and guidance emanating from the General Council. Possible amendments were linked to the discussion under Article 71.1. Therefore, it was incumbent on the TRIPS Council to first secure full and complete implementation by Member countries of existing provisions relevant to this area before embarking on a hasty debate aimed at amendment of the Agreement.

252. The representative of Chile said that he was only in a position to provide initial comments on the submission from the European Communities and their member States. In paragraph 9 of its proposal, the European Communities and their member States pointed out that the main questions related to intellectual property where further studies were required concerned copyright and related rights, patents, trademarks and the link between Internet domain names and trademarks and geographical indications. In a recent document (WIPO/OLOA/S/RFC/2 of 13 November 2000), WIPO had pointed out that, on 20 June 2000, the Director General of WIPO had received a request from 19 WIPO member States to initiate a new study on questions relating to the recognition of rights in connection with the use of Internet domain names. One of the subjects included in this request and which had been taken on board by WIPO concerned problems of bad faith, deceptive and unfair use of geographical indications and geographical terms. As the European Communities and their member States had suggested that the Council should study these questions, he wondered how such deliberations by the Council would relate to WIPO's work on the same matter. As regards paragraph 14 of the paper from the European Communities and their member States, he wondered whether the European Communities and their member States meant to say, when suggesting that the Council should examine how identified shortcomings should be addressed in the TRIPS Agreement, that the Council should prepare, for example, an interpretation of existing provisions, or their amendment or modification; and, if so, in what context the Council should do so.

253. The representative of Uruguay said that the Chairperson's progress report, to be prepared on his own responsibility, should be factual and that it would be up to the General Council to decide how to proceed in this area. The Council's earlier report (IP/C/18) referred to a number of issues in respect of which the Council was of the view that more analysis was required, for example the issues mentioned in paragraphs 10 and 11 of that report. Irrespective of any decision to be taken by the General Council at its meeting in December, the TRIPS Council had identified some issues specific to intellectual property. Eventually, the work programme should be continued in the TRIPS Council, at least in regard to the points identified as being specific to the TRIPS Agreement or intellectual

property more generally. He would revert to the proposals from the European Communities and their member States and Australia at the next meeting.

254. In response to the comments made by Chile, the representative of the European Communities said that paragraph 9 of his delegation's submission referred to a recent document from the World Intellectual Property Organization which dealt with electronic commerce and intellectual property issues. He was not aware of the letter referred to by Chile. He would revert to the question concerning the relationship between work on this matter in the Council and in WIPO at the next meeting. As regards paragraph 14 of his delegation's paper, he confirmed the view expressed that there might be a need to interpret existing provisions or to modify or amend existing provisions of the TRIPS Agreement. His delegation was of the view that it would be appropriate for the Council to attempt to identify possible shortcomings and had listed a number of core areas in which it believed that, at least, further study was required. Modification or amendment could be done in the framework of Article 71.1 or of a new round of trade negotiations. His delegation was ready to look into proposals for subjects to be dealt with under 71.1, provided that they were not yet covered by other reviews. If, in the near future, progress could be made towards launching a new round, this might provide a more appropriate framework.

255. The representative of the United States said that his delegation was still studying the submissions from the European Communities and their member States and Australia. Providing preliminary comments on the contribution from the European Communities and their member States, while expressing support for a number of the observations made in it, he wished to place a slightly different emphasis on some issues over others and would use different terminology than that chosen by the European Communities and their member States. However, he agreed that the TRIPS Agreement already provided a sound basis for the protection of intellectual property in the on-line environment, just as it did in the off-line environment. The Council should focus on how the TRIPS Agreement already provided such a sound basis and perhaps less so on what potential shortcomings there might be. There were many more relevant aspects of the existing Agreement that warranted examination. It would be worthwhile to clarify the application of the TRIPS minimum standards in the on-line environment. The Council could usefully continue such a discussion. He also agreed that, because of the rapid change in the on-line environment, at an appropriate time in the future, in light of the work being done in other fora such as WIPO, the Council might wish to clarify or adapt the provisions of the TRIPS Agreement. In response to Korea, he said that, in the coming year, the focus should be on actual implementation of the Agreement rather than on starting to consider any amendments to the Agreement.

256. The representative of Australia said that her delegation looked forward to receiving comments also from other delegations on its submission and to continuing substantive discussions on the matter, including on the specific proposals outlined in Australia's paper.

257. The Chairperson proposed that he be authorized, in the light of the discussions at the Council's previous and present meeting, to prepare, on his own responsibility, a progress report to the General Council on the further work done by the TRIPS Council.¹⁷

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

¹⁷ See document IP/C/20.

N. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

(i) Accessions

259. The Chairperson informed the Council that Oman had become the 139th Member of the WTO on 9 November 2000 (WT/Let/357) and had committed itself to apply fully the provisions of the TRIPS Agreement by the date of its accession to the WTO without recourse to a transitional period. Croatia had become the 140th Member of the WTO on 30 November 2000 (WT/Let/359) and had also committed itself to apply fully the provisions of the TRIPS Agreement by the date of its accession to the WTO without recourse to a transitional period. He suggested that the Council, in accordance with the review procedures it had applied thus far in respect of newly acceded Members, add Albania, Croatia and Oman to the list of Members whose national implementing legislation was scheduled to be reviewed in June 2001.

260. The Council so agreed.

(ii) Dispute Settlement

261. The Chairperson informed the Council that, at its meeting on 26 September 2000, the DSB had established a Panel in "United States – Section 211 of the Omnibus Appropriations Act of 1998", a complaint by the European Communities and their member States. On 26 October 2000, the composition of the Panel had been determined by the Director General (WT/DS176/3). Canada, Japan and Nicaragua had reserved third party rights in the dispute. At its meeting on 12 October 2000, the DSB had adopted the Appellate Body report on "Canada - Term of Patent Protection" (WT/DS170/AB/R) and the panel report (WT/DS170/R), as upheld by the Appellate Body report.

O. ANNUAL REPORT TO THE GENERAL COUNCIL

262. When resuming the meeting on 6 December, the Chairperson recalled that the Council's draft Annual Report had been circulated in document IP/C/W/229 and updated in document IP/C/W/229/Rev.1 so as to take into account the discussions at the present meeting. A second revised draft had been circulated following the receipt of suggestions for amendment in writing, as agreed by the Council when it adjourned on 30 November.¹⁸ However, he proposed that the Council adopt the version contained in document IP/C/W/229/Rev.1 as its Annual Report (2000) and have it forwarded to the General Council, on the understanding that, in paragraph 22, the last sentence as well as the reference to paragraph 34 of document IP/C/8 would be deleted; and, in paragraphs 21, 22, 23, 24, 27, 28 and 29 all delegations from whom the Council had received communications would be explicitly mentioned.

263. The Council so agreed.

¹⁸ Document IP/C/W/229/Rev.2.