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

MINUTES OF MEETING

Held in the Centre William Rappard
on 25-27 and 29 November, and 20 December 2002

Chairman: Ambassador Eduardo Pérez Motta (Mexico)

The present document contains the record of the discussion which took place during the TRIPS Council meeting held on 25-27 and 29 November, and 20 December 2002.

<u>Subjects discussed</u>	<u>Page Nos</u>
A. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT.....	2
B. FOLLOW-UP TO REVIEWS ALREADY UNDERTAKEN	3
C. PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH	6
D. ISSUES RELATED TO THE EXTENSION OF THE PROTECTION OF GEOGRAPHICAL INDICATIONS PROVIDED FOR IN ARTICLE 23 TO PRODUCTS OTHER THAN WINES AND SPIRITS	14
E. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B).....	49
F. RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY	49
G. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE	49
H. REVIEW OF IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71.1.....	56
I. IMPLEMENTATION OF ARTICLE 66.2.....	56
J. NON-VIOLATION AND SITUATION COMPLAINTS	58
K. ELECTRONIC COMMERCE.....	62
L. OTHER OUTSTANDING IMPLEMENTATION ISSUES (TIRETS 93 AND 94 AND PROPOSAL BY LDCS ON THEIR TRANSITION PERIOD).....	62
M. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2.....	64
N. TECHNICAL COOPERATION AND CAPACITY-BUILDING.....	65
O. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO.....	65
P. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS	65
Q. ANNUAL REPORT TO THE GENERAL COUNCIL.....	66
R. OTHER BUSINESS	66

1. In proposing the agenda for adoption, the Chairman said that, as far as the follow-up to the review of legislation of Chinese Taipei was concerned under item B, his intention had been to suggest, in accordance with the standard procedures, to delete the review of the legislation of Chinese Taipei from the agenda, given that it had already provided responses to all questions, with the usual understanding that any delegation should feel free to revert to any matter stemming from that review at any time. He suggested that the proposed agenda (WTO/AIR/1957) be adopted with an amendment of item B to the effect that it did not include the follow-up to the review of legislation of Chinese Taipei.

2. The Council so agreed.

A. 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 or who acceded to the WTO after that date*

3. The Chairman drew attention to the Secretariat's updated note reflecting the status of the notifications received from these Members so far (JOB(02)/162). The note showed from which of the Members in question notifications had been received by 14 November 2002. Since then, the Council had received a notification of laws and regulations from Guyana, and responses to the Checklist of Issues on Enforcement from Argentina.¹ From the 79 Members in question, there were now six who had not yet submitted any notification concerning their implementing legislation, namely Egypt, Papua New Guinea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Swaziland, and the United Arab Emirates. Notifications from a number of other Members were incomplete. Recalling that pursuant to Article 63.2 of the Agreement the notifications of the laws and regulations in question were generally due as of 1 January 2000, he urged those Members to submit the outstanding material without delay.

- *Notifications from other Members and notifications of amendments of laws notified earlier*

4. The Chairman informed the Council that, since its previous meeting, notifications of either new legislation or amendments to legislation notified earlier had been received from Albania, Chinese Taipei, the Czech Republic and Jamaica. These notifications would be available in the IP/N/1/- series of documents.

5. The representative of Cuba said that her delegation had notified Cuba's new legislation on geographical indications in September 2002, which she wished to introduce under agenda item B.

(ii) Notifications under Article 69

6. The Chairman informed the Council that, since its previous meeting, updated notifications of contact points under Article 69 of the Agreement had been received from Canada, Malawi and Germany and circulated in documents IP/N/3/Rev.6/Add.2 and Add.3. There were now 117 Members who had notified contact points under Article 69.

¹ Document IP/N/6/ARG/1.

B. FOLLOW-UP TO REVIEWS ALREADY UNDERTAKEN

(i) *Follow-up to reviews already undertaken*

7. The Chairman recalled that, as requested by the Council at its meeting in September, the Secretariat had updated an informal note that lists all the outstanding material required to complete reviews that the Council had already undertaken (JOB(02)/160). The table attached to the note listed those Members whose reviews were initiated at the Council's meetings in April, June and November 2001, and March and June 2002 but had not yet been completed, and it identified all the outstanding material. In addition, the note also listed a number of Members whose reviews had already been deleted from the Council's agenda, but to whom further questions had been posed.

8. He said that Guyana and India had now provided responses to all of the questions posed to them, and all of those responses had been circulated to Members prior to the present meeting. He proposed that the reviews of the legislation of Guyana and India be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from these reviews at any time.

9. The representative of Switzerland said that, in its replies, Guyana had referred to its national legislation, which he had not yet been able to consult. He understood from the information provided under the previous agenda item that the legislation had now been notified. He said that he intended to analyse the responses in the light of this legislation and pose further questions if necessary.

10. The Council agreed to proceed with the reviews of the legislation of Guyana and India as suggested by the Chair.

11. The Chairman said that the table indicated that there were 19 Members whose reviews were initiated between April 2001 and June 2002 that had not yet been completed. The table referred to submissions received before 11 November 2002. Since the Council's previous meeting, Congo had provided responses to most of the outstanding questions and Cuba had submitted responses to the questions posed by the European Communities concerning geographical indications. He recalled that, at the Council's meeting in June, the representative of Mauritius had informed the Council that the new draft legislation was before Parliament and would be circulated to WTO Members once adopted. At the Council's meeting in last September, Canada, Switzerland and the United States had requested Mauritius to respond to the questions they had posed to it on the basis of the new rather than the old legislation. The Council had just received a letter from Suriname.² In that letter Suriname indicated that new legislation on industrial property and copyright were presently being finalized, and that it intended to provide revised responses to certain initial questions as soon as its Parliament had approved that new legislation, which was expected to take place in the near future. In that context, it also intended to provide responses to the outstanding follow-up questions. The other Members whose reviews were still pending were Brazil, Cameroon, Egypt, Fiji, Grenada, Kenya, Malaysia, Moldova, Nigeria, Oman, Pakistan, the Philippines, Qatar, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Swaziland, and Zimbabwe.

12. The representative of Cuba recalled that the review of Cuba's legislation had been initiated at the Council's meeting in November 2001. On that occasion, her delegation had explained why it had not requested to postpone the review even though Cuba had not been able to adopt and notify, as it had desired, the necessary legal reforms adapting its legislation to the provisions of the TRIPS Agreement. Therefore, the review had started with legislation in the areas of trademarks and other distinctive signs (the Decree-Law No.203 of 24 December 1999 and a related Regulation of 22 May 2000), and enforcement (the Civil Code, the Criminal Code, the Law of Criminal Procedure, Civil, Administrative and Labor Legislations and Customs Legislation), that had been duly notified.

² Subsequently circulated in document IP/C/W/283/Add.3

At that point, Cuba had provided responses to the Checklist of Issues on Enforcement, and responded to 18 questions from the European Communities and their member States, two from Switzerland and two from Canada. All of them were related to the areas of trademarks and enforcement.

13. A new legislation on geographical indications was adopted on 20 February of 2002 and duly notified to the Council in September 2002. It defined geographical indications as indications that identified a product as originating in a country, a region, or a place, and where a given quality, reputation, or another characteristic of the product was essentially attributable to its geographical origin. It specified that geographical indications included both appellations of origin and indications of source, which were also defined, and that geographical indications were part of the national patrimony and that the only right to be granted would be the right to use them. Protection of geographical indications that constituted appellations of origin were only recognized through their registration at the Cuban Industrial Property Office. Registration requirements included, *inter alia*: that the applicant of the right to use should be an individual or a legal entity; evidence that its industrial activity was located in the area of extraction, preparation, or production of the good protected by the appellation; and the presentation of a document issued by the head office of the Hydrographic and Geodesic Services of the Republic of Cuba endorsing the validity of the geographical name. Furthermore, the applicant should present a detailed description of the characteristics of the product bearing the appellation of origin and of the ways through which natural or human factors, or both, interacted with the product in question. It was also a requirement that a certification be issued by the President of the Local Body of the People's Power endorsing the economic link between the applicant and the geographical area as well as the veracity of the characteristics of the geographical area stated in the description. The registration of foreign appellations of origin was based on their protection and validity in their respective countries of origin; this requirement should be fulfilled by presenting a certification issued by the institutions in which these appellations were registered in their countries of origin, as well as the right of use of the applicants.

14. It was stipulated that geographical indications should be used in accordance with their distinctive nature and, consequently, it was prohibited to use any means in the designation or presentation, or in any other form, of a good that indicates or suggests that the good in question originates from a place or geographical area other than the true place of origin in a manner which misleads or confuses the public as to the geographical origin of the good. Consequently, it was prohibited to use false or deceiving geographical indications, or ones that, although literally true as to the country, region, or place of origin of the goods, falsely portrayed to the public that the goods originated in another territory. It was also prohibited to use geographical indications on products that did not originate from the geographical area in question, even when the true origin of the good was indicated or when the geographical indication was used in translation or accompanied by expressions such as kind, type, style, imitation or the like. Any use of a geographical indication that constituted an act of unfair competition was prohibited.

15. An indication was not registrable as an appellation of origin if it was contrary to morality or public order, or if it was generic, *i.e.* if it was, or had become, a common name or the designation of a product instead of associating itself with or identifying a geographical name. Applications for the registration of appellations of origin were published in the Official Gazette (*Boletín Oficial*), with which, within the established term, any person claiming to be a senior right holder could present comments or oppositions. In the course of an examination and after the Conclusive Report (*Informe Conclusivo*), any interested party would be able to lodge an appeal with the Cuban Industrial Property Office and, after a decision in this case was rendered, an administrative process could be established before a tribunal. Special provisions in this Decree-law also included the exceptions of Article 24 of the TRIPS Agreement.

16. Concluding her overview of the most relevant provisions of the Decree-law, she noted that a more complete analysis of this issue could be found in the 53 responses given by her delegation to the

checklist of questions on geographical indications that was circulated in document IP/C/W/117/Add.26.

17. Her delegation had provided responses to the five questions on this matter posed by the European Communities and their member States. She recalled that Cuba still had not responded to seven questions from Switzerland on patents and undisclosed information, as well as 35 questions from the European Communities and their member States on patents, undisclosed information, layout-designs of integrated circuits, and industrial designs and copyright. Also one question from Canada on copyright and another from Australia on patents and plant varieties remained pending. A Decree-law regulating the granting of patents and the registration of utility models and industrial designs and aspects of undisclosed information would soon be enacted. She reiterated that the legislative reform on this matter in her country had required the modification of existing provisions and introduction of new regulations, especially in certain specific categories of rights in which previous regulations and experience did not exist. She called Members' attention to Cuba's presentation on 21 November 2001 at the beginning of this review, according to which governments needed to pay close attention to the implementation of certain norms, and that Cuba, given the fact that it was a developing country, needed domestic adaptations in order to make it possible for provisions having great impact on economic development and public policies would respect the obligations undertaken by her country without, at the same time, undermining the need for a fair balance between the public and private interests in question.

18. In concluding, she expressed her hope that the pending legislation could be adopted as soon as possible, and said that her delegation would keep the Council informed on the progress in this regard. Her delegation would answer the remaining pending questions as soon as possible.

19. The representative of Pakistan said that he regretted that his delegation had not yet been able to submit responses to outstanding questions, but he expected to be able to do so in the following week.

20. The Chairman urged the 19 delegations who had not yet submitted their responses to all the outstanding questions to do so without delay.

21. He said that the Secretariat note also listed five Members whose reviews had already been deleted from the Council's agenda on the understanding that any delegation should feel free to revert to any matter stemming from the review at any time. In this connection, certain questions had been raised with regard to the implementing legislation of these countries.

22. The representative of Argentina said that her delegation had provided responses to the remaining pending questions posed by Switzerland, the European Communities and Canada.³

23. The Chairman indicated that since the last meeting, Thailand had also provided a response to the further follow-up question posed by Switzerland in August 2002.⁴ The remaining three Members to whom questions had been posed were Dominica, Gabon and Ghana.

24. He suggested that the Council request the Secretariat to again update its note on pending reviews before the next meeting.

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

³ Document IP/Q3/ARG/1/Add.1 and IP/Q4/ARG/1/Add.1.

⁴ Document IP/C/W/319/Add.2.

(ii) Reviews of legislation of China

26. The Chairman recalled that the Council had taken up the reviews of the legislation of China at its last meeting and agreed, in accordance with the normal procedures, to provide the period until 11 October for any follow-up questions to be sent in writing with a copy to the Secretariat and for the period until 8 November for responses to be supplied in writing, again with a copy to the Secretariat. The Council had taken up its normal review of China's TRIPS implementing legislation combined with the review under the transitional review mechanism. China's responses to questions posed to it had been circulated in document IP/C/W/374 and its addenda 1 and 2. However, there were still some outstanding follow-up questions posed by Japan and the European Communities and their member States.

27. The representative of China apologised for not yet having been able to translate all the responses into English, but she expected this to be done soon, at which time the responses would be forwarded to the respective Members with a copy to the Secretariat. Her delegation was also ready to consult bilaterally with delegations with further questions, either in Geneva that week or at some other time in Beijing or in any other place that was convenient for all concerned.

28. The representative of Japan said that his delegation had submitted follow-up questions within the agreed timeframe but, unfortunately, had not yet received responses. He therefore reserved his right to pose further follow-up questions at the TRIPS Council after receiving responses to the earlier questions. He believed that there might be some regulations, such as the one concerning the protection of well-known marks, that had not yet been notified; if this was the case, he asked China to notify such regulations as soon as possible for the purposes of transparency and review of legislation under the normal TRIPS procedures. Concerning the TRM review, he said that the draft report contained in document JOB(02)/193 was acceptable to his delegation.

29. The representative of the European Communities recalled that, at the Council's September meeting, he had commented on the considerable progress China had made in putting in place a full IPR system. Since then he had had the opportunity to visit Beijing, which had been an excellent opportunity to clarify certain issues he had raised in September. He looked forward to receiving responses to the outstanding follow-up question and expressed his appreciation of the offer to hold further bilateral consultations. His delegation continued to be extremely worried about the high level of piracy and counterfeiting in China.

30. The Chairman said that, as regards the report that the Council had to submit to the General Council in accordance with the transitional review mechanism of China, the Council had requested, at its last meeting, the Secretariat to draft a factual report which would describe what had happened and make reference to the documentation that had been produced, including the relevant parts of the Council's minutes. This draft report had now been circulated in document JOB(02)/193.

31. The Council adopted the draft report on the transitional review under Section 18 of the Protocol on the Accession of China as contained in document JOB(02)/198.⁵

C. PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

32. This agenda item was discussed during the course of this meeting of the TRIPS Council on three occasions: on 25 November, on 29 November and on 20 December. On 25 November, the Chairman informed Members that he was holding consultations on the subject and would revert back to the matter later in the course of the meeting. On 29 November, he reported on the intensive consultations he had held in various formats where significant progress had been made. However, he

⁵ Subsequently circulated as document IP/C/26.

said that he was not yet in a position to present a draft legal instrument that the TRIPS Council might forward to the General Council and that he would continue his consultations with a view to circulating a draft to the TRIPS Council in time for its submission to the General Council meeting scheduled for the 10-12 December 2002. The delegations of Kenya, the European Communities, the United States, the Philippines, Cuba, Peru, Canada, Botswana, China, Uganda, Malaysia, Switzerland, Senegal, Colombia, Argentina, Brazil, Lesotho, Mauritius, Indonesia and India made statements at that discussion in that order.

33. On 20 December, the Chairman informed the Council that the intensive consultations he had held had not led to a resolution of the language concerning the scope of diseases/public health problems in paragraph 1(a) of the draft text he had tabled on 16 December 2002 (JOB(02)/217). He requested that he be authorized to report this to the General Council and to recommend that the TRIPS Council be asked to resume work on this matter at the beginning of 2003 in order to resolve the outstanding issues in the Chairman's text of 16 December and to report to the General Council in order to enable it to take a decision implementing a solution to the problem identified in paragraph 6 at its meeting scheduled for 10 February 2003.

34. The representative of the United States regretted its inability to join the consensus on the Chairman's draft text of 16 December relating to the implementation of paragraph 6 of the Declaration. She indicated that her delegation was willing to join the consensus on all parts of the draft, except the one on the scope of diseases. She appreciated the efforts that the Chairman, the WTO Director-General and the Secretariat, and other delegations had made to try and build a bridge that would provide the confirmation of Ministers' intentions at Doha, but said that thus far those efforts had been unsuccessful. Among other alternatives, her delegation had suggested adding a footnote to the text but that was not agreeable to some countries. The discussion had included an exploration of the concept of a Chairman's statement, but that had not provided the legal certainty needed by her delegation. She recognized that the Council had not yet reached a positive conclusion but her delegation remained committed to working with other Members in the new year to find an approach that would work for all. She did not believe that the differences were irreconcilable and her delegation remained committed to finding a workable, transparent, sustainable and legally certain solution that would fulfill the mandate given to the Council in the Declaration as soon as possible. Her delegation continued to remember that Members were responding to the needs of poor countries to gain access to drugs to fight the scourge of epidemics ravaging millions in their countries, while ensuring that the patent system, which promoted the continued development and creation of new life-saving drugs, was protected. Finally, she informed the Council that her Government would be making a statement soon on this topic from the capital.

35. The representative of Kenya, speaking on behalf of the African group, said that the African group was disappointed that the Council could not achieve a consensus decision on the implementation of paragraph 6 of the Declaration that would have allowed countries with no or insufficient manufacturing capacities for pharmaceutical products to make effective use of compulsory licensing under the TRIPS Agreement. She said that although the African Group had expressed their concerns on the Chairman's 16 December text, they had agreed to support it on the understanding that other Members would join the consensus. She appreciated that some Members had fears that the mechanism in this text would be interpreted in a manner that would be subject to abuse. However, she thought that these concerns were not well-founded because, first, applications for a compulsory licence under this mechanism would have to be considered by relevant governments that would address them in the context of public health policy and would act in light of the spirit of the Declaration. Second, under the terms of a TRIPS-compliant compulsory licensing system, governments had to first negotiate with patent right holders to obtain a licence on reasonable commercial terms. Apart from respecting their WTO commitments and national laws, governments also had to take into account the need to maintain a conducive investment environment and to build strategic partnerships with the pharmaceutical industry. Third, both developing and developed countries had agreed to the safeguard provisions in the Chairman's text to prevent the abuse of the

mechanism. Fourth, in their further efforts to contribute to the building of consensus and to allay the fears and concerns of those who still remained outside the consensus, a group of developing countries had agreed to work with the Director-General in finding a formulation that might help bring the remaining Members into the consensus. In fact the African Group had worked with the Director-General on a draft statement and even reformulated it as a text.

36. Furthermore, she expressed her concern about the US proposal to put a footnote in the Chairman's text. She said that this footnote would have the effect of redefining and limiting the scope of public health problems as reflected in paragraph 1 of the Declaration. In her view, the Declaration had been a product of intense negotiations and remained a significant milestone in tackling public health problems. Any attempt to redefine the Declaration would unravel the delicate balance achieved at Doha. Therefore, she urged Members to join the consensus in the spirit of multilateralism and humanitarianism.

37. The representative of Brazil said that the adoption of the Declaration had been a landmark victory for all WTO Members, namely developed and developing country Members. In accordance with the mandate set out in the Declaration, his delegation had engaged in the discussion on the public health issue with great flexibility and was willing to join the consensus on the Chairman's 16 December text. However, the consensus could still not be achieved because of the difference in perception among Members over the Doha mandate. In his view, it was not in the purview of the Council to re-examine what had been agreed upon in the Declaration. In other words, the Council should work constructively to find a solution to public health problems in paragraph 6 of the Declaration rather than re-examining the scope of public health problems in the Declaration. The Council should not underestimate the possibilities that the Declaration had offered for the promotion of access to medicines for victims in many developing and least-developed countries, especially those suffering from HIV/AIDS, tuberculosis, malaria and other epidemics.

38. The representative of India said that, as one of the promises made to developing country Members at Doha, the Declaration was the most important single achievement of the Doha Ministerial Conference. It sent a clear message to the world that the WTO was not insensitive to human suffering and that the WTO system could respond expeditiously, suitably and adequately to public health problems afflicting many developing and least-developed countries. He said that it was time for Members to reflect on the progress made on those promises. Paragraph 6 of the Declaration, which dealt with the difficulties faced by Members with insufficient or no manufacturing capacities in the pharmaceutical sector, was particularly relevant in the case of the Declaration. The current situation in the Council made him wonder whether the Council was discussing how to facilitate access to drugs at affordable prices to poor people or how to restrict the scope and ambit of the intended solution. It seemed that commercial interests had become increasingly predominant. He indicated that developing and least-developed countries had all along been engaging with a view to finding a solution acceptable to all Members. Therefore, it was in the spirit of compromise that his delegation had accepted the Chairman's 16 December text. In conclusion, he said that the whole world was waiting expectantly for the outcome of the Council's exercise. It would be difficult to justify why the WTO could not rise to the occasion and satisfactorily respond to the crises being faced in several parts of the world on account of public health problems of the kind described in the Declaration. At stake were the hopes of millions of people to get access to medicines at affordable prices and, therefore, it was imperative that the Council find a solution soon.

39. The representative of China supported the statements made by the African group, Brazil and India. He said that although his delegation was not fully happy with the Chairman's 16 December text, it recognized, with great flexibility, that it was a fairly balanced text and any change to the text would disturb the balance. Furthermore, he noted that, after one year's effort to find a solution to paragraph 6 of the Declaration, the focus of the discussion had turned to paragraph 1 of the Declaration, namely the scope of diseases. In his view, the scope issue had been agreed to and adopted by the Ministers at the Ministerial Conference. He said that the instructions from his capital

were clear that China would be opposed to any departure or dilution of paragraph 1 of the Declaration as it would totally disrupt the balance in the Chairman's 16 December text and Members had no mandate to do so. Finally, he urged Members to adopt the Chairman's text on this humanitarian issue.

40. The representative of Malaysia said that his delegation had been willing to go along with the Chairman's 16 December text with certain caveats that the balance in this text should not be upset. He believed that the Council's report to the General Council should cover some outstanding issues which some delegations, including his own, had particular interest in. In this regard he said that if there were to be a re-opening of the discussion on the Chairman's 16 December text, there should be flexibility to allow those delegations that had problems with this text, including his own, to come up with a more balanced text.

41. The representative of Canada expressed his disappointment that the Council had missed the deadline set out in the Declaration. He said that although the Council had not had all the answers to the problems posed, it had endeavoured to make the solution a little more palatable. In his view, there seemed to be harsh criticism aimed at the WTO and he hoped that the Council could take the criticism constructively and redouble its effort in the matter. Furthermore, he thought that the Council could learn some lessons from the discussion and that was, perhaps, the silver lining. One lesson was related to the issue of the scope of diseases, which had been discussed extensively in the Council. Some Members believed that protection of intellectual property was necessary for continued research and investment into finding new drugs, and that a one-sided interpretation of the Chairman's 16 December text would serve to undercut their efforts in this regard. Thus, they had expressed a legitimate concern on this issue. Meanwhile his delegation had tried to articulate, not defensively but honestly, that the Council could not put all of the various diseases in the solution since, in his view, Members did not have the same understanding of the Declaration. He said that although the Declaration was the result of great effort and joint action by Members and had been meant to address public health problems, Members still needed to distinguish between those that were truly epidemics and those that were not. He said that Members should bear in mind that they had to legislate progressively and could not afford to only be guided by the lowest possible common denominator that might or might not accrue. Members needed to account for this so-called frivolous request because they could not allow themselves to be placed in a position of not acting on HIV/AIDS, malaria, tuberculosis or the other epidemics.

42. Another lesson, he thought, was that Members recognized and accepted that all politics were local and all pressures had started at home. He noted that Members had been under particularly crucial pressure when they dealt with an industry which was great, innovative, creative, powerful, well-financed and politically positioned. At the same time, Members also needed to find a balance between the local politics and multilateralism. Furthermore, he said that notwithstanding the legitimate concern that his delegation had had in the previous informal Council's meeting, it was prepared to join the majority of Members, in the spirit of compromise, and stand together with what these Members had been prepared to live with in the Chairman's 16 December text. He thought that Members would have to find a balance between what all those countries standing together meant relative to all local politics. In his view, the Council had achieved a major part of its task where all Members were able to close every part of the Declaration and accept it as a compromise except for one area for some Members. Thus, Members had to be careful about how they could balance their local pressures with multilateral aspirations in the WTO.

43. In conclusion, he said that his delegation would continue to expend every effort that it possibly could with the Council in the days and weeks ahead. His delegation did not pretend that the discussion in the Council would be easy because Members understood how fragile it could be. He hoped that the window of opportunity to the Chairman's last text was a long window that allowed Members to go over that goal line and that Members could stand together on the Chairman's text.

44. The representative of Argentina said that her delegation had serious doubts about the effective operation of the system being proposed to Members in the Chairman's 16 December text and sought to find the true benefits which could derive from the proposal when Members balanced against the burdens and the restrictions involved. She said that her delegation had some concerns on this text, especially paragraph 6(2) regarding the desirability of harmonisation of intellectual property rights standards. However, after listening to the statements made by some Members, particularly the African Group, and humanitarian exhortations, her delegation had been ready to make its position more flexible and to lift its serious reservations and go along with the consensus that existed on the text. However, her delegation believed that the discussion on the scope of diseases had been closed in Doha and should not be re-opened. If the Council was going to re-open the discussion on this issue, her delegation would insist on some reservations it had put forward at the Council's meeting on 29 November 2002. These reservations included those on the differentiation made between least-developed and other WTO Members, on information to be provided through notifications and on the legal mechanism.

45. The representative of the Philippines said that the Declaration was the crowning glory of the WTO's contribution to global welfare and humanitarian concerns, especially for those who were gravely afflicted by the scourge of epidemics and other public health problems. However, it was disappointing that the Council had been unable to resolve a simple issue of implementation thus far. In his view, the Council's mandate was only to find an expeditious solution to the problems faced by Members with insufficient or no manufacturing capacities in the pharmaceutical sector and it was not mandated to re-negotiate the Declaration on the issue of the scope of diseases. The Declaration stood by itself and had been extensively discussed and decided by consensus at the Doha Ministerial Conference.

46. Furthermore, he reminded Members that there remained some other problems in the Chairman's 16 December text, such as the issue of safeguards in paragraph 4. He said that there seemed to be an attempt to manage the discussion solely on the issue of the scope of diseases. In his delegation's view, indifference towards other issues should not be construed to mean that there would be no further discussion on them in the Council. In this regard, he reiterated the statement made by Malaysia that the issue of safeguards remained an outstanding issue and must be addressed if the Council was to re-open the discussion.

47. The observer from the Holy See said that the Declaration was considered a significant breakthrough in reconciling two different governments' values in the world, namely the value of the government which permitted rapid response to urgent public health problems and the government which respected the creativity and innovative possibilities offered by a rules-based intellectual property system. He hoped that the Declaration was seen as a victory for all Members, especially for the poorest countries and for those who were exposed to public health problems. He reported that Pope John Paul II, in his message on the theme of peace, had stressed that the promises made to the poor must be respected and the implementation of those promises was a moral problem. Furthermore, he said that protection of private property and intellectual property was important, but there was a social mortgage on all private property including intellectual property. The impetus which the intellectual property rights system offered to creativity and innovation, especially in the field of public health, was to serve the common good of humanity. A positive decision on public health problems would have been a very important decision during this season. Finally, he hoped that a sense of common responsibility would help Members ensure that what had been achieved so far would not be lost and that a positive decision would be given to the global community as early as possible.

48. The representative of Botswana associated his delegation with the statement made by Kenya on behalf of the African Group and also endorsed the statements made by Brazil, India and China. He said that a solution to public health problems would have more impact on Africa than on all the other countries. Therefore, he urged Members to demonstrate heightened political will and determination to reach consensus on this issue which had significant moral and humanitarian dimensions. He also

pointed out that while the Council remained focused on the critical issue of the scope of diseases, it should avoid a roll-back on the significant achievements that it had already made.

49. The representative of Indonesia recalled that when the public health issue had been raised in 2000, his delegation had undertaken the work on the premise that right to life and a reasonable standard of physical and mental health, namely prevention and treatment of diseases, was a fundamental human right of people. His delegation believed that Members should not and must not stand back in helplessness while people suffered and died of diseases to which there were possible medicines because they were deprived of access to these medicines simply because they were poor.

50. Furthermore, he said that his delegation recognized that the solution in the Chairman's 16 December text was only a compromise rather than the best solution and it still had serious concerns, especially with respect to paragraph 4 and the Annex. However, his delegation was not willing to stand in the way of consensus because the countries most in need of the solution had acknowledged that the solution in the text might be helpful in managing their public health problems. Finally, referring to the statement made by Brazil, he said that his delegation took comfort in the fact that the Declaration remained intact.

51. The representative of Chile said there were two dimensions of public health problems in the Council: one was ethical, and the other was humanitarian. In his view, the Holy See's intervention had expressed these two dimensions very well. He said that since many people hoped that the WTO would undertake to respond to public health problems, lack of such action would have negative implications for the WTO's work and image and further support. Therefore, he urged Members to assume their political responsibility and respond to the problem. He also indicated that since it was only one Member that had been unable to join the consensus for various reasons, the political responsibility for failure should fall on that Member and not on all or the majority of Members. Finally, he hoped that the break in the next few days would enable Members to reflect calmly and would permit the United States to come back and join the consensus in order to respond to this ethical and humanitarian issue.

52. The representative of Thailand said that the public health issue was crucial to the WTO. She was disappointed that, despite the tireless effort by the Chairman and the Director-General in trying to find a solution to this issue, the Council had been unable to reach any conclusion. Nonetheless, she said that it was not the end of the world as there was still hope that Members would continue to work together. Furthermore, she said that although her delegation still had concerns on several elements in the Chairman's 16 December text, this text should be preserved in its entirety. She added that it was in the Council's interest to further explore ways and means to bridge the gap between divergent views in order to provide a level of comfort while advocating the need for the protection of public health for all Members.

53. The representative of Cuba said that as regards the need to respond to public health problems and the need to identify the achievement in the Council, the discussion in the Council should have been more transparent and straight forward. Reverting to the Chairman's 16 December text, he said that the Council had departed from the elements set out in the Declaration, particularly in its paragraphs 4 and 5. However, given the urgency of the need to find a solution as requested by the developing countries, particularly Africa, his delegation had been prepared to give its approval and go along with the consensus. Furthermore, he said that any attempt to isolate and lead developing countries away from the path that had been outlined in the Declaration could be extremely dangerous for the whole process that Members were engaged in. If what had been agreed upon was not to be respected and if there was any attempt to draw further away from that text, the overall credibility of the WTO in the current negotiating process would be at risk. He indicated that it was important for all Members to be aware and recognize when the discussion resumed in January 2003 that the text submitted by the Chairman at his own responsibility already represented major concessions for many countries. Therefore, re-opening the discussion on that text could have serious repercussions as it

would not be acceptable to depart further from the path traced for the Council in Doha. He said that his delegation would submit, in the near future, its written proposal that could be distributed to the General Council.

54. The representative of Pakistan joined other delegations in expressing his delegation's disappointment at the Council's inability to reach consensus on the public health issue. He said that reaching consensus on this matter would have been good for Members' consciences and would have boosted their morale and speeded the pace of negotiations elsewhere. It could also have sent a good message to the public at large as well. He said that his delegation had had serious concerns on at least two paragraphs of the Chairman's text. However, in view of the Chairman's explanation, and the slight change, his delegation was willing to go along with the consensus. In conclusion, he said that all Members needed to make some sacrifices in this manner and hoped that progress would be made in 2003.

55. The representative of Peru shared the concerns expressed by some Members. She said that her delegation was willing to be flexible and go along with the consensus despite the concerns it had had on some elements in the Chairman's 16 December text. Her delegation hoped that consensus would be achieved on the basis of this text as any changes to it would reopen the discussion on the whole text.

56. The representative of Hungary said that his delegation was also disappointed that despite the tremendous work, the Council had been unable to meet the deadline set out in the Declaration. He said that his delegation, like many delegations, had been ready to go along with consensus on the Chairman's 16 December text. Although his delegation endorsed this text, it still thought that it did not reflect its position in full. However, he believed that this text had struck a basic balance and offered a workable system. He added that the Chairman's 16 December text provided the Council the best shot at finding a solution by early 2003. He also hoped that the Council would be able to deliver on its mandate by the General Council's first meeting in 2003 through continued efforts by all Members. That was imperative not only because the solution was related to public health but also because failure to find an expeditious solution by early 2003 could have a serious negative impact on on-going negotiations in other WTO bodies. He agreed with the delegation of Chile that this issue had an important political dimension. He also shared the view that Members and the WTO as a whole could not afford to be seen as being insensitive, unable and unwilling to find a speedy and workable solution to the issue in paragraph 6 of the Declaration.

57. The representative of Hong Kong, China shared the disappointment expressed by other delegations. He said that Members could not help having a sense of failure although they had achieved much and were close to finding a solution. He said that Hong Kong, China did not have much manufacturing capacity in the pharmaceutical sector but it had neither defensive nor offensive interests in this issue. His delegation did not envisage utilizing the solution except under highly unexpected and exceptional circumstances. However, Hong Kong, China was not a disinterested party since it had recognized that this issue was extremely important and would greatly benefit the public and was also vital for the WTO's credibility. For these reasons, his delegation had all along been an active player in the exercise and had tried to be constructive and flexible.

58. With regard to the debate about whether there should be prior exclusion of Members as eligible importing Members, he said that his delegation maintained that the only criterion under the mandate was no or insufficient manufacturing capacities. His delegation had volunteered, as a gesture of good will, to opt out of the solution except under national emergency or other circumstances of extreme urgency. He agreed to the suggestion to make a declaration or statement to that effect once an agreement on this issue was reached. Turning to the issue of safeguards, he said that his delegation would have preferred more clarity on what exactly the measures expected to be taken by importing Members were to prevent trade diversion under paragraph 4 of the Chairman's 16 December text. Although his delegation was not completely satisfied with this text, it was prepared to accept the

whole package in the spirit of good will. In his view, the Chairman's 16 December text represented a careful and delicate balance and any attempt to change certain parts would risk unravelling the overall balance. He hoped that the time ahead would provide Members with an opportunity to reflect on their positions and move forward in the best and most expeditious manner. He urged all Members to redouble their efforts in 2003 to enable the Council reach an early solution on this issue.

59. The representative of Chinese Taipei hoped that a consensus could be reached once the Council's meeting was resumed in order to give the public a message that the WTO was a place where Members could solve problems to the benefit of society.

60. The representative of the European Communities said that a great deal of work and effort had been expended in the process which should not be lost. In his view, any kind of unravelling of the Chairman's 16 December text would be extremely dangerous. He also expressed disappointment that, despite the hard work and the political importance of this issue, the year had not ended as hoped. However, his delegation was ready to return to this issue with new resolutions in 2003 and work with the Chairman to find a solution that would be satisfactory to all Members.

61. The representative of Japan shared the disappointment that the Council could not achieve concrete results due to the extreme difficulties Members had faced in trying to arrive at a balanced solution. This balance, on the one hand, should address the humanitarian concerns of people who were dying or suffering and having no access to affordable medicines, and, on the other hand, should maintain the rules-based multilateral trading system which helped drive growth of trade necessary to alleviate poverty. In other words, Members were called to balance their warm hearts and cool minds. The Council had amply witnessed the warm hearts in Members throughout the process of discussion. The Council had also been pulled back by the cool minds to ensure that the regime Members were attempting to create would enable future generations to meet potential calamities. In any case there was still a long way to go. He hoped that the year 2003 would bring new creativity to bridge the gaps so that the seemingly divergent needs of Members' hearts and minds would be happily reconciled. His delegation was prepared to continue working based on the results achieved so far until consensus and an agreement was reached.

62. The representative of Switzerland said that his delegation was disappointed by the current situation faced by Members. He said that the reasons cited by other delegations for their disappointment such as the impact on the WTO's image and on on-going negotiations were secondary. He believed that the main reason for disappointment was that Members had not fulfilled the mandate set out in the Declaration to ensure that those in need of affordable medicines and without manufacturing capacity could take advantage of compulsory licensing under the TRIPS Agreement. In his view, it was Members' collective responsibility, namely the responsibility of all those who had participated in the exercise and had failed to bring it to a satisfactory outcome. One element of that responsibility was the early introduction of elements which were foreign to the original aim of the Declaration, which his delegation had regretted and tried to correct during the course of the discussion.

63. The representative of the Czech Republic said that, although all Members had shown their goodwill throughout the whole discussion and demonstrated a sincere desire to find a solution to the public health issue, the complexity of this issue prevented the Council from meeting the deadline given by Ministers in Doha. He shared other delegations' sentiments of frustration that the Council had not reached a consensus. However, his delegation remained confident that an agreement was within the Council's grasp because the remaining gaps were not irreconcilable. He reaffirmed his delegation's commitment to the Council to make effort to find a solution. He also said that his delegation was aware of the cost and implication of long and complicated discussions on the small delegations and it would ensure that the Council would not go that far. His delegation was also aware of the suffering of those countries from public health problems; however, a solution being sought in the Council was one tool to help them overcome the problems rather than a final or only solution.

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

D. ISSUES RELATED TO THE EXTENSION OF THE PROTECTION OF GEOGRAPHICAL INDICATIONS PROVIDED FOR IN ARTICLE 23 TO PRODUCTS OTHER THAN WINES AND SPIRITS

65. The Chairman recalled that, in order to facilitate a more systematic discussion, he had prepared for the Council's September meeting a Checklist of Issues taking into consideration the points raised in the discussions at the Council's previous meetings, informal consultations and recent communication (document JOB(02)/117). At that meeting, the Council's discussion focused on the first set of issues identified in the checklist, namely "the legal issues relating to the differences between the general protection for geographical indications provided for in the TRIPS Agreement and the additional protection for geographical indications for wines and spirits". At an informal meeting held on 10 November 2002, the Council had continued its discussion on the first set of issues, and started its discussion on the second set of issues, namely "broader policy issues such as the impact on producers and consumers of any extended protection". The Chairman's intention was to continue the discussion on the second "basket of issues" at the present meeting and then take up the third one, namely "the administrative costs and burdens of the procedures associated with any extended protection and any other impacts on governments".

66. The Chairman recalled that, at its September meeting, the Council had requested the Secretariat to prepare prior to the present meeting a compilation of the elements contained in the oral statements made at the September meeting and the written submissions prepared for it, including the points made at the informal meeting of 10 November 2002 in relation to the first "basket of issues". The representative of the Secretariat said that he regretted to inform the Council that the Secretariat had not been able to complete and circulate the compilation. As had been discussed at the Council's last meeting, the Secretariat faced structural capacity problems in keeping up with the ever-growing workload in the Council. Secondly, the Secretariat had, like delegations, given priority to the paragraph 6 negotiations in the period since the last Council meeting, which had been held just over two months ago. Thirdly, the Secretariat staff had been working to rule in the recent weeks. Although this had not applied to the paragraph 6 work, it had been applied to all other work of the Council.

67. The Chairman recalled that, at its meeting in June, the Council had requested the Secretariat to circulate to Members the report of the eight session of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), held on 27-31 May 2002, once it became available. This report had been adopted by the SCT at the Committee's meeting held on 11-15 November 2002 and was being circulated in document IP/C/W/391.

68. Turning to the second basket of issues concerning broader policy questions, such as the impact of extended protection on producers and consumers, the Chairman said that, although the Council had already started the debate on these issues at its informal meeting of 10 November 2002, all delegations should feel free to address any of the matters relevant to this set of issues. As to producers, he said that there were two sets of producers whose concerns could be examined. First, those that produced the goods in the area that was designated by the term that benefited from its enhanced protection: to what extent would these producers benefit from such enhanced protection in the marketing of their goods? Second, those producers who could be prevented from using the term in question: to what extent would they be adversely affected in the marketing of their goods and what kind of adjustment costs/burdens would they be faced with? With regard to the impact on consumers, he said that there could be a need for further discussion to establish the relative importance of the claimed benefits from greater clarity in the geographical origin of the goods against claimed confusion and higher prices that would arise from disruption to existing marketing practices.

69. The representative of Switzerland said that producers within designated geographical areas that produced goods protected by a GI would benefit from extension because the use of a GI on goods not actually originating from the place indicated by it would be prohibited even when a "delocalizer", such as "made in", "imitation", "style" or "type", was added. Consequently, legitimate producers would no longer need to fear that their GIs would become generic over time by such misuse on other products. As to enforcement, they would no longer need to bear the onerous and costly burden to prove to the court that the illegitimate use of their GIs had misled the public or that such use constituted an act of unfair competition: it would be enough to prove that goods illegitimately bearing the GI in question did not have a proper origin. Such improved legal security at the multilateral level would reassure producers to use GIs as an efficient marketing tool. Moreover, it would constitute an incentive for producers to market their goods internationally, thus promoting international trade.

70. He noted that delegations critical of extension were concerned that extension would necessitate substantial re-labelling of products by producers outside the designated area, which would result in administrative costs and consumer confusion. However, the proponents had repeatedly said that such re-labelling would not be necessary because the exceptions contained in Article 24 would continue to apply as they presently applied to GIs for wines and spirits. These exceptions would take due account of prior good faith use of GIs for products without the relevant origin. If, however, such use had taken place in bad faith, with the intention to free-ride on the reputation of a GI, the Article 24 exceptions would not apply. In that case, the obligation to re-label a specific product seemed an appropriate consequence. The economic long-term benefits of extension would, in any case, outweigh the costs of a few cases where re-labelling was necessary.

71. Another concern raised by delegations critical of extension was that, in the future, producers outside the designated area would have to perform extensive examinations to determine whether they would be allowed to use a GI. However, in his view, extension would eliminate legal uncertainties, because producers and traders would need to answer only one simple question when deciding whether to use a GI on a product: did the product come from the place and have the given quality designated by the GI in question? This was easy to examine and would not result in any additional costs.

72. The representative of the Australia said that a range of broader policy issues existed that were neither dealt with in the Checklist of Issues nor discussed by the TRIPS Council. It seemed to him that the first policy issue would be whether any new or extended IP rights should be attached to food and other like products. IP rights were normally granted to those who had discovered or created something. Protection was given to creators, scientists, inventors, authors and researchers in order to reward them for having come up with new products, new processes and new works of art. At the same time, they, and their investors, were given an incentive to continue doing so. By protecting these IPRs, governments were in effect rewarding them with a monopoly for their creative work. But the important question worth asking was whether governments should grant similar monopoly rights based on an accident of history where there would be a geographical connection to a product. He had serious doubts about such a proposition.

73. He believed that Members should be very cautious about the examples that had been cited by demandeurs to show that the adoption of a GI had led to market benefits. None of the examples had showed that GIs were the determining factor in the success of a product. The causal factors of any increase in market share could be many and varied. For example, a full and proper analysis would have to weigh up the relative contribution of various factors in this regard, such as exchange rate movements, the relative efficiency of distribution channels for different products, the extent to which consumer preferences were driven by a company, a country of origin, reputation distinct from the GI itself, and the quality, quantity and accessibility of competing like-products over the period being measured. It would, therefore, be very difficult to see how many of the statistics presented could convincingly attribute increased prices and market share to a GI. A dramatic increase in New World wine exports to the EC market could not be explained on the basis of the benefits of the higher level of GI protection accorded to wines as most of these countries, and, until very recently, most of the

New World wine suppliers, had not had bilateral agreements on the protection of their wine GIs in Europe and, therefore, had not benefited from the same level of protection as European producers. Rather, the success of New World wine exports were attributable to strong competition on price, on quality, and on effective marketing. The export success of the Australian wine had been primarily due to the fact that it was a quality product that had been offered at a competitive price, effectively marketed as Australian, and assisted by a domestic regulatory structure that supported international competitiveness for Australian industries.

74. However, when talking about wine being successfully marketed as an Australian product, one should not forget that the European Communities were strongly opposed to the concept that "Australia" would be regarded as a GI. He was convinced that many of the terms Members sought to protect as GIs would, at the end of the day, not receive such protection. Countries would find out that the terms they wished to protect did not fall within the definition contained in Article 22.1. Australia had raised the specific issues of country names and blending as examples of the differences between a theoretical understanding of what Article 22.1 could cover and what some countries interpreted that provision to encompass when it was implemented domestically. The question of what would or would not fall within Article 22.1 was fundamental to assessing what benefits producers would obtain from increased protection in export markets.

75. The exceptions contained in Article 24 provided an important balance *vis-à-vis* GI rights. These exceptions recognized that there were other legitimate uses of terms claimed as GIs and that such uses should be allowed to continue. Many terms that had been advanced to date were likely to fall within these exceptions. The Czech Republic had noted at the Council's last meeting that the word "pilsner" was a generic term. He agreed with this assessment, and said that it would be virtually impossible to claim protection for this indication. But the same would go for many other products which several Members of the Council believed they would be able to protect, one example being "feta cheese". Many of the terms demandeurs had been advancing as worthy of protection had been used in international markets for decades and producers of those goods had failed to do anything to protect them or to enforce their rights. In the case of the EC markets, extended protection would not provide the level of protection currently afforded to EC producers. He referred to paragraph 3 of document IP/C/W/353, in which demandeurs stated that the proposal on extension would only be designed to have effect for the future and would not affect existing uses of names that coincided with protected GIs to the extent that they had been in conformity with Article 24. Did this mean then that the producers of terms such as "basmati" and "Ceylon tea" would not expect to obtain protection at the higher level?

76. Continuing, the representative of Australia said that he sought to focus Members' attention on implementation of the existing provisions. Members' failure to fully and appropriately implement existing obligations was leading to the misconception that existing levels of protection were inadequate. Further, the failure of many Members to protect their GIs domestically would lead to a refusal by others to recognize these GIs in export markets. As noted in a paper Australia had sponsored on the implications of extension (IP/C/W/360), it appeared that "basmati rice" and "jasmin rice" were still not protected domestically, leaving it open to other Members under Article 24.9 to deny protection on the basis of lack of protection in the country of origin.

77. Producers also needed to be aware that establishing rights to a GI domestically would entail costs. Domestic producers wishing to establish a GI needed to mobilize other producers in the region to create a consensus. As the example of "feta cheese" in the European Communities demonstrated, reaching intra-domestic consensus could be a difficult process. Producers would need to settle the territorial limits within which the essential link to a quality, reputation or other characteristic of a product would apply, and also decide what would be the criteria that would apply in determining when a GI could be used. These processes could cause conflicts between domestic producers that would need to be adjudicated. Such efforts would also likely require government lobbying, studies to demonstrate the geographical boundaries, as well as defending claims by producers who would be left

outside of the boundaries. Such costs could not be easily borne by developing countries' producers or industries, which were dominated by small and medium size enterprises.

78. Discussions had also overlooked the fact that producers could not expect to sit back and do nothing to protect their rights. A higher level of protection would not change this. Article 23.1 would still require Members to take action to enforce their rights and this would result in costs. This was entirely consistent with the protection of other types of IPRs. Producers benefiting from those rights must bear the costs of protecting them. Thus, the extent to which producers would actually benefit from a higher level of protection would also depend on the extent to which producers would be willing and able to enforce their rights.

79. Demandeurs had claimed that the higher level of protection would not entail significant costs to producers. The representative of Switzerland had said that the costs of re-labelling were quite immaterial. Australia's experience was quite to the contrary. Producers prevented from using terms claimed as GIs were subject to significant adjustment costs, including the costs of re-labelling. Given that the TRIPS Agreement did not contain any transitional period for the phasing out of claimed GIs, producers using such GIs could be subject to immediate claims to change labels. These costs would likely fall more heavily on small and medium sized enterprises that were producing goods for niche markets. Additionally, such producers would be subject to sanctions such as fines or court action. Furthermore, there would be the costs of defending their right to continue using a term. Claimants for extension seemed to assume that producers would and should automatically cease to use terms that were the subject of a GI claim under the higher level of protection scheme. This assumption ignored commercial reality. Producers who were subject to such claims would likely be willing to spend significant resources in defending their right to continue using such terms on the basis of the exceptions contained in Article 24. The Danish Dairy Board member and the Spanish wine producer who had talked at a WTO Symposium in May 2002 about their experiences defending their right to continue using the term "feta" for cheese, and a family name for wine, knew what sort of costs they had incurred in their defence. The parties involved in these Danish cheese and Spanish wine cases incurred many costs, such as costs with government lobbying, court actions, consumer surveys, the production of extensive information concerning domestic rules, statistics, market profiles, etc.

80. Furthermore, there were the costs of undertaking a country-by-country analysis of every export market. Producers would have to undertake such analysis for every export market to which they would export, or were planning to export, in order to determine whether they would be able to continue to use existing packaging and marketing material in those markets. This would be very expensive and would constitute an additional burden, particularly to small and medium sized enterprises and producers not supported by a strong collective industry structure. If producers failed to do this kind of research they would seriously risk subjecting themselves to sanctions or court actions in export markets accusing them of breaching another producer's GI. As to the question of the cost of developing a new name for a product, he said that a producer who was subject to a successful claim to cease the use of a GI would also have to invest resources in developing a new name for that product and in marketing that new product to avoid losing market share. These costs should not be underestimated, particularly when there was a need to launch a marketing campaign in an overseas market. There were also the costs associated with the loss of reputation and market share.

81. As to the implications for consumers, he said that, given that Article 22 protection already provided protection against misleading consumers, any increase in the level of protection to that contained in Article 23 would do nothing to enhance the level of information that consumers already had concerning the origin of a product. Extension would not therefore entail any cost-savings to consumers. Consumers' search costs would not be reduced. On the other hand, extension would likely entail increased costs to consumers. The costs with re-labelling, product name development and advertising that some producers would incur would undoubtedly be passed on to consumers through higher prices. Furthermore, under extension, there would be a limited number of producers and, as a consequence, consumers would only have available "Greek feta cheese" rather than, as in Australia,

also "Danish feta cheese", "Bulgarian feta cheese", "Australian feta cheese", etc. Where were the benefits to consumers in that case?

82. The representative of Canada said that the Council's discussions on legal issues had clearly shown the lack of a common understanding of what constituted a GI. She stated that the definition set out in Article 22.1 was very broad and its elements were still open to interpretation, as demonstrated by the recent discussions on the relevance of country names, traditional expressions, and the objective link that must exist between the origin of the good and its quality, reputation or other characteristics. In this context, it would be very difficult to properly assess the benefits or the overall economic impact that extension would have on producers and consumers. In fact, even if one set aside these legal uncertainties, the economic value and practical benefits of GIs for all economic agents were far from being known or understood. She agreed with those delegations which had said at the Council's September meeting that an assessment of the economic impact extension would have on producers, distributors and consumers would be required in order to better evaluate the actual need for extension.

83. An assessment of the economic impact of extension for producers could not be decoupled from the impact it would have on consumers. Consumers and producers were indeed intrinsically linked through the market, i.e. via the interplay between offer and demand. It was the demanders' assessment that an increased consumer demand for quality goods would secure better prices for goods bearing a GI and thus ensure higher producer benefits. Assessing the impact that extended GI protection would have on producers thus required a prior assessment of the GI's ability to generate a different consumer behaviour, i.e. an assessment of the role it would play in differentiating products. What was still to be determined was the impact a GI would have on consumer purchasing.

84. Examining this issue, her delegation had found a number of recent European studies focussing on the effectiveness of GIs. The European Union, for example, had set up the DOLPHINS project ("Development of Origin Labelled Products: Humanity, Innovation and Sustainability"). The DOLPHINS project, a concerted action to enquire into agriculture and agro-food's origin-labelled products and, in particular, to look into the link existing between GIs and consumers, had as one of its three stated objectives "to provide relevant recommendations to the EU to support the negotiations regarding the protection and promotion of origin-labelled products in the forthcoming WTO Round". Her reading of the DOLPHINS project's conclusion suggested that GIs were not working very well in terms of clarifying consumer understanding. According to these experts, the European directive on GIs was not working because GIs were not used extensively by consumers to differentiate between products, since they did not recognize them. Moreover, the consumers that did recognize GIs did not rely on GIs alone to provide them with the information on the origin and qualities of goods. Consequently, consumer demand for goods bearing a GI did not rise and prices, in reaction, remained unchanged. Therefore, producers were not necessarily benefiting from their use of a GI. She said that her purpose in calling this work to the Council's attention was not to demonstrate that GIs were not useful, but to bring a better understanding of their benefits and limitations. Before supporting an increased level of protection for GIs and before developing a domestic *sui generis* system of protection for GIs that would be costly and burdensome, Members should think again about what would really be at stake in order to determine what the actual gains (as opposed to perceived gains) and the real costs were.

85. The representative of Canada recalled that, at the Council's informal meeting, the representative of Switzerland had used the French appellation of origin "Piment d'Espelette" as an example of the success a GI could have in fostering increases in production. Looking more closely at this example, her delegation had found that, indeed, the production of this specialty pepper was said to have doubled since it had been granted an appellation of origin, a fact easily verifiable by visiting the producers' website. According to this website, the production of "Piment d'Espelette" had doubled between 1997 and 2000, but, interestingly enough, the appellation was only effective on 1 June 2000, i.e. two years after the success had started to be seen. One could thus question which role the GI (or, in this case, the "appellation d'origine contrôlée"- A.O.C.) had played in the success of this product.

The producers also clearly acknowledged on their website the role that the European Communities, their member States, their region and their departments had played in providing financial support without which the protection of "Piment d'Espelette" would never have been achieved. Another issue that this example raised was that developing a GI that would meet the definition of Article 22 would involve investments in time and effort. It took close to thirty years for the producers of "Piment d'Espelette" to finally acquire this A.O.C. in France. This example clearly showed that GI protection could not be achieved in a short period of time.

86. She recalled that, at the Council's last meeting, the representative of the European Communities had explained how they provided national treatment to nationals of third countries. Her delegation continued to find the European Communities' interpretation of TRIPS very surprising. The European Communities had indicated that they believed that registration systems should be primarily aimed at the identification of domestic GIs. Consequently, nationals from third countries would not benefit from the European system of GI protection but should rely instead on the labelling foodstuff legislation "which supplement the European Communities unfair competition laws and provide, to all foreign GIs, the minimum level of protection required by Article 22 against consumer deception". Surprisingly, this protection was very close to systems of GI protection that the European Communities qualified as inadequate. Were they saying that this system was not good enough for their own GIs but would be for those from third countries? Furthermore, she noted that the European Communities emphasized the "importance to demonstrate a link between the protected quality, reputation or other characteristic of a product and its geographical origin". In relation to this, she told that, in the course of its bilateral negotiations with the European Communities, Canada had asked the European Communities to supply it with this kind of information concerning the wine names they wanted to protect in Canada, but they had refused to give this information to Canada, noting that they had already registered the names in the European Communities.

87. The representative of New Zealand agreed with Australia's comments relating to producers that manufacture goods in the area designated by a term that would benefit from enhanced protection and the question of the extent to which they would benefit from such protection in the marketing of their products in other countries. While recognizing the theoretical benefits that Article 23 protection would provide, she believed that producers would only benefit if there was a strong recognition for the protected term in other countries. Otherwise, they would face exactly the same marketing costs as other producers selling similar goods – extended protection for GIs would not overcome this.

88. Although the question in the Chair's Checklist of Issues was framed in terms of marketing products protected by GIs in other countries, it was important to recognize that one of the major incentives on the part of demandeurs was to increase the market share of such products in their own countries. To the extent that extended protection would increase the market share of such products by forcing the re-labelling of competing products from other countries, the producers of those products would benefit. But the corollary to this was that while they could get a better situation in their own markets, they could be shut out of foreign markets. And while she recognized the point made by the representative of Switzerland that, under Article 23 protection, producers would not have to take the apparently onerous step of proving that another producer's use of the term was misleading, she said that they would still have to prove that the term, which they believed was a GI, was in fact valid and that the Article 24 exceptions would not apply. As others had already pointed out, this would not necessarily be a simple task.

89. As to producers from outside the area indicated by the GI and the question as to whether they would face costs in the marketing of their products and what kind of costs they would be faced with, she said that her country's own industry had informed her that the costs of this could well be substantial. They would include marketing costs associated with developing substitute terms and getting consumers to recognize them. The re-naming and marketing process would be complicated by the fact that, in many cases, producers would have to try and market what would appear to be "new" products (because they had different names), but without the benefits of those products actually

having any new characteristics. Other costs would include the loss of revenue, as prices would have to be lowered in order to encourage consumers to buy these "new" products, as well as the costs of alterations to the production and labelling processes. There would also be costs resulting from disruption to consumer relationships. If in one week one was selling to consumers "emmentaler" and in the next week it would be called "firm, nutty, light yellow cheese", then one could not expect to negotiate this change-over without disruption. And as Australia had noted, TRIPS did not include transition periods to allow producers sufficient time to adjust to this. Also, potentially, a loss of market access could exist, particularly into markets with quotas or tariffs that related to specific product types or product names. There would also be obvious costs depending on whether the extended protection would override pre-existing rights. Even the International Chamber of Commerce had recognized this, noting that the implications of extension, notably the interests of trademark holders, needed to be carefully studied.

90. Commenting on the costs and benefits to consumers, she said that, under extension, one would have a smaller number of producers making a particular product. It was basic economics that as the supply of the named product would fall, prices would likely rise and consumers would be worse off. Additionally, there was no guarantee that the quality of what was available to consumers would be higher. In fact, the quality could be even worse in a situation of lesser competition. Certainly there would be little incentive to improve upon a product. Consumers would also have diminished choice. Previously they were able to choose from a variety of brands of similar products, increasing the chance of finding a product that would meet their own needs in terms of quality, price and process. Alternatively, one could argue that consumers would not have a diminished choice but that they would have to increase their search costs to find their preferred price and quality combination since a crucial product descriptor would no longer be available to them. Either way there would be a cost to consumers.

91. A key principle of the United Nations Guidelines on consumer protection, developed by the UN Economic and Social Council, was that consumers needed to have access to adequate information so as to enable them to make informed choices according to their individual wishes and needs. Another guideline stated that government policies should seek to enable consumers to obtain optimum benefit from their economic resources. They should also seek to achieve the goals of satisfactory production and performance standards, fair business practices, informative marketing and effective protection against practices, which could adversely affect the economic interests of consumers and the exercise of choice in the market place. These principles seemed to validate the existing level of protection in Article 22 by recognizing the need for fair business practices while noting the importance of individual consumer choices and preferences.

92. She did not accept the argument that extension would lead to greater clarity in the geographical origin of products to such a magnitude that it would outweigh the costs she had outlined above. Her position derived from the fact that a high level of clarity for consumers was already provided for under Article 22 level protection. What consumer would be deceived by a label that clearly stated "feta made in New Zealand", thinking that it was "feta made in Greece"?

93. Consumers in some rich countries might well be prepared to pay the costs outlined above. But did this mean that consumers in all other countries should do the same? She hoped that those consumers would be prepared to spend an extra second or two standing in the supermarket checking where a product bearing a GI came from. It seemed a very small price to pay in order to ensure that less well off consumers standing next to them would still have the option of buying a similar product bearing a GI that would fit their own particular budget constraints. She also noted that the approach to consumer protection that extension would entail was quite at odds with consumer policies of a number of countries. New Zealand's system of food standards and regulation was designed in a way to give consumers maximum choice while protecting their right of choice and variety. Regulators should and would want to invest their time, energy and resources in making sure that products were safe. This objective had nothing to do with a geographic indication.

94. Concluding, the representative of New Zealand said that what had been asked from the Council regarding extension was inconsistent with the overarching objectives of the WTO and with the public policy directions being taken both by individual governments and by other international organizations. Finally, she asked the Secretariat to include in its forthcoming compilation the points raised by delegations under the second and third set of issues as well as the points that had been raised under the first, so as to cover the full range of issues being considered by the Council.

95. The representative of Japan, commenting on the broader policy issues in the Checklist's second basket, said that attention should be paid to the expected impact of extension on producers and consumers. If additional protection was to be made applicable to certain goods, this could, to some extent, contribute to the promotion of production, formation of appropriate trade practices, and protection of consumers. On the other hand, producers would have to bear new costs resulting from the necessary changes in product labels and repackaging. There were also concerns that consumers could be confused as a result of the change of product packages or labelling, which could lead to a downturn in sales of goods and, in the end, manufacturers would have to reformulate their marketing strategies. In order to make a fair assessment of the advantages and disadvantages that producers and consumers would face with extension, it was essential that Members engage in a concrete and pragmatic discussion on these issues.

96. The representative of the Unites States, associating himself with the interventions made by the representatives of Australia and New Zealand, said that it was not true, as stated in the European Communities' paper introduced at the June 2002 meeting, that the exceptions provided in Article 24 would mean that all geographical terms currently used in connection with WTO Members' agricultural, processed food, and beer industries could continue to be used even if their protection was to be extended. He did not want Members to have any false sense of security about what retaining those exceptions would mean. The availability of any Article 24 exception would have to be determined case by case in each WTO Member and, depending on the determination in each country, could make it necessary for a producer to vary its labels from one market to the next, or, as an alternative, to cease using a geographical term altogether in a particular export market, even though the use of that term would not mislead consumers. In either case, the costs would be considerable. Additionally, there was another reason why one could not take too much comfort in the existence, or the retention, of all the Article 24 exceptions. In his recent discussions with the European Communities' Agricultural Minister and other representatives of the EC, he had asked what the impact of extension on existing products would be, particularly the ones of concern to US consumers. He found out that while they would not seek to complicate or cancel the use of existing terms through the TRIPS negotiations, the EC delegation had said quite clearly that it was their intention to withdraw the use of terms through the agriculture negotiations. Hence, Members should not rely on the assertions concerning the continued use of geographical indications under Article 23-level protection.

97. The representative of Argentina noted that some delegations claimed that extension would provide more effective protection, and recalled that during the Council's informal meeting of 10 November 2002 there had been a discussion regarding a classic case of a Mexican spirit protected by Article 23 and recognized in a bilateral agreement. The GI of that Mexican drink was not able to enjoy such effective and exclusive protection that the Council had been told would be available under Article 23. Referring to the assertions by certain delegations that Article 24 exceptions would continue to apply, she said that one should bear in mind the position of the same delegations in the negotiations on the establishment of a multilateral system of notification and registration of GIs for wines and spirits. In that context, Members' ability to apply Article 24 exceptions under their national legislation and jurisdiction would be curtailed through an opposition procedure to be set up under the wine registry system suggested by those delegations. Echoing Australia's comments on the policy objectives of IP protection, she said that it would be difficult to see how this type of protection would be appropriate for GIs.

98. As to the second basket of issues, she said that there would be several costs resulting from extension, such as the costs to producers who would need to stop using a name they had been legally using. It would be important to ensure that there would not be unfair gains to persons who claimed the right to a certain GI. Someone who had used that name legitimately and created a market for a given product would be in a difficult situation if that market were simply handed over to the holder of the exclusive right under a legislation that was not in line with the legislation of the country where protection was being requested.

99. The representative of Chinese Taipei said that his delegation believed that any decisions made in the WTO should benefit all Members or, at least, achieve a balance of interests. Having reviewed and carefully examined the current proposals, he said that his delegation needed some statistics and quantitative analysis in order to be convinced that Members would benefit from extension. He hoped that demandeurs could provide the Council with prima facie materials or experiences so as to allow it to evaluate the potential effects of extension on existing legislation.

100. The representative of Sri Lanka associated herself with the statement of the Swiss delegation. On the question of the implications of extension for consumers, she said that some countries had argued that extension would imply search and transaction costs resulting from consumer confusion, from the need to rename and re-label products and from the disappearance of terms customarily used to identify products. She believed this reasoning was not justified. GIs served to identify a good as originating in the territory, region or locality of a Member where a given reputation or other characteristic of the good was essentially attributable to its geographical origin. Thus, GIs would help consumers to identify the true origin of a product they wanted to purchase and would also prevent situations where consumers could be misled as to the true geographical origin or the characteristics of that product. The extension of additional protection of Article 23.1 to include GIs for products other than wines and spirits and the prohibition of the false use of GIs in translations or accompanied by expressions would enable consumers to clearly and quickly determine whether the product they wanted to purchase did in fact originate from the territory referred to by the GI. They would also be able to confirm whether that product actually had the qualities, reputation and other characteristics that were essentially attributable to its geographical origin. Consumers would no longer be influenced in their choice by the use of GIs in combination with a de-localizer. They would, therefore, be entitled to have real choice based on correct distinctive indications. With the extension of the protection of Article 23.1 to include GIs for products other than wines and spirits, such use of de-localizers would no longer be allowed and this would help prevent consumer confusion.

101. The concern expressed by some Members whereby extension could lead to the need to re-label products and even result in the disappearance of terms customarily used to identify products had not been substantiated. The exceptions provided for in Article 24 of the TRIPS Agreement meant that indications which had been used in good faith or in a customary manner over some time, and for specific products, would not have to be abandoned. With extension, markets would not be closed to such products and they would not need to be re-labelled. These exceptions were the proof that the TRIPS Agreement provided for flexibility and offered a balanced solution for extended protection.

102. She noted that some Members had claimed that extension would have negative implications on trade. The argument set forth was that certain industries, in particular those in which GIs were particularly relevant, such as dairy and food processing industries, could find access to lucrative trade opportunities in new and emerging markets closed to their products and would incur costs due to the need to rename and re-label those products. As already pointed out, Article 24 provided for exceptions taking due account of the need to balance the interests of various parties that had an interest in GIs. However, the use of a GI for products not from the place of origin indicated and not qualifying for one of the exceptions in Article 24 should be prevented. Otherwise, free-riding would be encouraged.

103. The representative of the European Communities associated himself with the comments made by the representative of Switzerland. He said that, because his arguments were being contested, he felt tempted to read out his speaking brief even though he had said he was not going to do so. However, he would simply hand over his text so that it could be incorporated in the minutes of the meeting. He said he was amazed by the dismay with which certain delegations viewed GI protection, which had been said to be based on an accident of history. While he could understand that some delegations would have more sympathy for one kind of protection than for another, there was no need to reinvent a particular type of protection that had existed for a long time, not only in the European Communities but internationally as well. He noted that one delegation, continuing to refer to a bilateral agreement negotiated with the European Communities years ago, did not seem to acknowledge the value of that agreement. This was surprising, because the negotiations on that agreement had been quite time-consuming and, as usual, a bilateral agreement, as any other agreement, reflected a balance of interests for both parties involved. He also noted that the question of country names in the European Communities had been raised again despite the information provided in the past. It had been suggested that the Council concentrate on the implementation of the TRIPS provisions on GIs in national law. Because these issues were being dealt with under the agenda item on Article 24.2 and another delegation had volunteered to offer detailed explanations about its own legislation, his delegation had raised many questions about six months ago but had not yet received responses to them. Noting the comments made on the DOLPHINS project, he said that he would look again at the website and information produced by the DOLPHINS' group. He believed it would not be difficult to find information which would be different from that mentioned by the delegation which had cited the DOLPHINS project.

104. He was also puzzled by the claim that extension would not be consistent with the overall objectives of the WTO. It would be up to each individual delegation to decide what would be consistent with these objectives. Another delegation had said that GI extension did not reflect a balance of interests. He called Members' attention to the fact that a significant group of countries, developed and developing, had tabled a communication which set out in detail what objectives it was seeking by extending GI protection. He was pleased that the US representative had had the opportunity to meet with the European Commissioner for agriculture and that his message had been understood correctly. On the "Feta" case, he suggested that, in order to avoid repeating himself, he would hand over the text of his statement to be inserted in the minutes of the meeting.

105. The Chairman asked the Council whether it could agree that the written statement of the European Communities be included in the minutes, even though it had not been read out. The representatives of Australia and Paraguay said that it would be more appropriate if the European Communities would circulate it as a document. The Chairman asked the EC delegation whether it wished to circulate its statement as a document.

106. The representative of the European Communities responded that he would prefer to read his statement. He recalled that, at an earlier meeting, the representative of Australia had asked what kind of evidence the European Communities had to determine that "Feta" was not a generic name. It was evident that the generic character of a name must be appreciated in relation to the name, not the product. A name becoming generic meant that the name of a product which, although relating to the place where it was originally produced or marketed, had become the common name of a product. This needed to be proved. For example, with respect to "Feta", the European Communities had conducted a consumer survey in which more than 13,000 consumers in twelve EC member States had been asked about "Feta", the origin and product that it evoked and its generic character. The survey demonstrated that up to almost 80% of regular consumers of "Feta" identified "Feta" with an origin of cheese (in the Communities' territory). The European Communities had consulted a scientific committee composed of 14 scientists with specific expertise in geographical indications that concluded, unanimously, that "Feta" was not a generic term. The European Communities had also consulted the sales, imports and exports of cheese labelled as "Feta" throughout the European Communities. That data indicated that production and consumption of "Feta" were heavily

concentrated in Greece (the production of "Feta" cheese in Greece represented 60% of the total EC production of this cheese and 90% of the EC production from ewe's and goat's milk). The products produced in other member States, occasionally bearing the name "Feta", were primarily produced from cow's milk, using different technology, and were exported in substantial quantities to non-member States of the European Communities. As to consumption, about 73% of the consumption of "Feta" cheese took place in Greece, where annual consumption was 10.5 kg per person, as against 1.76 kg in the rest of the European Communities. From all that data, the European Communities could, therefore, not conclude that the designation "Feta" was generic, since the original Greek product was dominant on the EC market. Data proved that even in those member States, that were not significant producers and consumers, the designation "Feta" could not be said to have become generic since the word was not used as a common name for such a good. In the consumers' perception, the name "Feta" always evoked a Greek origin and, therefore, was not something which had become a common name and hence generic in the Communities.

107. The Commission had also verified the relevant national and Communities' legislation. In this respect, 12 member States (i.e. the majority) did not have any specific legislation and, therefore, the general Community and national rules on cheeses applied to "Feta". Only Greece and Denmark had specific legislation. As to the methods of marketing "Feta" cheese in the Communities, consumers were offered two products, with differing compositions and organoleptic characteristics, under the same designation. Yet, it could not be said that genuine "Feta" made of goat's milk and other products using that term and made of cow's milk were the same product at all. The Commission had also checked the large number of general reference works, such as dictionaries and encyclopaedias, and specialized publications, which showed that in all languages of the Communities the way the definition "Feta cheese" had evolved over time had not diminished the association and identification with Greece. He said that it was important to point out that the labels for "feta cheese" not originating in Greece made direct or indirect references to Greece, by adding text or drawings with a marked Greek connotation. This link between the name "Feta" and Greece was deliberately suggested and sold as part of a sales strategy that capitalized on the reputation of the original product, and this created a real risk of consumer confusion. This implied that the term "Feta" was not used as a common name without any significance, synonymous with white cheese in brine. "Feta" was generally presented as being of Greek origin. This was not a coincidence.

108. The representative of Switzerland said that GIs had an enormous potential and would bring benefits to Members' economies, if protected adequately. An investigation made by a Swiss institute the IHA (IHA/GfM Institut für Marktanalysen) showed that consumers paid a great deal of attention to the geographical origin of products when buying a product. For example, an investigation on wine markets concluded that the place of origin was the most important purchasing criterion for consumers. This survey, conducted with more than 1,000 consumers from different countries, showed that the GI of a wine accounted for 45% of the consumers' decisions to purchase this product. The remaining percentages were: 25% for the price, 11% for the vintage, 10% for the type of grape, 4% for the trademark, and 4% for the producer.

109. As to the question of the impact of extension on consumers, he said that re-labelling would not be a widespread consequence of extension due to the exceptions provided in Article 24. The Council had not been given examples proving that re-labelling had taken place, when, at the end of the Uruguay Round, better protection for wines and spirits had been provided at the international level. That was the reason why he did not believe that any re-labelling would take place in an extension scenario. Extension was first and foremost an effort to improve the protection of GIs for the future. The intention of his delegation was not to establish roll-back protection. Extension would facilitate consumers' choice, since they would be assured that products using a GI actually originated from the place indicated by the GI on the product.

110. Another concern of the opponents of extension was that extension could result in less product choice, higher prices and lower competition. Contrary to this, GIs and products' specific quality

related to their origin were marketing tools that producers were free to choose to invest in and use for their own benefit. Instead of investing time and money into the quality or the specific characteristics of a product, a producer could just as well choose to maximize the efficiency of production processes or to use mass production, and compete with low prices against more costly quality products. While GIs were only one of potentially successful marketing strategies, they were a particularly promising one in today's international trade and should, therefore, benefit from effective protection. By diversifying approaches to the marketing of products, competition would be enhanced. Consumers were free to decide whether to buy a product with a specific geographical origin and a GI indicating specific characteristics and qualities or to buy a similar, maybe cheaper, product without these characteristics. Extension, however, would ensure that consumers would be able to trust in their choice when opting for a product using a GI.

111. The representative of Guatemala rejected the idea that under extension GI protection would be automatic and without costs for producers. As indicated by Australia, Canada and New Zealand, producers in developing countries, which were generally micro, small and medium sized producers, would have to go to the courts to fight for the application of the extension. He wondered how much his country's producers would have to pay to fight in courts, or administratively, for these rights and whether they would have the economic resources to bear these costs. At various seminars held in Geneva, it had been indicated that these administrative and legal proceedings were excessively expensive. Would it be better or more efficient to keep the existing protection than make producers go to courts to defend themselves?

112. The representative of India associated himself with the statement made by Switzerland which had laid down what the proponents thought the benefits to the producers and consumers were. India became a demandeur for extension after it had gone through the legal analysis of the experience of protecting some of its traditional products in certain markets. This analysis had convinced his country that it would be easier to protect certain traditional names if additional protection to such GIs would be provided. As to certain references made to "Basmati rice" and concerns about whether traditional names would meet the requirements under the definition of Article 22, he said that this would amount to inventing a new definition of GI. "Basmati rice" was recognized in India as containing certain defined characteristics and as coming from certain regions of India. The legal system had recognized it although, to date, it had not been formally registered. However, this was a temporary situation that did not prevent India from protecting it as a GI. In view of this, he considered that a lot of benefits would accrue to producers of such items if additional protection were accorded.

113. The representative of Chile associated herself with the statements made by Australia, New Zealand, Canada, United States, Guatemala and Argentina. She believed that extension would create more problems than benefits for Members, and recalled that most countries had very few GIs whereas a minority had very many. The need to develop a new name might require major investments for producers from countries like Chile. As stated by Canada at the last Council meeting, one or too delegations had said that the Council still did not have economic statistics fully showing the benefits of extension. She would have liked those countries in favour of extension to provide other Members with more information about this, particularly on investments that companies had to make in order to promote their products with a new name. In conclusion, she said that the success of a product, whether wine, cheese or any other good, did not depend on additional protection but instead on its quality, production and prices.

114. Commenting on the argument made by the delegations of Australia, Canada and other opponents of extension according to which the costs associated with such extension would by far outweigh the benefits flowing from it, the representative of Hungary referred to his delegation's earlier oral statements, reflected in paragraphs 146 to 151 of the minutes of the Council's previous meeting (IP/C/M/37/Add.1), and to the written documents on this issue, particularly a more recent communication IP/C/W/353. He believed that paragraph 41 of document IP/C/W/353 was of particular importance because it confirmed that all exceptions of Article 24 (related to prior use, good

faith prior application for the acquisition of a trademark and generic terms) would apply *mutatis mutandis* in an extension scenario. The grandfathering exception was of particular relevance and, in his view, would take care of, at least, the majority of the concerns in relation to costs, raised by some delegations.

115. His delegation welcomed and was open to consider the new proposals put forward by Australia, New Zealand and other Members to include transition periods in the negotiations on the extension of GI protection. His delegation saw it as a sign that opponents were willing to take part constructively in the negotiations.

116. He referred to the detailed concerns expressed by the representatives of Australia, New Zealand and others on the potential cost-implications of GI-extension and their observation on how widespread and extensive the use of GIs of other Members was in some other WTO Members, and said that, if anything, this would strengthen his delegation's determination to deal with this issue and obtain extension. Turning to the comment made by Canada that the definition in Article 22.1 was too broad and open to interpretation, he said that he did not know how one should interpret this assertion. Was the intention of Canada to suggest some change in the definition of a GI contained in Article 22.1? Secondly, as to Canada's statement that the definition was open to interpretation, he wondered whether there would exist any other provision in the TRIPS Agreement, and for that matter in any WTO agreement, which would not be open to interpretation. Finally, Canada asserted that because of the fact that this definition was too broad and open to interpretation it would be impossible to assess the economic impact of extension. Should that be the case, how could it then be asserted that the overall economic impact of extension on Members would be negative?

117. He recalled that New Zealand had said that, for consumer policy purposes, it would like to retain the possibility to use GIs when the real origin of the product was also indicated, and that, by keeping that possibility open, prices could be reduced. He noted that no similar argument by any delegation, especially by any demandeur, had been made in respect of any other field of IPRs. For instance, in the area of trademarks, he had not heard any suggestion that a particular trademark used, e.g., on a beverage should be allowed, for the sake of the same public policy purposes, to be copied and used on the products of another manufacturer so as to keep this product affordable for the consumers. As to the question of whether the extension of Article 23-level protection would lead to consumer confusion, he still failed to understand how consumers could be confused if it was agreed that only a product that in fact originated in a given geographic territory could bear a term which identified the product as originating from a territory where a given quality, reputation and other characteristics of the good was essentially attributable to its geographical origin.

118. The representative of Australia, addressing his comments to Sri Lanka, said that the European Communities and Switzerland had some of the largest tea producers in the world despite the fact that they did not grow much tea and suspected that they had high tariff escalation. He also understood that Sri Lanka had a certification mark for its tea. Having said that, he asked whether companies like Tetley, Twinning, Lipton and Nestlé recognized that certification mark. Were they licensed by the Sri Lankan tea authorities to use that mark? If so, what was the problem that they had in getting recognition for their name and, if not, why those big companies, coming from the countries that were so supportive of GIs, had not done so? Was Sri Lanka able to register its certification mark in the European Communities? And, if not, why not?

119. As to "feta cheese", he noted the remark made by the Bulgarian representative, who had said that "feta" came from Bulgaria. However, he now understood that this term came from Greece. The delegate from the European Communities had described the great amount of work that had to be done in Europe to convince the relevant authorities that "feta" was a Greek GI. On the other hand, in the negotiations on the establishment of a notification and registration system for foodstuffs, the European Communities and Switzerland had been telling Members that all the exceptions in the TRIPS Agreement would be retained. However, from what he understood from their proposal,

Australia would no longer have the power to decide whether "feta cheese" was or was not a generic term. Instead, Australia would have to come to Geneva and go through a convoluted arbitration system at which no Australian would be sitting. There would be a group of experts, non-Australians, who would ask Australia to provide, among other things, information from thousands of consumers, give proof of what scientists had found and of what the dictionary stated. Today, clearly under the current Australian Bill of Rights and Obligations, Australia possessed the right to determine whether a name was generic or not, just as Denmark would. However, under the European Communities system, it would be an arbitration panel that would decide such an issue and one would be obliged to provide all this information to defend a decision that one's national authorities had already taken.

120. Noting that the delegation of Hungary had always been telling the Council that "tokay" was Hungarian, he said that the Oxford dictionary defined the word "tokay" as follows: "1. a sweet aromatic wine made near Tokay, in Hungary", or "2. a similar wine produced elsewhere". Commenting on the survey referred to by the representative of Switzerland, involving some thousand consumers who seemed to attribute clearly that their preferences on their wine purchases were governed by their association with a GI, he said that he had heard from the Swiss delegate in a recent head of delegations retreat in Sydney that there were a lot of concerns in Switzerland about the increased level of imports of foreign wines into Switzerland. He wondered then whether this was happening because the discerning Swiss consumers understood that these foreign wines were from Chile, Argentina, Australia and New Zealand, none of whom have GIs? Finally, as to Hungary's comment regarding the definition of a GI and its question to Canada asking whether it wanted to change this definition, he wanted to make it clear that the definition did not include traditional expressions, despite some countries' positions to the contrary.

121. Responding to Australia, the representative of Bulgaria said that he had never claimed that "feta" was Bulgarian. What was true, though, was that Bulgaria produced Bulgarian white cheese. That cheese was organoleptically not different from the cheese produced in Greece and which the Greeks called "feta". "Feta", then, was the Greek name for white cheese. In Bulgaria, the Greek term "feta" was not used. Instead, Bulgarians used their own generic name for white cheese. But sometimes their cheeses were sold abroad as "feta" because they were organoleptically identical to "feta". It had been said that among the white cheeses produced in the Balkans, the Bulgarian white cheese was the best. Because of this reputation, non-Bulgarian products were sold as being of Bulgarian kind, style, taste, etc. He demonstrated this by showing to the Council a product which had both "feta" and Bulgarian designations. If one looked at the labelling of this product, one could see "feta" in relatively small letters. Then, in somewhat bigger letters, one could see "façon", the French for style, and then, also in big letters, the word "Bulgare", the French for Bulgarian. And underneath it there was also the German term "bulgarische Art". He, like the producer of that sample product, believed that what was important in the label was the use of the indication "Bulgaria". If the producer had used that same label without the term "feta", which for the producer was obviously not that important because it was used in small letters, and had instead used some other generic description, like "soft white cheese in brine", he would still be equally concerned by the use of the indication "Bulgarian". What Bulgarians wanted to protect was their own GI, in this case "Bulgaria". Now, under WTO law this term was not protected but it would be under an extended level of protection. He believed that the reputation of the products of his country was linked to their origin in Bulgaria and that the use of the term "feta" was not the crucial element of this reputation.

122. Turning to a more general aspect of the debate about "feta", he said that one of the main arguments made by the opponents was that no one would benefit from extension because the European Communities did not, or would not, implement GI protection properly. This argument was flawed, because it was based on the general assumption that international commitments, including those in the WTO, would not be properly implemented and that international protection was not important. According to that argument, one should look at the domestic systems and ways of protection and forget about the WTO. Opponents were in fact telling the Council that they would deal with these problems domestically, in their own courts. But, if this was true, why did they ask for

WTO commitments in other areas, like in agriculture? He believed that it would be much easier and better to achieve international protection within rather than without the WTO.

123. As to the benefits, he believed that the additional protection that extension would give to the products of his country would increase their market share. Enforcement of GIs in domestic countries would become easier and less costly. He noted that opponents had stated that GIs were not important for the success of a product, while at the same time they had raised the fear of losing market shares. To whom would they lose that market share, then? Another argument was that the exceptions provided for in Article 24 of the TRIPS Agreement would diminish those benefits for producers of goods with GIs. Did this mean that the opponents would not insist on the exceptions? Such argument, like others, was made merely for rhetorical purposes. The same would go to their comment on the assertion that what demailleurs had been asking for was directed to the future. They did not challenge nor negate this assertion. Opponents just said that it would take a long time and that there were costs linked to develop a name. But why then not give demailleurs the increased protection they had been asking for? The argument opponents had made was that, in fact, this would not be directed to the future. But what about existing names? What about "Basmati" or "Ceylon tea"? Opponents had made the argument that these were existing names and that they would not get adequate protection. He could not understand such rationale: Were they arguing that there should be fewer exceptions? If that was the case, he could agree with that.

124. He noted that opponents had referred to the costs of getting domestic protection for products which would likely benefit from extended protection abroad and to the costs for governments. This kind of costs, which would be linked to the domestic protection of GIs as a pre-requisite for protection abroad, were costs which producers presumably would gladly take upon themselves. Why not give them the opportunity to bear those expenses? If they did not bear these costs, the government would. Additionally, the registration system would not be obligatory anyway. This would indeed result in higher prices for the products bearing GIs and this would ultimately be paid by consumers. So, in a way it was true that consumers, as indicated in the Checklist, would have to pay somewhat higher prices for those products bearing genuine GIs. Consumers would, however, not necessarily have to pay those prices, as would be the case for patents or copyrights. They would always be able to choose to pay the lower prices of the "generic" products. And, as opponents had pointed out, that price could even fall, so consumers would have increased choice and maybe a lower price for the same product that was usurping another name.

125. Another argument raised by opponents was that new intellectual property rights should not be given to food products. Australia had said that IPRs were granted to artists, scientists and researchers in order to award them with a monopoly for their creative work. Did this mean that patents should not be given to food products, because there was no creativity attached to them? GIs were not monopolistic in the same way that patents and copyrights were because, unlike patents and copyrights, nobody would be prevented from producing and selling the product itself. Therefore, this incentive was directed to a much greater extent at small producers looking for niche markets, as opposed to big companies which more frequently made use of patents and copyrights. He could not accept the statement that the efforts invested in the reputation of any famous product in relation to its geographical origin would not be creative. Sometimes this reputation would be based on decades or even centuries of creativity and on the development of traditional knowledge. In fact, GI protection was one way, by far not as strong as patents or copyrights, of protecting traditional knowledge although in a softer and less monopolistic way. But it was nevertheless a way of protecting knowledge.

126. He said he was coming to the conclusion that opponents were not conducting this discussion in good faith, which would lead the Council nowhere. The deadline was near and the Council was not properly fulfilling the mandate which it had under paragraph 18 in conjunction with paragraph 12 of the Doha Declaration. This would influence his delegation's position in other issues under negotiation, the deadlines of which were also getting closer.

127. The representative of Turkey, supporting the statements made by the European Communities, Switzerland, Sri Lanka, India, Hungary and Bulgaria, said that the several costs mentioned by opponents did not actually exist. In Turkey's experience, producers' costs were usually related to the initial administrative registration of a GI. For Turkey the issue of GI extension was related to the relevance of the WTO, in general, and TRIPS, in particular, to its small producers in small towns, functioning under small foundations. Turkey had a lot of goods which would certainly enjoy and benefit from extended protection.

128. The representative of Paraguay said that the position of his delegation was reflected in document IP/C/W/386 of 8 November 2002, which it had co-sponsored. He shared the positions of Australia, Canada, New Zealand, the United States, Argentina and others. Paraguay did not see the need nor the suitability of extension. He said that a GI, if not protected in its country of origin or if spilled over from a given location to many other locations, would become a generic term, as was the case of "feta cheese". Genuine GIs were already protected by Article 22 and, therefore, anyone interested in this protection should seek it using this provision and should not attempt to reverse the burden of proof using extension. The costs of additional protection would always fall on developing countries, and that was to be the advantage that some developed countries wished to get.

129. The representative of the European Communities, commenting on the issue of re-labelling and the alleged displacement of products and goods with existing GIs, said that the effect of the exceptions under Article 24 was that this sort of shifts, displacements and re-labelling would not occur. Such movements and re-labelling would occur in systems that went beyond TRIPS, in bilateral agreements or in systems within the European Communities, which was also TRIPS-plus. For this reason, his delegation had asked the United States, at the Council's informal meeting in November, to give some examples on displacement and re-labelling resulting from the additional protection wines had enjoyed since 1994. The fact that the United States had not submitted such information was leading him to think that such consequences had never taken place. He would continue to wait for such information. At the same meeting, the Australian delegation had expressed a concern about an exponential increase of administrative and judicial cases if extension would happen, and also provided an example regarding the Australian GI "Coonawarra", which was subject to a lengthy legal dispute in Australia. In this interesting case, some Australian producers had found themselves excluded from the possibility of using a GI. This appeared to show that Australians had in fact interest in using GIs. He asked the Australian delegation how many other cases involving GIs, besides the cited one, had been filed in Australia, as well as how many cases had been filed involving trademarks.

130. He was perplexed about the statement that GIs should not be protected as an IPR because such rights were intended to protect innovation and creativity. He believed that IPRs went beyond those two criteria. In fact, there were many examples in the TRIPS Agreement of categories of IPRs that did not protect either innovation or creativity, *e.g.*, the protection of undisclosed information for marketing approval of pharmaceutical products. This data related to experiments made in order to obtain the marketing approval of a pharmaceutical product and were protected via unfair competition rules. This kind of data did not contain any innovation or creativity. What was protected was the investment made by the pharmaceutical company in the experiments and gathering of data. The same could be said regarding trademarks, protected under Article 16 of the TRIPS Agreement, which protected the reputation and the investment that the trademark owner had made in the product. Article 23 was not different from this case. Article 23 protected the investment that producers had made to make their GIs known, as well as enabling consumers to identify the origin of goods and their characteristics. Therefore, the same respect given to producers who used trademarks to make their products known in the market should be given to the producers who decided to make their products known through GIs.

131. The representative of Hungary, reacting to the debate on the protection of GIs as intellectual property, said that he was not aware that the Council was in the business of renegotiating the TRIPS Agreement *per se*, including why GIs needed to be protected or the definition of a GI. He recalled

that the representative of Australia had found in a dictionary the name "Tokay" defined as meaning not just a geographical origin in Hungary but also as meaning a certain type of drink. As a counter-argument, he noted that the Encyclopaedia Britannica defined "Tokay" exclusively as a geographic name. Furthermore, he had found the name "Martini" defined in a dictionary as a cocktail mix made up of three parts of gin and one part of dry vermouth. Based on the logic of Australia's argument, Australia or any other country could presumably start producing drinks and bottles with this vermouth Martini trademark from an Italian firm because that would also be a generic use of this name. Australia's use of the Oxford Dictionary as "the" source of information to determine whether a term was generic did not seem consistent with its approach in the Article 23.4 negotiations, or with its position that it should be left to individual countries to determine whether a particular term met the requirements under Article 22.1 and whether the Article 24 exceptions would apply in a particular case. It was puzzling that, while Australia was not willing to accept the word of expert arbitrators, made on the basis of the provisions of Section 3 of the TRIPS Agreement, it was willing to accept the opinion of the Oxford Dictionary's editors. Australia had argued that the type of registration system that Hungary supported would take away the right of WTO Members to determine whether a term met the definition of Article 22.1 and the provisions in Section 3. This was simply not the correct interpretation of Hungary's proposal, the purpose of which was to create a registry in which there would be a rebuttable presumption of eligibility for protection. That, in fact, would mean that the burden of proof before local courts would be reversed but the ultimate decision whether a term had met the definition would remain at the national level. If one would follow the argument put forward by Australia to the extreme, one might be able to find a very cost-effective and easy solution to the establishment of an Article 23.4 registry. Members could perhaps simply notify the editors of the Oxford Dictionary the terms for which they wanted protection through registration and all they would have to do then would be to sit back and wait for the revised edition of the dictionary to see whether these terms were indeed eligible for protection.

132. The representative of Australia said that the comments by the representative of Bulgaria had shed a completely new light on the Council's discussions. He understood that the representative of Bulgaria had said that he had no objection if he was to be placed in a position, as he soon would be, in which any Bulgarian "soft white cheese" described as "feta" would not be allowed to be sold in the European Communities because, within the Communities, the word "feta" would no longer be able to be used in relation to any place other than Greece. What the representative of Bulgaria disliked about the tin of "soft white cheese" he had showed to the Council was the fact that it was manufactured in a member State of the European Communities, that the colours used were the Bulgarian national colours and that the word "Bulgare" was prominently displayed on the package. This was a very important point because the question was what kind of protection did the TRIPS Agreement give now for a country to take action to prevent such misleading advertising and passing-off of a product which was clearly not genuine. In Australia, and probably in most WTO Members, there existed legal means and laws which sought to prohibit such misleading advertising. So, if Bulgaria wanted to take action to prevent this from happening in the European Communities, what would it do to this end? Was there any recourse in the European Communities to stop this? But, the most important point one had to bear in mind in this discussion was what did this mean in terms of TRIPS protection under Articles 22 and 23? Bulgaria had clearly implied that if cheese was given a higher level of protection this would never happen. This, however, was completely false. He was not sure whether this was given protection under Article 22, because he was also not sure if "Bulgaria" was a GI. And if this term did not meet the definition of a GI, then it would not get protection under Articles 22 and 23. So, would Article 23-level protection for "soft white cheese" automatically prevent member States of the European Communities from producing a good like this? If the answer was yes, then the discussion would be seen in a different light. However, he said he did not believe this was the case because of the question as to whether a country name would automatically be a GI, the question of whether it would be protected in Bulgaria or the country of origin, and the question of whether it would not be automatically protected under Article 22. Furthermore, he rejected the notion that Australia had not been engaging in this discussion in good faith. Australia had deliberately been

seeking for the last year to engage in a sensible discussion on this matter. He was convinced, from his talks with Ministers, that there was still considerable confusion on the whole question of GIs.

133. As to the issue of "tokay", he quoted from an article published in the Financial Times of London on 14 November 2002, as follows: "Europe's economies are plunging into darkness, European Union competitiveness initiatives are strewn on the wayside: who blames the 15 EU ambassadors in Brussels for taking refuge in the finer things in life, such as Hungary's Tokaj dessert wine? A dispute erupted at their weekly meeting yesterday over plans to give Hungarians sole right to use the Tokaj name. Italy, which produces Tocai wine, cited 13th-century documentary evidence that the Hungarians got their original grapes from Italy. 'We have also found documents from 1632 showing that a noble woman from Gorizia married an Hungarian count and took 300 Tocai grape plants as a dowry', says an Italian official". So these could be the issues Members would get into if trying to make a decision on whether a word was owned by someone or someone else or whether it had become a generic term. All Members should think very carefully about the costs that would be involved in researching back to 1632 to find out who married whom and who took grapes as a dowry.

134. The representative of Hungary informed the Australian delegation that under a recent agreement between Hungary and the European Communities the name "Tokay" would not be used by any of these countries that were mentioned after the year 2007. He considered this to be a good model for the Council's negotiations.

135. The representative of Bulgaria said that the question of country names would only be relevant to the debate if Members were suggesting something to be changed, which was not the case. This was the reason why he had said that opponents were not discussing in good faith. Country names were already covered by the TRIPS Agreement. His conclusion was that opponents were engaging in a debate to distract from the substantive issues. The present negotiations were based on the agreement that the substantive issues would be discussed in the Council.

136. The representative of the Czech Republic supported what was said by Switzerland, the European Communities, Hungary, Sri Lanka, Bulgaria and the other proponents of extension. In relation to costs to producers that would be imposed by extension, she hoped opponents would provide information on these costs based on data that would indicate what costs were imposed to producers of wines and spirits in their countries and how many names, labels and packaging had been changed since the TRIPS Agreement came into force. She had also requested this information at the Council's last informal meeting and she still believed that this information would be very important for the purposes of the discussion. As to the term "pilsner", she assured the Australian delegation and the whole Council that her delegation's statement regarding the generic nature of this GI was made on the understanding that "pilsner" became generic as a result of wrong-doing, free-riding, and non-authorized and misleading use of this indication. "Pilsner" used to belong to her country but was misused and stolen due to an insufficient legal level of protection. Her delegation did not intend to rewrite history to correct this but it would like to prevent similar things from happening in the future.

137. The representative of the Slovak Republic said that the current system of GI protection under Article 23 was discriminatory and inadequate. Extension would bring protection and security for many producers in different countries. The current imbalance of GI protection under the Agreement had led to illegitimate free-riding on famous GIs for products other than wines and spirits. Such free-riding endangered the investments that local producers had made over the years to develop the reputation and quality of their products, as well as the future economic development of new local quality products that were marketed at the national and international levels. He was convinced that the aims of the TRIPS Agreement of reducing distortions and impediments to international trade and promoting effective and adequate protection of IPRs based on the principle of non-discrimination should serve as the main premises for all TRIPS negotiations. This aim was further reflected in individual Parts of the TRIPS Agreement, including the ones regarding GIs. While Article 22 defined principles for protection of GIs generally, Article 23 provided additional protection for GIs for a

particular group of products, namely wines and spirits, dividing GIs into two groups: GIs with additional protection and GIs with the basic level of protection. He considered this discrimination against other products as falling out of the scope of Article 23. On the other hand, there were many other products with a given quality, reputation or other characteristics attributed to their geographical origin generally known not only in their respective domestic markets but also abroad. The additional protection for GIs should be provided in a non-discriminatory manner and, therefore, extended to all products.

138. An equal protection of all GIs would have a positive impact on both producers and consumers. For producers of such products, extension would be a valuable marketing tool increasing the chances of better market access and would prevent the free-riding on the reputation of such products. Extended protection would also facilitate product identification and eliminate the risk of consumers being misled. There was a clear mandate given by the Doha Declaration that needed to be fulfilled by the end of 2002. If appropriate action was going to be taken, it should be the elimination of the imbalance that existed in the TRIPS Agreement regarding GI protection. Extension and the establishment of a multilateral register would thus bring about a more equitable and reasonable system of protection of GIs.

139. The representative of the European Communities advised delegations that were unsure of whether the European Communities provided a legal means to interested parties to protect their GIs, to look at page 79 of the minutes of the Council's meeting in September (document IP/C/M/37/Add.1). The same statement also provided information about country names. A country name, or any other name, would not automatically be considered a GI because it would benefit from protection only after it had met the requirements of the definition in Article 22.1. As to the European Communities' experience in protecting country names, he referred delegations to page 84 of those minutes, where the European Communities had put forward some examples of country names that were protected as GIs, such as Germany for Brandy, Italy for Brandy, Spanish for Whisky, and Irish for Whisky, among others.

140. He said that he was still hoping to get some answers to the questions that he had posed earlier to Australia concerning litigation on GIs in that country. Reacting to the statement by Hungary, he said that, although "Martini" might be defined in a dictionary as a cocktail drink, it would never become generic just because it was defined in a dictionary in a neutral or generic manner. He also noted that "Martini" was not Italian and did not belong to an Italian company, but to Bacardi, a US company.

141. As to the question of benefits and costs to consumers of GIs, he said that it was well known that GIs were protected because they identified a good as having an origin where such goods enjoyed a certain quality, reputation or other characteristics. In the European Communities, only firms that abided by controls and inspections to make sure that the said characteristics would be met in a consistent manner would be entitled to use a GI or a protected appellation of origin as the name of their product. Why did firms do that? It was because those firms would then be able to capitalize on a privileged consumer perception of speciality products. In order to supplement his previous statement, he shared with the Council some results of two consumer surveys that had been done by an independent institution in 1994 and 1996. Those two surveys were done throughout the European Communities. The consumer sample was about 16,000 EC consumers and, when asked to single out three out of possible ten indications of quality, they replied that the presence of "quality labels" was in 31.5% of the cases an indication of quality; an adequately marked origin was in 15% of the cases an indication of quality; information that the product was made locally was in 22.5% of the cases an indication of quality; and information that the product was publicly controlled was in 23.6% of the cases an indication of quality. GIs performed all of those functions cited by consumers as they would serve as quality labels guaranteeing an adequately marked origin, often controlled by a public body. Indeed, when asked to single out two out of nine possible elements, the sample of consumers saw in a geographical indication/appellation of origin: a guarantee of origin (37%); a quality guarantee

(35%); a guarantee of the place of production and/or method (56%); and a traditional method of production (17%). These findings had also been supported by several other independent academic studies. He said that he would provide the Secretariat with the full statement in writing for inclusion in the minutes.

142. Geographical indications were something on which producers could capitalize and they could represent a true market access tool. In these surveys, consumers were asked whether they were ready to pay more for products bearing a GI. The results were quite telling. For example, 43% of EC consumers indicated that they were ready to pay 10% more for origin-guaranteed products. If one took a market like the European Communities, with an estimated 370 million consumers, one could extrapolate and say that perhaps around 159 million consumers would be ready to pay 10% more for products bearing a GI. Additionally, 8% of EC consumers were ready to pay 20% more for origin-guaranteed products, which would amount to 29.6 million consumers and, finally, 3% of EC consumers were ready to pay 30% more for origin-guaranteed products. Thus, this made it quite clear that GIs could indeed be a marketing opportunity and a market access tool.

143. As to the costs to consumers, he found the argument made by opponents striking, according to which consumers would not be able to recognize the products after extension. He gave the example of the Catalan-Spanish GI "Cava". Producers in that region had been using the term "Champagne" since the nineteenth-hundreds. In 1986, following the entry of Spain into the European Communities, they had agreed to give up the use of the term "Champagne" and started to use a new denomination called "Cava". In 1987 the exports of "Cava" increased by 31% and in 1988 by 16%. In the next 10 years, the exports of "cava" increased by 1000%. So, if consumers were really unable to identify the product that was sold under the new name "Cava", earlier sold as "Champagne", how was it possible that the exports had increased by 1000%?

144. Responding to the question posed by the representative of Australia, the representative of Sri Lanka said that her country had been protecting the term "Ceylon tea" in most of the major markets as a trademark because the concept of a GI was not widely known to her country. However, Sri Lanka had experienced some difficulties in some of the markets where the registration authorities had refused the registration of "Ceylon tea" based on the argument that, according to their trademark laws, any intellectual property requiring protection needed to be owned by a private entity. Since "Ceylon tea" was not owned by a private individual but, rather, by a country, Sri Lanka, this was obviously a problem. That was the reason why Sri Lanka had had to look for an alternative method of protection, such as certification marks or GIs. Sri Lanka would prefer to protect "Ceylon tea" under the concept of GIs for three reasons. First, because certification marks needed to be renewed after a certain period of time and fees would have to be paid for each and every renewal, which was too costly for Sri Lanka. Secondly, a certification mark owner could find it too risky to rely mainly on a judgement given over the rights to third parties, the so-called senior rights, who would also be entitled to use the same geographical term. Thirdly, because under normal circumstances it would be difficult to prevent a geographical term registered as a certification mark from becoming a generic term. For these reasons, Sri Lanka decided to get protection for "Ceylon tea" under a GI rather than through certification marks.

145. The representative of Argentina said that regarding the issue of costs it was evident that no delegation had denied that there were implicit costs coming from extension. Evidently, some had downplayed these costs and others had highlighted them. There was still confusion regarding this issue. It seemed that many delegations had lost track of the fact that what was being discussed were IPRs, i.e., granting of exclusive rights to producers. While patents rewarded inventors and, at the same time, guaranteed that the whole of society would benefit from the disclosed knowledge, GIs were a non-technological innovation with a permanent monopoly. Some had stated that extension could indeed result in costs for consumers or producers but these costs could well be borne by governments. This would depend on the model of production that each country possessed. The

Argentinean agricultural or agro-industrial model, for example, did not necessarily function through subsidies. In this system those costs would necessarily be borne by producers and consumers.

146. The consumer surveys presented by the European Communities were not helpful because they concerned the Communities only. She wished to know how much the policy of promoting of GIs within the EC market cost the Communities. When analysing such surveys one should take into consideration the special sensibilities of the European consumer *vis-à-vis* the conditions of production and the resulting quality. In Europe, special sensibilities existed due to serious sanitary problems that had emerged as a result of a distorted model of production. Hence, it was not strange that the European consumer paid attention to labels and wanted to know what the origin of the product was. It seemed that what had been discussed was the concept of a GI as including origin, quality and process. She believed that if one would be talking about origin, quality and process one would not be talking about IPRs or issues related to the TRIPS Agreement. One would instead be talking about issues related to the traceability that had been discussed in the negotiation of the codex.

147. As to the "Cava" wine example and the statistics of how exports of this product had soared after this new name was introduced, she said that this data was not convincing because statistics were relative and one would always be able to come up with numbers proving the contrary. Additionally, she asked what the conditions negotiated with the "Cava" producers were that convinced them to stop using the name "Champagne". She also asked if any kind of help was offered by governments or the European Communities. Were there any expenses in marketing, selling, and publicity? She asked the European Communities to provide information about the relation between the expenses related to this new product ("Cava") and the expenses related to the old product ("Champagne"). Were the costs covered by the producers or some organization? She believed this data would help her delegation to evaluate more objectively the situation. Finally, she reminded delegations from non-Spanish speaking countries that "cava" meant in Spanish "wine shop" and that this was evidently not a geographic name.

148. The representative of Australia said that the Bulgarian delegation's concern about the use of its country's name would be easily solved if it were agreed that producers in countries should not use the names of other countries in any of their advertising. He believed Bulgaria's concern was that someone was misleadingly using its country's name when the product did not come from its country. He said that he did not know whether this was prohibited under other areas of WTO rules but that it was something that probably concerned everybody.

149. He also thanked the representative of Sri Lanka for the responses she had given to some of the questions he had posed. As he understood it, part of the problem with protecting "Ceylon tea" in Europe was that Sri Lanka could neither get national treatment nor access the GI registration system in Europe, and if it could, then this would overcome its concern about the use of "Ceylon tea". That was a point that had been raised on a number of occasions. There was a question mark as to whether even under the current rules countries were living up to their obligations under national treatment. It seemed that the representative of Sri Lanka was not necessarily arguing that GI protection or additional GI protection was better than a certification mark system. But she had talked about factors that were important to her government, including the fees charged for the renewal of certification marks. On that question he asked Sri Lanka to balance this against the fees that were going to be incurred as a result of a GI extension system. Some delegations were putting forward a costly system of a multilateral register that would probably be based on a fee-for-service cost. In other words, if one wanted to register a GI one would have to pay for it. The more important point here concerned the costs involved in challenging whether a term was generic. As the representative of Sri Lanka had pointed out, under the registration system that demandeurs were pressing for, every country would retain its rights under the current provisions, and one of those exception provisions was if a term was generic. If Sri Lanka were to take issue with a country which was claiming that a term was generic they would be obliged to go through this arbitration system. It would be a very costly exercise because the costs in challenging GIs in the EC system, for example, were massive. Therefore, he

asked Sri Lanka and other Members to weigh up the costs for re-registering certification marks with the costs of the disputes they would be involved with in challenging whether a country could use a generic term.

150. As to the consumer surveys presented by the European Communities, he agreed with Argentina that they needed very close examination because any of them could come up with statistics to show whatever they liked. He thought that some of the statistics that were being cited were ludicrous, for the reasons Argentina had explained. It was like asking a European consumer to be prepared to pay more for a product to defend the common agricultural policy. If they came up with a majority that said "yes", would that be a moral defence for maintaining this distortive common agricultural policy that had completely ruined international trade and destroyed the aspirations of developing countries in improving their agricultural sectors? So, to suggest that someone would be prepared to pay a little more for the quality of a term or GI was a completely spurious proposition.

151. The representative of the European Communities noted that the consumer surveys indeed reported only on EC consumers. It was not obvious that the results could be extrapolated elsewhere. European consumers had their own characteristics and it had not been his intention to suggest otherwise. However, they were still relevant because everyone seemed interested in accessing the European market. He again noted that he had not received responses to the questions he had posed to the United States on examples of re-labelling, and to Australia on the state of its own GI and trademark litigation.

152. Reacting to the intervention of Sri Lanka, he recalled that, at the Council's last meeting, he had already explained that foreign geographical indications could be protected without registration in the European Communities. In his view, Sri Lanka was right in continuing to support extension because certification marks would not give it the protection that it would get under extension. To illustrate this, he said that Italian producers of a product bearing the denomination "Parmigiano Reggiano" had tried to get protection through a certification mark in the United States. They registered not one, but five certification trademarks between 1987 and 2001. They registered "Parmigiano Reggiano" as a word mark and also as four different figurative trademarks. This however did not help them in protecting the term in translation, as they would have under Article 23, because "Parmesan" would be a hindrance to the registration of a certification mark containing the original Italian term "Parmigiano Reggiano." And this was not because "Parmesan" was a generic term, but because "Parmesan" had been registered as such on at least four occasions by a US company and named "Grande Cheese Company". This company had even claimed that the translation into Italian of "Parmesan" was "Parmigiano Reggiano." So, as much as one would try, certification marks would get one nowhere. That was why many delegations were continuing to ask for extension.

153. The representative of the United States said that, in response to the European Communities' intervention, he would look into the situation concerning "parmesan". He doubted that anyone would have obtained protection in the United States exclusively for the term "parmesan", as it was quite generic in the United States. He would also endeavour to identify some examples of re-labelling.

154. He asked the representative of the European Communities to clarify whether he was referring to some documents that he would not read out but that he was going to provide to the Secretariat, and whether he intended to circulate those papers in the room as documents or circulate them for inclusion in the minutes. The representative of the European Communities replied that his written intervention with some further data would be given to the Secretariat for inclusion in the minutes, as an annex, if the Secretariat agreed. The Chairman recalled a discussion on this matter earlier in the course of the meeting, and said that he believed that it would be better if the document was read in case the delegation wished it to be included in the minutes, which would provide an opportunity for any reaction to the statement. The European Communities could circulate the document, if it so wished. The representative of the European Communities said that the parts he had omitted from his oral intervention were further statistical data from other studies, apart from those two that he had

specifically quoted and that they pointed in exactly the same direction. Therefore, it was not necessary to include them in the minutes or read them out. He thought the point had been made and was sufficiently supported by the data that had already been provided orally. The Chairman confirmed that only what was said during the course of the meeting would be included in the minutes.

155. On the same point, the representative of the United States referred to an annex that appeared in the minutes of the Council's September meeting (document IP/C/M/37/Add.1), which was entitled "Written Statement by the European Communities on item D". Under part 2 of this document, "Registration Systems and National Treatment", he found that there was an exhaustive list and analysis of the registration regimes, or systems, and of the issue of national treatment in Latin America. He did not recall that the European Communities had read out this analysis of Argentina, Uruguay, Chile, Panama, the Andean Community, Costa Rica, Nicaragua, El Salvador, Guatemala, Mexico and the Caribbean, where it had asserted that the European Communities' regime, which was inconsistent with the TRIPS Agreement, was in fact mirrored by all of these other countries. He suspected delegations might have had some reaction to such an assertion. If it had not been read out by the European Communities at the last meeting, he did not believe it was appropriate for the document to appear in the minutes of the Council's last meeting.

156. The representative of the Czech Republic requested Argentina to clarify whether it wanted to re-open the TRIPS Agreement with the aim to lower the protection of IPRs already provided by this agreement. The representative of Argentina responded that an imbalance existed in TRIPS regarding GIs, whereby certain products benefited at the expense of others. Demandeurs argued that this justified extending Article 23-level protection to all products. On the other hand, one could well remedy such an imbalance also by leaving everything to be protected by Article 22.

157. Responding to the delegation of the United States, the Secretariat explained that, at the meeting in September, when the Council was running out of time in the discussion on extension, two delegations, the European Communities and Sri Lanka, had said that in the interest of saving time they would not read out the whole of their statements they had prepared and requested that their longer written statements be reproduced in the minutes. No objections had been expressed and that was how the matter was left. However, it was for the reason that the US delegation had raised that the Chairman had earlier at the present meeting wanted to clarify the situation so as to ensure that there was indeed acceptance of this practice by all Members, given the possibility of the sort of concerns that the United States and Australia had mentioned could arise.

158. The representative of European Communities said he had offered to include his written statement in the minutes for the only reason that the Council was short of time. The point he had tried to make was indeed that the EC interpretation of national treatment had been endorsed by the legislation of many Members. He had thought it would have been a waste of time to go through the information country by country. He fully understood the concerns of the United States, but it was not his intention to provide information to which countries would not be able to react.

159. Reacting to a reference to his country in the European Communities' annex to document IP/C/M/37/Add.1, the representative of Guatemala said that the fact that additional protection of GIs was provided for in the national legislation of a country and it did not mean that, *ipso facto*, this extended protection had been endorsed by this country at the multilateral level. Guatemala did not support extension at the multilateral level. The representative of the European Communities responded that the reference in the annex to Guatemala's legislation was not intended to imply that, if a Member's national legislation already included extension, it would then support extension at the multilateral level. The purpose of the reference was to indicate that Guatemala's legislation would not require any adaptation were extension to take place.

160. The representative of Panama said that her delegation had not been aware that Panama had been mentioned in the text annexed to document IP/C/M/37/Add.1. Therefore, her delegation

reserved its right to react to the text. She took the opportunity to ask the Secretariat to consider a solution to this kind of problem to avoid the inconvenience of not knowing that information about a Member's delegation was contained in a document, since delegations had the right to comment on such documents.

161. The representative of Ecuador said that, since his country was mentioned in the European Communities' document annexed to IP/CM/37/Add.1, he also reserved his right to make comments and clarifications regarding the Ecuadorian legislation. There was also a comment in that document about the Andean Community and this would also be discussed in case the member countries of that community considered it appropriate.

162. The representative of Switzerland noted that the representative of Australia seemed to consider that the issue of whether a country name could be protected was not even a TRIPS-related matter. In his view, the question of whether country names could qualify as GIs was addressed in Article 22.1, applied equally to the general protection available under Article 22 and to the additional protection under Article 23. Therefore, this was not a question that needed to be raised under extension.

163. The representative of the United States said that, given the inclusion of the EC statement in the annex, his delegation would henceforth be more sensitive as to what could happen if the Council agreed to something as seemingly innocent as his delegation had thought it had agreed to at the last meeting. He took issue, nevertheless, with the previous intervention by the European Communities, according to which the analysis of laws from Latin America was not intended in any way to cast an aspersion on them. However, on page 82 of the minutes, under the description of the Andean Community, it was stated that "[a]gain we are faced with an unfortunate group of countries that, like the EU, are apparently in violation of the TRIPS Agreement, according to the US interpretation of the TRIPS Agreement". The representative of the European Communities responded that the only point his delegation had tried to make was that those countries' legislations mirrored the EC legislation, so logically, if the European Communities was being depicted as non-TRIPS compliant, those legislations should be depicted in the same manner.

164. The representative of Chile, commenting on the EC consumer surveys, wondered how confused Chilean consumers might be if they were told that the food they had been eating for 10 or 15 years was not what it was supposed to be, and that they would now have to pay 10%, 20% or 30% more for a product that had been renamed and that was not exactly what they had been consuming before. The renaming of a product would entail considerable investments domestically, but even more in foreign markets. She supported Argentina's call for more information regarding the kind of investments that some companies in the European Communities had had to make in order to promote their renamed products abroad. As to the information in the annex containing the EC statement, she said that Chile had concluded a bilateral treaty with the European Communities that protected their GIs. Those GIs were for wines and spirits, and that in no way meant that Chile wanted to extend additional protection to GIs for other products.

165. The representative of Argentina said that the European Communities, with the exception of maybe two or three countries that had concluded TRIPS-plus bilateral agreements, was the only WTO Member that had practical experience in providing assistance relating to costs, name changes, labelling, etc. Therefore, she wished to know what kind of help or subsidy producers who had changed the names of their products had received. She also asked what happened to the excess of production from the areas that produce goods with GIs. She did not believe that producers of European GIs produced the quantity necessary for the market.

166. Commenting on the annex to the minutes of the Council's September meeting, she said that she did not recall that there had been a discussion on procedure at that meeting. The minutes of the Council's September meeting should only reflect the oral statements made at the session, and,

consequently, the annex should be removed from the minutes. Any written statement should be circulated by the delegation which presented it in a separate document. She understood that the Secretariat, and on this she spoke from personal experience, had always tried to be as neutral and faithful as possible to what had been said orally. Her delegation had been in communication with the Secretariat on another occasion when her delegation had believed that something it had added to its intervention was missing from the minutes. At the meeting in question, her delegation had tried, in the interest of being brief, to synthesize its oral statement. But because there had been no way to include the entirety of the summarized statement later, it had not had any other choice but to repeat its complete intervention at the following meeting so that it could be included in the minutes. She asked that this criterion be maintained and that the minutes include only exactly what was said in the Council. This Council did not have a system of approval of minutes, so Members had to trust the work of the Secretariat because there was no way to verify what one said, to amend work or to approve the minutes.

167. The representative of Colombia noted that his country was not included as one of the members of the Andean Community in the European Communities' statement annexed to the minutes. He was worried by the possibility that his country, as a member of the Andean Community, could face litigation brought by the United States for a possible violation of the TRIPS Agreement. He asked the European Communities what was the possible violation that Colombia would be incurring by giving reciprocal treatment regarding the protection of GIs. As to the impact on consumers and producers, he informed the Council that Colombia had made a detailed geographical, anthropological and sociological study, in which it had tried to find out the advantages and disadvantages of the extension of the protection under Article 23. Unfortunately, the disadvantages were greater than the disadvantages and no significant benefits had been found. At least from the Colombian producers' viewpoint, there was nothing indicating that Colombia should change its position on extension.

168. The representative of the European Communities asked the representative of Argentina to clarify the connection between her question about excess of production and the issue of intellectual property. As to the Colombian question regarding reciprocity, he believed he was not the best person to answer the question, because he had not argued that reciprocity was incompatible with national treatment. He wondered whether the delegation of the United States might wish to respond to the question posed by Colombia.

169. The representative of Argentina said that she understood that certain cheeses produced in the European Communities were sold only in particular quantities with relevant GIs in order to ensure that the price did not go down, and that the excess was sold under another name, that is, no longer under the denomination of origin. Issues such as quality and origin were ignored and the cheeses were sold as if they were a different product and competed in the market with similar products. Requesting the European Communities to confirm this information, she asked in what circumstances this happened and how the excess was handled. As to cheeses sold under specific GIs, she asked whether only the amount sold in such a way was produced or whether there was excess production.

170. The representative of the United States, reverting to the question on "parmesan", said that he had performed a search on the US Patent and Trademark Office's trademark electronic searching system and extracted all of the registrations of "parmesan". He had found out that in no case had anyone obtained protection for the term "parmesan". In fact, it was stated in each of the registrations that no claim was made to the exclusive right to use the term "parmesan" apart from the mark as shown. That meant that the mark was protected only as stylized, but the term itself, "parmesan", was not protected. As to the EC request for a clarification of the US interpretation of national treatment, he believed it was commonly understood in the Council that national treatment was not to be accorded only on the basis of reciprocity. The EC definition of national treatment in their Regulation 2081/92 provided protection and the opportunity to register only if one was attempting to register an EC place name. If one tried to register a US place name, that would not be possible, which the European Communities considered to be consistent with national treatment.

171. The representative of the European Communities responded that the figurative trademarks cited by the US delegate sometimes consisted of a stylistic version of the name "Parmesan" and that was why they were protected. So, "Parmesan", even in a different, graphic style, was indeed part of a trademark. Furthermore, he reiterated that, in the European Communities, foreign GIs were protected without registration. It was clearly stated in the EC written statement that under the unfair competition laws of its member States and Directive 2000/13, protection under Article 22 was granted to any GI without the registration requirement.

172. The Chairman called Members' attention to the third basket of issues related to administrative costs and any burdens that would be associated with extended protection, especially as they impacted governments. As indicated in the Checklist, the issues that had been raised included: (1) The adaptation of legislation and institutions: for example, to what extent could existing models for wines and spirits be extended to other areas and to what extent would a thorough review of trademark and unfair competition legislation be entailed? (2) The use of procedures for acquiring protection: for example, the extent to which such use might put burdens on governments and commercial interests because of the number of likely applications, the need to deal with differences as to eligibility for protection, etc.? (3) Enforcement: Issues that could be discussed included the extent to which the burden for ensuring compliance would rest on the commercial interests concerned or governments might be required to monitor compliance and get involved in litigation at the national level and, potentially, dispute settlement proceedings at the multilateral level.

173. The representative of the United States noted that the European Communities had mentioned that it provided opportunities for protection for all GIs through their unfair competition laws. That did not, in any way, take away from the fact that the European Communities had decided to provide a system under Regulation 2081/92 that benefited owners of GIs within the Communities. The TRIPS Agreement required that any favour, advantage or privilege that one provided to one's own nationals should also be extended to the products of other WTO Members. He had not heard any convincing argument as to why Regulation 2081/92 was not available to all WTO Members.

174. On the third basket of issues, he said that for Members with long-standing statutory geographical indication systems, the costs of protecting the few additional geographical indications of other WTO Members would seem to be minimal, to the degree that they would actually provide such recognition and enforcement on a national treatment basis, which, as he had noted, was far from assured. The costs of extending Article 23-level protection for the Members without such formal systems, in many cases, would be considerable. In the case of the United States, Article 23-level protection could not be provided for GIs for products other than wines and spirits merely by extending what it currently did with respect to GIs for wines and spirits. In the United States, distribution of alcoholic beverages was strictly regulated by the US Bureau of Alcohol, Tobacco and Firearms (BATF), including labelling, advertising, and standards of identity of alcoholic beverages, *inter alia*, to prevent consumer deception and to provide information about the identity and quality of such beverages. This century-old regulatory regime allowed the United States to agree to Article 23's additional protection for GIs for wines and spirits as part of the Uruguay Round's TRIPS Agreement, in exchange for appropriate concessions from other Members, primarily the European Communities. There was, however, no comparable regulatory regime in the United States for products other than wines and spirits. Extension of Article 23 would require either substantial changes in the authorities of the US Department of Agriculture and the US Food and Drug Administration, which were responsible for overseeing the sale and importation of produce, meat, and dairy products to ensure that US sanitary and processing standards were met, or significant changes to US trademark and unfair competition laws. The Department of Agriculture and the Food and Drug Administration did not oversee the sale and importation of all goods, even of all agricultural products. Were Article 23 level protection extended to GIs beyond those currently regulated, new statutory authorities would have to be given to agencies that currently did not have such authority, or new agencies would have to be created, adding even greater costs.

175. Amending the US trademark and unfair competition laws to provide Article 23-level protection for all GIs would be to stand those laws on their heads. Both US trademark law and the US unfair competition law, which provided protection for GIs in accordance with Article 22, were intended to prevent consumers from being confused or misled. They were never intended to provide the owner of a trademark or other source indicator with protection against all uses of identical or similar marks or indicators, regardless of whether that use was likely to confuse or mislead consumers.

176. As his delegation had pointed out in previous meetings, it would appear that few foreign entities had sought to obtain certification mark protection for their GIs in the United States. These entities had not indicated that the protection was inadequate. Article 7bis of the Paris Convention required that Paris Union Members provide protection for collective marks. That obligation was incorporated into the TRIPS Agreement via its Article 2.1. Therefore, protecting GIs through registration as collective marks used a system that was already required to be in place under TRIPS. No additional commitment of resources was required. A Member's use of its existing trademark regime to protect GIs involved only the use of that Member's resources already committed to the trademark system for applications, registrations, opposition, cancellations, adjudication, and enforcement.

177. The representative of Australia said that many of the considerations that would face the United States were exactly the same for Australia. Even though Australia had a system of GIs for wines and spirits, to think that this would be a simple matter of extending it to other products was not true. All of the Members needed to be alerted to the fact that they were likely to face demands to protect a very large number of European GIs compared to a very small number of their own. In Australia's bilateral agreement with the European Communities on wine there were 89 Australian GIs compared to around 4,500 European GIs. He understood that other countries had been subjected to even more extreme EC claims for GI protection. Members needed to reflect very carefully on the simple number of GIs that each country was going to have to protect in its own legislation. He did not think there was any reason to believe that the numbers he had quoted in the past on wines and spirits would be any different in terms of non-wines and spirits. One should look, for example, at the experience of non-European and developing countries under the Lisbon Agreement. In a paper written recently by the South-Center on GIs, it was pointed out that, of the 766 registered appellations of origin under that agreement, a single country in the European Communities accounted for 66.3%, and six member States of the European Communities accounted for 94.3% of the registrations. At the same time, Burkina Faso, Congo, Costa Rica, Gabon, Haiti, Togo and Yugoslavia had not lodged any registrations. This illustrated the imbalance that WTO Members would have in this area.

178. The important issue of enforcement had not been adequately covered in the discussions. Enforcement obligations in respect of IPRs could be some of the most costly and difficult aspects of implementing intellectual property protection. The TRIPS Agreement obligated governments to provide necessary legal means to right holders and to play a role in enforcing the regime. For example, Article 23.2 required a government to refuse or invalidate registration of a trademark that contained or consisted of GIs for wines and spirits with respect to wines and spirits that did not have this origin. Article 23.3 required Members, that is, governments, to determine the practical conditions under which homonymous GIs could be used. Some of the enforcement provisions contained in Part III of the Agreement also had application to rights in GIs. For example, Section 2 of Part III required application of certain civil and administrative procedures to rights covered by TRIPS, including GIs. Furthermore, it was impossible to isolate the discussion of extension in this context from the negotiations for a multilateral system of registering wines and spirits GIs. Under the EC proposals, Members would have to play an even more active role in enforcement in the following ways: notifying domestic GIs; examining GIs by other countries; engaging in bilateral negotiations and, possibly, in dispute resolution to either defend or to object to a notification of a particular GI.

179. The representative of the European Communities asked the US delegation to clarify whether it meant that extension would require an overhaul of the trademark regime protection, given that protection under that regime met the obligations under Article 22 but not under Article 23. He also asked whether certification marks provided the protection required under Article 23. Responding to Australia's comments on the number of GIs that developing countries would need to protect after extension, he recalled that, at the Council's meeting in September, the European Communities had provided information on how many European GIs were protected in Brazil and Paraguay: in Paraguay, protection had not been sought for any GI on wines or spirits, and in Brazil, protection had been sought for only two GIs. It seemed that the reality and the data did not demonstrate that the extra 500 European GIs that would enjoy protection under extension would in any way alter the situation. Therefore, he was not convinced by this argument of imbalance of numbers.

180. The representative of Thailand said that he fully supported the extension of protection of GIs under Article 23 to cover all products. Extension was important because GIs were often related to culture and ancestors' traditional knowledge. The proponents sought to increase the level of GI protection for products other than wines and spirits under Article 23 because they strongly believed that agricultural producers that had been able to develop a product with a certain reputation, quality, and/or characteristics that originated in their territories had the right to be protected so that they could compete effectively in the global market. Thailand sought a level of GI protection, now accorded to wines and spirits, to be extended to Thai products such as "Thai rice", the so-called "Thai Hom Mali rice" and "Thai silk". "Thai rice" or "Thai Hom Mali rice" were GIs indicating specific characteristics, resulting not only from specific longitude and latitude, but also from specific altitude from sea level, air pressure, level of sunshine and frequency of rainfall.

181. Progress had been very limited with extension, like with many other issues of developing countries' interests and concerns. At Doha, the TRIPS Council had been mandated to address this issue as a matter of priority and to report to the TNC by the end of 2002 for appropriate action. Thailand was of the view that GI extension was in fact one of the implementation-related issues and concerns that fell under paragraph 12(a) of the Ministerial Declaration, that required Members to engage in a negotiation to find appropriate solutions. However, after one year it was clear that the deliberations in the TRIPS Council were far from reaching a definite conclusion. Thailand suggested, as regarded the GI extension issue, that the Council report the facts to the TNC and give it specific recommendations and offer directions as indicated in the letter submitted to the Council and the Secretariat by a number of Members, including Bulgaria, Cyprus, the Czech Republic, the European Communities, Georgia, Hungary, India, Jamaica, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Turkey and Thailand. These Members had proposed that the Council recommend to the TNC the adoption of the following guidelines for the negotiations on the extension of the protection of GIs provided for in Article 23 to products other than wines and spirits: (a) the protection of Article 23 of the TRIPS Agreement should apply to geographical indications for all products; (b) the exceptions contained in Article 24 of the TRIPS Agreement should apply *mutatis mutandis*; and (c) the multilateral register to be established should be open for geographical indications for all products.

182. The representative of Japan said that, regarding the domestic implementation of additional protection of the GIs, one should keep in mind Article 23.1 and its footnote. The footnote stated that "[n]otwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action". If applicable products were expanded beyond wines and spirits and any Members were to select implementation through administrative measures, it would be important to give careful consideration regarding any costs and burdens that would occur. Effects on consumers and producers should be considered and the extent to which the necessity existed to additionally protect individual products should be measured. This would be beneficial in judging whether it was appropriate to bear corresponding administrative costs or not.

183. Article 23.2 stipulated that, when granting additional protection, it was necessary to refuse trademark applications containing or consisting of the geographical indication to be protected and invalidate related registered trademarks. Therefore, one should pay attention to the effects of trademark application workloads, like the increase in translation, trademark examinations and examination-related workloads. Regarding translation, Article 23 said that legal measures should be taken "even where the geographical indication is used in translation". In case of extension, Japan would need to consider how to translate into Japanese geographical indications from various languages of the world. It would also be necessary to prepare a database for translation to be used by trademark examiners. Also, regarding GIs from countries in whose languages Japan did not have a great deal of experience, pronunciation data of the translated geographical indication itself would not be sufficient for the reference purposes of trademark examiners. The examiner would have to prepare translated data concerning the name of the region of production and the product itself related to the geographical indication. This would create a considerable extra burden.

184. With respect to trademark examination itself, judgement of whether the public had been confused or misled would not be necessary in case of additional protection. Consequently, some countries had claimed that related costs and time required by examiners for judgement would be diminished. To some extent, this could be true. However, since in general trademark examination there was judgement regarding the requirement for the registration of these goods, judgement regarding confusion as to quality in the area outside subject goods would be needed. Therefore, it would not be possible to say that the amount of the overall judgement process would greatly decrease, and Japan doubted that it was possible to further decrease the examination burden resulting from extension. As to the examination-related workload, he said that when examining trademark applications, an examiner did not just examine substantive requirements, but also prepared and administered necessary data for examination, notified the applicant, and received responses from applicants. It would therefore be necessary to consider what type of effects extension would have on related examination workloads. Japan had been lax in meeting the necessity of entering geographical indications under the general protection of Article 22, which did not cause public confusion. As a result, although it had not made data as examination reference material, under additional protection, public misleading was not necessary and translations could also be the object of protection. As a result, preparation of examination reference material data was necessary, which would lead to the burdens of database entry, computer system construction and its administration.

185. The representative of Jamaica, referring to Australia's comments on the potential imbalance of extension, said that such imbalance was not unique to GIs. She thought that in all areas of intellectual property, in the patent, copyright and trademark systems, countries utilized the IP system based on their comparative advantage. For instance, countries with a thriving cultural industry would see the copyright system as more beneficial than the patent system. Consequently, there was no level playing field in intellectual property. Countries benefited based on their comparative advantage and they would manipulate the system to benefit their respective economies.

186. As to the question of costs, Jamaica believed that this was an important issue, but it should not be considered as a deterrent. For example, when Jamaica launched a programme of modernization of its IP system, it was costly as IP was a fragmented legal area. Nowadays, her country had everything under one roof with the creation of its national IP office. That had been costly and was still costly because this was a fairly new office, but they had begun to realize the economic dividends from such an activity. Her delegation believed that, costs should not be a prohibitive factor and a deterrent to extension.

187. The representative of the European Communities hoped to get an answer to his question on whether certification trademarks indeed provided for the level of protection prescribed by Article 23 of the TRIPS Agreement, because it was very important to establish the relative efforts that extension would require from countries that had chosen to implement GI protection through that particular system.

188. His delegation was convinced that extension would benefit governments. To begin with, it believed that extension would facilitate, for example, the task of trademark examiners who were faced with an application for the registration of a trademark, including for a GI for a product other than wines and spirits, and would have to determine whether such an application would mislead the consumer or not. Such a determination was often made on the basis of the examiner's information of what an average consumer did or did not think. However, such a determination could be challenged before domestic courts on the basis of evidence such as consumer surveys, which were often unavailable at the time that trademark examiners needed to make their decision. With extension, trademark examiners would simply have to assert whether a trademark application contained or consisted of a protected GI and would only allow registration to proceed if the trademark was entitled to use the geographical indication for its products. There would no longer be the need to make a costly and difficult determination of whether the consumer would be misled by the registration of a trademark, including a GI. It would be clear to producers whether they could use a term or not. Consequently, they would not use GIs that belonged to others or that were used by others in other countries. This would result in a greater clarity and certainty of legal protection, which would diminish litigation and related costs.

189. Regarding the costs to governments, many of the countries that opposed extension claimed that it would impose the establishment of costly administrative registration systems. This was not the case. As was mentioned in communication IP/C/W/360 by the proponents of extension, registration was one of many ways and means to implement GI protection for third country GIs. Registration systems were not compulsory. At the Council's meeting in September, it was shown how Paraguay and, for that matter, the European Communities, did not use registration systems to protect third country GIs. This was why what was stated in paragraph 14 of communication IP/C/W/360 by Australia, the United States and others was simply not true. Indeed, his delegation believed that reproducing the language of Articles 22 and 23 might be one of the valid options to implement Section 3 of the Agreement without the establishment of a registration system. In sum, registration systems were not compulsory and it was unfair to stigmatize or criticize extension on the basis that this would impose a registration system on Members.

190. As to the government-as-an-enforcer question, he said that a number of delegations had accurately pointed out that the EC system of GI recognition provided for governmental enforcement. However, these delegations believed this was not the case for the protection of GIs under TRIPS. His delegation, along with 20 other delegations, had stated very clearly in communication IP/C/W/360, tabled in June 2002, that extension, or for that matter GI protection, did not require government enforcement. The TRIPS Agreement did not state that governments must police third countries' GIs. The TRIPS Agreement was a minimum-standard agreement and in regard to GI protection it was quite clear that that enforcement was left to right holders, as far as minimum of third countries was concerned. The European Communities had however made a choice of protecting GIs via government enforcement. Certainly other countries could choose differently. The European Communities fully respected any country's choices and believed that saying that extension required government enforcement was simply false and did not hold true with what was stated in TRIPS.

191. The representative of the Czech Republic said that it was true, as opponents had highlighted, that an establishment of a new IPR protection system for a new IPR category would be burdensome and costly for each government. But it was important to stress that they were not discussing the establishment of a totally new protection system for a new IPR category, which had never benefited from protection. On the contrary, the Council was discussing the extension of a level of protection which, for historical reasons, was presently available only for wines and spirits. From this perspective, extension should not be expected to be extremely burdensome for administrations that already provided this kind of protection for wines and spirits. For example, in the Czech Republic, a country providing protection on the basis of registration, once the registration system had been established, it started to produce an income for the Czech administration because GI owners had to pay fees for GI registration. It was true that the income for governments was not as significant as it

was from the registration of trademarks, for which the payment of renewal fees was necessary. The administration's burden of maintaining the GI protection system did not, however, exceed that of the trademark systems. The burden was, in fact, much lower and did not increase in relation to the number of GIs protected. What did increase was the income from fees. The more applications for GIs they had, the more revenue flowed from it to the government. She thought, therefore, that the argument on higher administration costs, made by those who provided GI protection through the trademark system, was not relevant to this issue.

192. Regarding the costs for administrations relating to enforcement of protected GIs, all such costs on national legal systems had been already imposed by the enforcement provisions of the TRIPS Agreement. With extension, costly proof in civil or criminal courts or administrative bodies would no longer be necessary in order to show that either the public was misled or an act of unfair competition had occurred in relation to the use of a GI. From this point of view, the additional level of GI protection would represent not only a simplification of the enforcement process but would also represent a cost-saving possibility for legitimate producers.

193. The representative of the United States said that his point in discussing certification marks was that the existing level of protection under the TRIPS Agreement was adequate and effective and, if implemented properly, could already provide the type of protection that many Members were seeking with respect to GIs for products other than wines and spirits. Why should any Member go through the process of negotiating a higher standard of protection if the standard of protection they had already negotiated, if implemented properly, could provide the kind of protection they were looking for? Furthermore, he wondered why countries would want to get into a situation where they were undertaking additional obligations that were largely going to benefit only a small number of Members who had an extraordinarily large number of GIs, when those Members were not themselves providing them with the protection that they had negotiated for in the Uruguay Round.

194. In response to the EC question on labelling, he said, as reflected in the US responses to the Checklist of questions under Article 24.2, that the US Bureau of Alcohol, Tobacco and Firearms had strictly regulated the labelling, advertising and standards of identity of alcoholic beverages, among other things, to prevent consumer deception and to provide information about the identity and quality of such beverages. That regime was over a century old. The US acceptance of the additional protection of Article 23 for GIs for wines and spirits, therefore, did not require any changes in BATF's labelling regimes for wines and spirits. On the other hand, there was no similar protection to products other than wines and spirits and, as a result, the establishment of such a regime would involve considerable costs to the US government and businesses, and would cause considerable confusion among consumers who were seeking products that they were interested in purchasing. Therefore, the US did not have any re-labelling experiences to offer to the European Communities because its labelling regime was in fact over a century old. However, many had already alluded to the fact that doing so in areas where there were no existing regulations would cause considerable costs and, like other Members, the United States would be very interested in information from the European Communities and other demandeurs about the re-labelling costs that they had experienced.

195. The representative of Canada, associating herself with the comments previously made by the United States, Australia and Japan on the direct costs to their own administrations, said that those who thought that a few minor adjustments to the legislation would suffice would have a very unpleasant surprise waiting from them. The US delegation had outlined in detail examples of actual costs that would be realized if the United States needed to change its trademark and certification legislation. Canada would also need to do the same. The only experience that Canada had with Article 23 level of protection was with respect to wines and spirits. Canada had adopted a special regime of protection in its trademark law for the protection of GIs for wines and spirits. Canada was currently facing a request of a Member to protect close to 10,000 names as GIs. One of the biggest problems Canada had faced was not only the number of GIs that it would have to register and the administrative burden that this would put upon it, but that Canada did not have sufficient resources to do so in the short

time-frame that the Member in question was asking Canada to do this. Her government was also facing strong pressure to consider bulk registrations for a reduced price or a bulk price. She knew that the Czech delegation believed that bulk registrations would not be a burden from the Czech perspective. This could be the Czech situation, but it was certainly not Canada's. If bulk registrations implied a bulk fee, which seemed to be the case of the demandeurs, it would not generate revenue as the Czech delegate had suggested.

196. The representative of the European Communities said that the US answer still did not fully respond to his question, which was: Did certification trademarks provide the level of protection equivalent to that of Article 23 of the TRIPS Agreement? Many delegations seemed to believe that certification marks could be sufficient to provide the level of protection required by Article 23. If that was the case, certification marks would apply to all products alike, wines, spirits and other products. Those delegations' views concerning to administrative costs could change depending on whether the answer was yes or no. His impression from an earlier US intervention was that certification marks were not sufficient and that was why the US representative had explained that the United States would have to change its trademark regime. He asked for this to be confirmed.

197. He noted that a country that did not have a bilateral agreement with the European Communities and had claimed that a considerable amount of re-labelling would result from extension was unable to offer a single example of re-labelling. Since 1994, 4,000 EC GIs for wines of spirits had already been covered by extension. His delegation, along with many others, had always maintained that the exceptions of Article 24 were so large that re-labelling was largely avoided. This was why his delegation had asked a country without a bilateral TRIPS-plus agreement to give examples of re-labelling in the area of wines and spirits. Without such evidence the claim on re-labelling was not credible.

198. As to Canada's comments on bulk registrations and fees, he said that bulk registrations and fees were being discussed in the framework of bilateral agreements and talks that the European Communities was having with Canada. In his view, the TRIPS Council should not discuss bilateral matters but, it seemed that certain delegations wished to continue to pollute the Council's debate with things that happened at a bilateral level. This was regrettable because the Council would not make much progress in that way. The idea of bulk registrations and fees was not something stemming from TRIPS but rather from a bilateral deal that the European Communities was negotiating with Canada. Countries that had concluded bilateral agreements with the European Communities but believed that what the European Communities was asking was completely unreasonable had a very simple solution for this, namely, they should not have accepted or signed the agreement.

199. The representative of Malaysia said, concerning the costs to governments, that there would be a need for adaptation of legislation and institutions, and that her country would have to train personnel to understand and take note of the new procedures and requirements in relation to GI administration. She also noted that it was not very clear what the European Communities meant by saying that extension would not imply government enforcement. She noted that there were exceptions under Article 24 for generic use, and asked what the costs would be to producers as to any legal or administrative measure to be complied with in order to prove the generic use of GIs. What would be the costs to producers to have to prove that their allegedly unlawful use came under an exception in Article 24? What would be the cost of proving their case in the courts of hers and various other countries?

200. The representative of New Zealand said her country did not currently have a bilateral deal on wines and spirits, but they did have some experience with re-labelling wines and spirits under Article 23-level protection. Unfortunately they had been unable to get specific data from their capital overnight, but she did plan to revert to the matter at a future meeting with some more information on their experience on this issue. Secondly, she wanted to address the point of whether or not bilateral deals and discussions were relevant to work in the multilateral Council. She submitted that it was

very important in this multilateral forum to have a good understanding of developments at the bilateral level. The effects from bilateral deals between two Members were not confined to the parties to those agreements. Third countries could experience significant trade impacts from bilateral deals between two Members. Therefore, even countries which did not take part in bilateral deals in this area would have an interest to monitor such developments.

201. The representative of Australia believed that it was unhelpful for the EC delegate to assert that those who talked about the experiences of their bilateral agreements on wine were in some way seeking to pollute the present discussion or to divert attention away from what the Council was doing. He thought that it was those who had had experiences with bilateral wine agreements who could best appreciate exactly what the implications were of what the demandeurs, such as the European Communities, were seeking to achieve in the extension debate. It was necessary to know the costs of implementation, the costs of disputation, the implications of protectionism, and that was why they had been seeking to contribute to the discussion in this Council of the broader implications of extension. A number of developing countries would like to see a relatively small number of their GIs protected, and one could clearly understand that they would feel some degree of envy that it could be done on wines and spirits but not in relation to other products. But he still thought that there was a significant lack of understanding and appreciation of the very significant costs that were going to be involved in this higher level of protection. Therefore, he thought that the remark that Members should not discuss their bilateral experiences was quite unreasonable, and it did not benefit the discussion within the Council on this issue. Australia was very conscious that there was already considerable concern among developing countries about the TRIPS Agreement and its costs. He did not think they realized just what the costs were going to be if they got into the kind of registration system that the European Communities was seeking to establish, not only on wine but on all other food products.

202. The representative of Switzerland posed a question to those countries which protected GIs under a certification mark system: How were homonymous GIs protected under a certification mark system? He wished to have this question answered first in respect of homonymous GIs for wines and spirits in light of Article 23.2, and then in respect of homonymous GIs for products other than wines and spirits.

203. The delegations that had a critical view of extension had indicated that their fears were based on the fact that extension might entail, generally speaking, an administrative burden and increased costs for governments, and that, in particular, for the countries that did not resort much to the protection of GIs presently. The reasons why these fears were not justified had already been explained in detail in communication IP/C/W/308/Rev.1 (paragraphs 4-11). When determining the real costs of an extension and an adaptation of a protection system, one should compare these possible costs to the benefits expected from extension. Only such a comparison between the possible costs and benefits would give an idea about the whole question. First and foremost, he wished to point out that all Members were already obliged to provide protection to GIs according to Articles 22 and 23. Therefore, extension would imply only minimum administrative charges. And these costs might be limited to a modification or change of legislative provisions extending the protection of GIs for wines and spirits to GIs for all other products. Furthermore, if one compared what the TRIPS Agreement required under Articles 22 and 23, one would quickly realize that the differences were minimal from the legal point of view and that they only referred to the criteria to grant the protection – the public being misled or the existence of unfair competition – present in Article 22 but not in Article 23. Therefore, the implementation of protection envisaged in Article 23 for all GIs would not necessarily require the establishment of a completely new protection system or the establishment of a registration system for GIs.

204. It was important to bear two elements in mind. First, national administrations were free to determine the appropriate method to implement the provisions of the TRIPS Agreement in the framework of their own legal systems and practices, as envisaged in Article 1 of the TRIPS Agreement. Therefore, the protection of GIs could be ensured in different ways, a registration system

for GIs being one possibility for so doing but certainly not the only one. Second, the protection given to GIs under the TRIPS Agreement could be characterized as negative, inasmuch as the Agreement only required that Members make available to the interested parties the legal means allowing them to prevent an abusive use of their GIs and nothing more. The TRIPS Agreement, therefore, did not require that the Members develop registration systems for GIs at the domestic level or prevent the abusive use of GIs in their territory. A Member could very well leave it to the interested parties to request judges or any other authorities to stop the abusive use of a GI. What was important in this context was that Members should establish a system that ensured the protection of GIs, including if they did not want other Members to refuse protection of their GIs through Article 24.9, but in particular Members should envisage rules for the interested parties to be able to prevent the abusive use of GIs.

205. All this could be done independently of any registration. In Switzerland, for example, the protection of both domestic and foreign GIs was ensured, in general, without registration. This type of protection did present several advantages. First, it ensured general protection for all GIs, both national and foreign, at a lower cost. Secondly, this type of protection did not entail specific burdens on national administrations, other than that of developing legislation concerning the subject-matter and extension of the protection of GIs at the domestic level, as well as providing the means for interested parties to stop the abusive use of GIs. Thirdly, the costs linked to the protection of GIs would be borne by the legitimate producers and consumers' associations and not the national administration. Therefore, he did not believe that extension would necessarily entail costs and administrative burdens that would be out of proportion.

206. When examining the costs that extension could possibly entail, it was advisable not to consider only the operation costs entailed by certain administrative adaptations, but also the reduction of administrative and legal costs entailed by the fact that in many cases it would no longer be necessary to give proof on the public being misled or the existence of an act of unfair competition. Contrary to Article 22, Article 23 did not require proof of these to prevent the abusive use of GIs. As the result of extension, protection of GIs for products other than wines and spirits would no longer depend on the provision of such proof. This improvement of the protection of GIs for products other than wines and spirits would entail an easier access for all parties interested in the effective protection of GIs.

207. In conclusion, he said that extension was a topic that interested both industrialized and developing countries. This was illustrated by the list of countries that had co-sponsored the communications in favour of extension. All these countries supported extension due to the potential benefits they would obtain, in particular the export of their products on the world market and to see them being commercialized as well as protected.

208. The representative of Argentina associated herself with the comments made by Australia, New Zealand, Canada and the United States, on the issue of administrative costs. Agreeing with Australia, she said that it was highly relevant to discuss bilateral agreements, because that was the only practical experience available in the international arena in this regard. Another important point that should not be forgotten in the context of extension was the negotiations regarding the establishment of a multilateral system of notification and registration of wines. Delegations that had argued that the exceptions would remain applicable did not seem to have the same view when they discussed that multilateral system, under which the applicability of these exceptions would be decided within opposition procedures rather than by the national jurisdiction of each country, as it would be the case under the system her delegation, along with other delegations, had proposed. She also doubted whether the exceptions would continue to apply since in many bilateral agreements none of the exceptions of the TRIPS Agreement had been able to survive. She asked from the demandeurs whether the exception in Article 24.4 had ever been incorporated into any bilateral agreement, and whether they expressly recognized this exception as applicable and if they respected it in regard to wines and spirits.

209. She also wanted to know how a GI was protected in *sui generis* systems for GIs? In the informal session of 10 November 2002, a delegation had specifically asked from the Swiss delegation how it had negotiated in respect of the GI "Champagne", because it appeared that there had been no negotiation based on Article 23.3 and that Switzerland had renounced the use of this homonymous GI. Responding to Switzerland's statement that extension equally interested both developed and developing countries, she also said that this issue did not interest developing countries as it interested developed countries. There were many developing countries in the TRIPS Council that had expressed that they were not favourable to extension. She wondered whether developing countries were in a position to accept higher additional obligations in intellectual property within this multilateral trade system, while many of these same countries were still facing problems implementing the obligations already negotiated in the Uruguay Round.

210. Noting that it was still being argued that developing countries saw extension as an advantage because this would favour their exports in the world market, she said that she could not understand how an intellectual property right would improve market access. If Argentina protected its cheeses through GIs, how would this overcome the tariff and non-tariff barriers, and the sanitary barriers that existed for dairy products? In fact, demandeurs were mixing things that had nothing to do with each other. If there was truly a desire for developing countries to increase their exports, this desire, expressed from the countries in favour of extension, should not be pursued in the TRIPS Council but in other fora. This issue was extremely relevant for the Latin American countries, not only because of the fact that these countries were colonized and many places were named after European cities, but also because of the strong influx of immigration that these countries had been subject to. Argentina's experience with at least one homonymous GI had not been, at least to date, a happy one. The experiences that occurred at the bilateral level were undoubtedly determinative of the positions they would take at the multilateral level.

211. The representative of the European Communities, addressing certain questions raised by the delegation of Malaysia, said that the very same training received by the personnel responsible for the protection of GIs for wines and spirits would be enough for the extended protection of GIs for other products. Therefore, he believed there would not be any additional costs on training personnel. As to adaptations to legislation, he believed that the Malaysian year 2000 GI Act already provided for extension. As to the costs of a case establishing that a name was generic, he believed that the costs depended on each country and on how it had interpreted and implemented the notion of genericness..

212. Responding to delegations that insisted that they should not be criticized for making reference to bilateral agreements, he said that the Council should understand that the only reason opponents were talking about bilateral agreements was because re-labelling did not occur under TRIPS. It would only occur under bilateral agreements. Article 24.1, second sentence, of the TRIPS Agreement stated that the provisions of paragraphs 4 through 8 (i.e. the exceptions on prior use, prior trademarks and generics) shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. These bilateral and multilateral agreements were precisely designed to increase the protection that would otherwise be negated under one of the exceptions. This was why re-labelling could occur, but only under bilateral agreements and not under TRIPS. He was looking forward to the evidence promised by the delegation of New Zealand, in particular because his most recent information from the New Zealand Intellectual Property Office was that the 1994 Act on GIs was not yet in force. Consequently, he was interested to find out how re-labelling had occurred on the basis of the additional protection for wines and spirits.

213. The representative of Singapore said that it was quite clear that certain costs would result from the need to modify legislation and to put in place a mechanism for registration. If one's system was based on registration, one would need more personnel to manage additional applications. He noted that it had been claimed, on the one hand, that there would be huge costs and, on the other hand, that this was simply a question of amending one's legislation and applying what one already had to some additional GIs. Obviously the truth lay in between these two propositions. He wondered

whether it would be useful if the Secretariat were to request a paper from a body that administers these issues and whether the Council could then gauge what kind of costs would result from extension.

214. The representative of Argentina said that Article 24.1 provided that no Member should use the exceptions to refuse to conduct negotiations or to conclude bilateral or multilateral agreements, but there was no provision in TRIPS that said that a Member should renounce the rights and obligations that existed under the Agreement.

215. The Chairman suggested that the Council request the Secretariat to prepare, prior to the Council's next meeting, a compilation of the elements contained in the oral statements made at the present meeting and the written submissions prepared for it in relation to the second and third baskets of issues, including the points made at the informal meeting of 10 November 2002 in relation to the second basket of issues.

216. The Council so agreed.

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

F. RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY

G. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

217. The Chairman recalled that, prior to the Council's meeting in September 2002, the Secretariat had circulated three notes on the review of the provisions of Article 27.3(b), the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), and the protection of traditional knowledge and folklore (IP/C/W/369, 368 and 370). He advised that the discussions on these items had continued during the last meeting held in September 2002, and he informed the Council that a communication had been received from the European Communities and their member States and circulated in document IP/C/W/383.

218. Furthermore, he reminded the Council that during the March meeting he had urged more Members to provide, by 1 June 2002, responses to the questionnaire on the implementation of Article 27.3(b) and that the Secretariat had accordingly issued an airgram (WTO/AIR/1756) on 26 March 2002 reminding Members to submit their responses. Since the September meeting, the Secretariat had received responses and supplementary information from five Members, namely the Czech Republic; Estonia; Hong Kong, China; Lithuania; and Thailand. The Secretariat would update the synoptic table in its summary note IP/C/W/273 in light of the new submissions as soon as possible. Finally, he recalled that the Council had agreed at the September meeting to invite a representative of the Food and Agriculture Organization (FAO) to make a presentation on the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as the "FAO treaty").

219. The representative of FAO said that it was after 23 years of discussion and seven years of formal negotiation in the FAO that the FAO treaty had been adopted, by consensus, on 3 November 2001. The FAO treaty was considered to be an excellent example of North-South cooperation in the fight against world hunger. He informed the Council that 815 million people were suffering from hunger. He hoped that the FAO treaty could help achieve the World Food Summit's target to halve the number of hungry by 2015. He said that the FAO treaty was a binding agreement of importance for several different sectors, including agriculture, trade and environment. He recalled that the WTO Secretariat had been represented and had provided essential advice to the negotiators at many meetings of the FAO. In his view the FAO treaty was in harmony with other international agreements, including the TRIPS Agreement.

220. Regarding the importance of the FAO treaty, he said that it dealt with plant genetic resources for food and agriculture, including the crops on which food security depends. He mentioned the famine in Europe in the 19th century as an illustration of the importance of these resources to human kind. That famine, which caused the death of two million people in Ireland and led to the emigration of millions, had emanated from the narrow genetic base of the potato in Europe, when the disease called *phytophthora infestans* had struck potato plants. The use of chemicals could not solve the disease problem. The problem was eventually solved after discovering resistance genes in the centre of origin of the potato in Latin America. A similar problem had occurred in the United States in the 1970s when a disease called *helminthosporium maydis* had struck maize in the Southern part of the country. That problem was also solved only after finding resistant genes in Africa. He said such examples showed that no country could be self-sufficient or independent with respect to plant genetic resources. On average, approximately 70% of the genes necessary to solve the problems of agriculture for the most important crops come from countries other than those with the problem. Thus, international co-operation was not an option but a necessity.

221. Unfortunately, he said, for the most important crops, up to 90% of the diversity existing at the beginning of the 20th century had been lost for ever. The loss of genetic resources that had existed in local farmers' varieties and in the wild relatives of crops limits our ability to develop new plant varieties capable of resisting future diseases and to cope with unpredictable environmental needs. He explained that biotechnology depended upon genetic resources as the raw material to produce new varieties. Genetic resources could be compared to the child's game, "Lego", as genes were like building blocks. Having a large variety of pieces could enable one to build a house, a castle or a bridge, as needed. However, if some pieces were missing or if all the pieces were the same, our choices would be drastically limited. Plant improvement needs diversity and, like "Lego", cannot build on uniformity. He noted that biotechnology did not create genes but used genes to make different useful combinations. Although biotechnology may appear to be a highly technical field, the question of protecting genetic resources for food and agriculture had wide socio-economic, political, cultural, legal and ethical implications affecting the future of humanity. It was for these reasons that countries within the Conference of the Parties to the CBD had recognized in 1995 the specific nature of agricultural bio-diversity, its distinctive features and problems, which needed distinctive solutions.

222. He described the FAO treaty as having three goals: first, the conservation of plant genetic resources for the future. Genetic diversity was part of human heritage, handed down from previous generations, but much of which had been lost in the 20th century. The present generation had an obligation to conserve for future generations the genetic resources they would need to deal with threats to food security, and meet evolving needs. Countries that were party to the FAO treaty therefore had a legal obligation to protect and conserve their plant genetic resources. The second goal was the sustainable use of plant genetic resources. Humanity had so far used only very little of agricultural genetic diversity: only 150 of the 7,000 plant species used in the course of human history of food and agriculture were currently farmed. Twelve of them alone provided most human food from plants, and four only provide more than half. Therefore, the FAO treaty established incentives for people to use a broader range of the diversity. The third goal was the fair sharing of the benefits derived from the use of genetic resources. Articles 12 and 13 of the FAO treaty provided several elements that would contribute to the fair sharing of the benefits derived from the use of genetic resources, including access to genetic resources for research and genetic improvement, exchange of relevant information, transfer of technology, national capacity building for the conservation and improvement of genetic resources, and the mandatory or voluntary sharing of the monetary and other benefits of commercialization.

223. The FAO treaty also set out a number of innovative elements to achieve its goals. Firstly, it established a Multilateral System for Access and Benefit-sharing that is applicable to 64 crops. Two selection criteria were used in identifying these crops, namely the importance of the crop for food security and the level of interdependence between countries. The breeding of new plant varieties often involved the use of tens or hundreds of traditional varieties from different countries. Bilateral

agreements for access to these genetic resources were likely to involve enormous transaction costs. Countries therefore agreed that a multilateral system was the only effective way of managing these crops. Access and the sharing of benefits were to be regulated by standardized material transfer agreements (MTAs) to be approved by the Governing Board of the FAO treaty. Secondly, the FAO treaty provided for the recognition of farmers' rights, including the right to the protection of traditional knowledge, the sharing of the benefits, and farmers' participation in decision-making at the national level.

224. He said that countries, through the FAO Commission on Genetic Resources for Food and Agriculture, had negotiated the Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture, adopted by 150 countries at the Leipzig International Conference on Plant Genetic Resources, in 1996. This Plan set out agreed priorities, programmes and activities necessary for the conservation and the sustainable use of plant genetic resources. The Treaty envisaged the implementation of a funding strategy for plans and programmes that took the Global Plan of Action into account. The Governing Body of the FAO Treaty would periodically establish a target for such funding.

225. The FAO treaty would enter into force 90 days after 40 governments had ratified it. Already 77 countries (including a large number of developing countries, 15 countries of the European Union, the European Communities, the US and Switzerland) had signed the FAO treaty. Eleven countries, including several African countries, Canada, India, Jordan and Nicaragua, had ratified the Treaty or acceded to it. In 2002, many appeals were made for the ratification of the Treaty, so that it might enter into force as soon as possible. These included in the Declaration of the World Food Summit, in the Ministerial Declaration of the Sixth Meeting of the Conference of the Parties to the CBD in the Hague, and in the Plan of Implementation of the Johannesburg World Summit on Sustainable Development.

226. He said that while many breakthroughs had been made during the negotiation of the text of the FAO treaty, some issues had deliberately been left aside for parties to solve later. These included the level, form and manner of monetary payments on commercialization, the mechanism to promote compliance, the development of a funding strategy and the development of a standardized MTA. All these elements were essential and were to be considered in the first meeting of the Governing Body, which would meet after 40 countries had ratified the FAO treaty. Countries may therefore consider it important to be among the first to ratify, so as to ensure that their national interests be taken into account at the Governing Body's first meeting.

227. He expected the FAO treaty to be ratified within the year. With respect to the review of Article 27.3(b) of the TRIPS Agreement, the FAO treaty had been negotiated by the same member countries of the WTO and the CBD and was in harmony with the TRIPS Agreement and the CBD. Cooperation and synergies in the development and implementation of these agreements under national legislation were still necessary. He noted that the TRIPS Agreement, the CBD and the FAO treaty involved three different sectors, namely, trade, environment, and agriculture. The FAO treaty gave specific solutions to some important subjects of direct importance to the agricultural sector, such as access to genetic resources, the fair and equitable sharing of the benefits and farmers' rights. Finally, he said that he would be ready to respond to any question regarding his presentation.

228. The representative of Peru noted that the FAO presentation had stressed that the importance of protecting plant genetic diversity as a means of dealing with the serious food problems was not exclusive to developing countries. Many developing countries, including Peru, suffered from food insecurity and it was imperative to tackle this serious and widespread problem. Peru recognized that the FAO treaty was a unique international agreement concerning sustainable development of plant genetic resources for food and agriculture. For this reason Peru had signed and would soon be ratifying the FAO treaty. She hoped that many other countries would subscribe to and ratify it too so

that it entered into force as soon as possible. She supported the FAO's proposal to make an informal presentation on the FAO treaty in February 2003 to Members in the TRIPS Council.

229. The representative of the European Communities said that his delegation had submitted a comprehensive communication in September 2002 (IP/C/W/383), that dealt with a number of issues covered by paragraph 19 of the Doha Ministerial Declaration. The communication covered the review of Article 27.3(b), the relationship between the TRIPS Agreement and the CBD, and the protection of traditional knowledge and folklore. It also contained several proposals on disclosure of genetic resources used in an invention, plant variety rights, traditional knowledge and farmers' exemptions. He welcomed comments by other delegations on this submission.

230. The representative of Brazil commended the European Communities and their member States for their support, as contained in their communication, to grant observer status to the CBD in the TRIPS Council. He recalled that Brazil and other developing countries, including China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia, and Zimbabwe had circulated a proposal on the relationship between the TRIPS Agreement and the CBD in document IP/C/W/356 on 24 June 2002. He noted that many Members believed that the TRIPS Agreement and the CBD should be mutually supportive. In that respect, his delegation believed that the TRIPS Agreement should be amended to require, as a condition for acquiring patent rights, that an applicant for a patent relating to biological material or to traditional knowledge, disclose the source or country of origin of biological resource and traditional knowledge used in the invention, provide evidence of prior informed consent through approval of authorities under the relevant national regime and evidence of fair and equitable benefit sharing under the national regime of the country of origin.

231. As regards the Council's report to the TNC on this subject, he suggested that it would be appropriate for the Council to signal that the Council had undertaken to find a proper solution to the implementation issues and had agreed that negotiation on the outstanding implementation issues should be an integral part of the Council's work programme. Furthermore, the Council could, based on paragraph 12(b) of the Declaration, request the TNC to determine the appropriate action that could be taken on these issues. He said that his delegation would draft an appropriate reference to its proposal that could be included in the report to the TNC in due course.

232. The representative of India said that his delegation supported the assertion that the TRIPS Agreement and the CBD should not undermine each other's objectives and that the two agreements should be implemented in a mutually supportive manner. He commended the EC for stating in their submission IP/C/W/383 that Article 29 of the TRIPS Agreement did not prevent Members from requiring the patent applicant to disclose the source of origin or to provide evidence that access and benefit sharing rules had been respected, as long as such requirements did not constitute a patentability criterion or invoke the validity of the patent. He recalled that the EC had acknowledged that it would be important to have uniform requirements on disclosure globally and that the legal consequences of not respecting these requirements should lie outside the ambit of patent law. In other words, the EC believed that patent law should not be used to sanction the non-respect of the domestic access and benefit sharing requirements through rejection of patent application or the invalidation of patent. However, his delegation believed that leaving the consequences of non-disclosure outside the realm of patent law would nullify the requirements themselves and that there should, therefore, be provisions in the patent law to enforce this obligation in order not to reduce the requirement for disclosure of the source of origin to just a formality.

233. He noted that the EC had not addressed the requirement for patent applicants to provide evidence that prior informed consent and benefit-sharing had been undertaken in accordance with the domestic laws of the country of origin. This requirement was essential in ensuring that domestic access and benefit sharing regimes were respected and implemented effectively. It would also require providing remedial action against violation of domestic law at the global level through the TRIPS Agreement as a means of implementing the CBD and the TRIPS Agreement in a mutually supportive

manner. Furthermore, he recalled that the United Kingdom Commission on Intellectual Property Rights (CIPR) had stated that the principle of equity dictated that a person should not be able to benefit from IPRs based on genetic resources or associated knowledge acquired in contravention of any legislation governing access to that material. The Commission had also stated that all countries should have a provision in their legislation on obligatory disclosure of information of geographic source of the genetic sources from which their inventions were derived. In his view, sanctions should be applied only when it was evident that the patentee had failed to disclose the source or when he had sought to mislead the patent office. He said that the TRIPS Council should, in light of the mandate contained in paragraph 19 of the Doha Declaration, consider the proposal made by a group of developing countries in the document IP/C/W/356. Finally, he supported the comments made by the representative of Brazil with respect to the Council's report on the outstanding implementation issues.

234. The representative of the United States reiterated that the TRIPS Agreement and the CBD were mutually supportive. Accordingly, his delegation had urged those Members seeking to regulate access to their genetic resources to carefully consider implementing an access regime based on a contractual system. Such a system could be built upon existing contractual law and could be implemented immediately. He added that the system could be associated with Members' visa systems in order that domestic law is respected by foreign nationals seeking to collect such materials. The domestic law could therefore be used to provide access and benefit-sharing with citizens and residents as well as foreign nationals. His delegation had submitted a paper to the Council to illustrate how such a contractual system worked in his country. That paper described the system being used by US National Park Service for determining whether to grant a permit for access to individual instances and for determining the conditions under which that access might take place. In addition, there was a model law under development for a regime on access to genetic resources and traditional knowledge that might be adapted by other countries seeking to establish such regimes. He urged Members to take a dispassionate look at the contents of his paper, the sample memoranda of understanding and letters of collection of the US National Cancer Institute, and consider how a contractual system of a similar nature might be incorporated into their own laws and practices relating to access to genetic resources. That would provide an immediate benefit for the issues that Members had been concerned about rather than a much more long-term and much less productive discussion in the Council about prior informed consent, and benefit-sharing requirements in the patent system.

235. The representative of Cuba supported the statement made by the representative of India and endorsed the suggestion made by the representative of Brazil about the Council's report to the TNC.

236. The representative of Australia said that her delegation had on previous occasions clarified the need to address concerns relating to bio-piracy. She recalled that her delegation had clarified in its paper of October 2001, that it would support the examination of options for disclosing information about the source of biological materials used in all patent applications. Her delegation's interest in this discussion reflected its position as one of the only 17 mega-bio-diverse countries in the world. Australia controlled 10% of the world's natural genetic and biochemical resources. Much of that material had yet to be evaluated for its commercial potential and a significant portion of the biodiversity was yet to be described. For these and other reasons, her delegation shared the interest of many developing countries in terms of ensuring a fair return on exploitation of Australia's biological resources and in developing practical, cost-effective measures to discourage unauthorized commercialization of its genetic resources. Her delegation had an interest in continued discussion on these issues and thus held the view that the EC's communication was helpful. She said that the problem of bio-piracy should be addressed first through the implementation of effective systems at the national level for regulating access to genetic resources and benefit-sharing as set out in the CBD. She also said that her delegation had been an active participant in the negotiations of both the CBD and the TRIPS Agreement and that it did not consider that there was a conflict between the two treaties. She believed that legal certainty was important in ensuring sustainable investment in this sector.

237. She noted that the EC had stated that the disclosure requirement should not constitute an additional formal or substantial patentability criterion, but should rather be a self-standing requirement which would apply globally. She said that her delegation supported, in principle, the use of documentation associated with patent application to disclose the source of relevant genetic resources. Her delegation also supported, in principle, the notion that non-disclosure requirements might have legal consequences. In this respect, Members might wish to consider what legal consequences might be appropriate, bearing in mind the broader policy objective. Her delegation was committed to continued and constructive engagement in the discussion of these issues and looked forward to other Members' comments and proposals.

238. The representative of Peru supported the suggestions made by the representative of Brazil that the Council's report to the TNC should include the recommendations made by developing countries.

239. The representative of China recalled that her delegation's position was reflected in document IP/C/W/356. Her delegation believed that for implementing the CBD and the TRIPS Agreement in a mutually supportive manner, the basic principles recognized by the CBD, such as national sovereignty, prior informed consent and equitable sharing of benefits, should be incorporated into the TRIPS Agreement. Her delegation also agreed with the statements made by the delegations of Brazil, India and Peru about the Council's report to the TNC.

240. The representative of Thailand said that her delegation was a co-sponsor of IP/C/W/356 submitted by the representative of Brazil and therefore supported Brazil's proposal to include that document in the Council's report to the TNC.

241. The representative of Norway said that the relationship between the TRIPS Agreement and the CBD was not only being studied in the TRIPS Council, but was also being studied inter alia within the CBD and WIPO. In his view, the TRIPS Council should not wait for the outcome of the discussions in the CBD and WIPO, but should pursue the discussion under its mandate in parallel with discussions in other organizations. He noted that there were two proposals before the TRIPS Council that both proposals were aimed at furthering the two basic objectives of the CBD. While the implementation of the TRIPS Agreement and the CBD should be mutually supportive, a key issue was how the TRIPS Agreement could support the objectives of the CBD, in particular that of the equitable sharing of benefits and prior informed consent. When discussing this issue, he said that Members should bear in mind that the primary objective of the TRIPS Agreement was to set minimum standards for the protection of intellectual property rights, while providing Members with some amount of flexibility in implementing certain provisions.

242. The TRIPS Agreement already recognized that it should contribute to goals beyond the strict objective of protecting IPRs, such as "the transfer and dissemination of technology in a manner conducive to social and economic welfare". It was important that the TRIPS Agreement actively acknowledge the importance of the CBD in the same way as the CBD acknowledged the importance of patents and other intellectual property rights. He said that his delegation would certainly not exclude any opinions or options at the current stage, including amending the TRIPS Agreement, in order to further these objectives of the CBD. However, the extent to which the TRIPS Agreement could go in furthering some of the concerns expressed would be a matter of discussion. He added that any amendments to the TRIPS Agreement should aim to safeguard its objectives and should be tailored in a manner that would avoid causing unnecessary obstacles to the protection of IPRs relating to biological materials.

243. Regarding the proposal by Brazil and other Members that a patent applicant must fulfill three requirements in order to acquire a patent for a biotechnological invention, he said that although inserting such a requirement into the TRIPS Agreement would no doubt contribute towards achieving the principles of fair and equitable benefit sharing and prior informed consent, the proposal must be assessed against its compatibility with the primary objectives of the TRIPS Agreement. It would also

be helpful to clarify, with respect to the first element of that proposal, whether the patentability criteria of novelty and inventiveness had been fulfilled in certain cases. He added that the proposed requirements could be a valuable instrument in cases where a patent official examined a proposed invention whose effect might turn out to be a mere replication of traditional knowledge long practiced by a local community. However, his delegation was still contemplating whether this aspect alone would justify a general provision related to the mandatory disclosure of the source of origin of genetic resources. An analysis of that would *inter alia* have to take into consideration how frequently a biotechnological invention was likely to conflict with traditional knowledge. Therefore, his delegation needed to study the consequences of the first element of the proposal in more detail.

244. Regarding the other two elements of the proposal, he said that they would potentially involve difficult assessments of commercial agreements between patent applicants and host countries, based on host countries' national legislation. His delegation would have to examine further whether this type of scrutiny would be a suitable task for national patent offices. He indicated that another possibility could be to add a provision under Article 29 of the TRIPS Agreement, which would either require or enable a Member to oblige a patent applicant to disclose the source of origin on biological resources. The understanding of the legal consequences of such an amendment would be that the failure to reveal such origin would not result in a rejection of a patent. However, the Member would have the possibility to invoke other types of sanctions or repercussions *vis-à-vis* an applicant who had failed to reveal the geographical origin. Increased fees could be one possibility, provided that these were reasonable under Article 62.1 and any submission of false information could certainly be punishable under criminal law. The primary objective of an amendment to oblige a patent applicant to disclose the source of origin should be to increase the awareness of the patent applicant about the potential source of patentable biological materials. Such a provision would also place added focus on those patent applicants who for some reason or another failed to reveal the source of origin in their applications. The provision would, in much the same way as the EC proposal, encourage the voluntary disclosure of such material and would thus contribute to the achievement of the basic objectives of the CBD. His delegation believed that the system proposed by the EC could be a valuable instrument that could encourage patent applicants to reveal, on a voluntary basis, the source of origin of patentable genetic material. He said that the proposal should be clarified further in the Council's discussions in relation, among other things, to the choice of legal instruments.

245. The representative of Peru said that her country was working on the establishment of a system for the protection of indigenous peoples' traditional knowledge and those relating to biological resources. Law number 26811 had been promulgated in July 2002 with the objective of promoting the protection, conservation, broad application and development of the collective knowledge of indigenous people. It sought to promote the fair and equitable distribution of benefits derived from the use of indigenous knowledge and to guarantee that such use was made with the prior informed consent of indigenous people. It was also aimed at avoiding the patentability of inventions based on indigenous knowledge that had not been taken into account in considering the inventive steps and innovation. In other words, the law was aimed at avoiding piracy. Furthermore, three registers were to be set up as an enforcement mechanism to ensure the conservation and safeguarding of the collective knowledge of indigenous peoples and their rights to that knowledge. The registers would also ensure availability of information to the competent national intellectual property authority, INDECOPI, to allow it defend the rights of indigenous peoples to their traditional knowledge. A Fund would be set up to help promote the full development of indigenous people. This Fund would enjoy technical, financial and administrative autonomy and would be run by representatives of the indigenous communities. It would also be administered through traditional mechanisms to ensure the sharing of benefits. Indigenous peoples with collective traditional knowledge would be protected against the revelation, acquisition or use of their knowledge without their prior consent. The mechanism would enable indigenous peoples to grant licences to third parties in order to safeguard against the unfair use of their knowledge. The licensing contracts would have to be registered with the Intellectual Property Office of Peru to ensure that they were in line with the provisions of

Article 27. There would also be a system to deal with infringements to ensure that any action taken against the law was sanctioned and dealt with properly.

246. The representative of Bolivia reiterated the importance of traditional knowledge and folklore to her delegation and said that the international system should not only favour its preservation but should also promote its continuity through efficient legal protection. That would allow legitimate owners to have an effective control over its use, transmission and the obtaining of benefits derived therefrom. It was therefore necessary to have an effective means of ensuring positive protection of innovations based on traditional knowledge and practices of the indigenous population.

247. The representative of the European Communities said that his delegation would continue to take an open view on issues related to Article 27.3(b) and the relationship between the TRIPS Agreement and the CBD. However, he did not agree with the statement made by the Indian delegation that without legal consequences of not respecting disclosure requirements within the ambit of patent law, the requirements would be an empty shell. His delegation did not believe that it was in anyone's interest not to respect disclosure obligation nor that such failure should result in the refusal to grant the patent. It would neither be in the interest of innovation nor those who were expecting to share in the benefits entailed by a patent. Therefore, his delegation believed that legal consequences should be outside the ambit of patent law. However, that did not mean that Members could not find legal consequences of another kind that would not have a sufficient deterrent effect on patent applicants who would not respect disclosure requirement. He said that sufficiently deterrent legal consequences to the notion of "non-respect" could be found with a minimum of creativity and hoped that the Council could continue working on this issue.

248. The Council took note of the statements made under these three agenda items.

H. REVIEW OF IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71.1

249. The Chairman recalled that, at the Council's meeting in March 2002, the previous Chairman had noted that a substantial number of suggestions for topics to be considered under the Article 71.1 review had been made prior to the Doha Ministerial Conference, but some of them had overlapped with other items on the Council's post-Doha agenda. In considering how to organize its work, the Council had invited Members to submit ideas for issues to be taken up under this agenda item by the Council's meeting in June 2002, without prejudice to the right of Members to submit ideas at a later stage. To date, no suggestions had been tabled by any Members.

250. The Council agreed to revert to the matter at its next meeting.

I. IMPLEMENTATION OF ARTICLE 66.2

251. The Chairman recalled that, at Doha, Ministers had instructed the TRIPS Council to put in place a mechanism for ensuring the monitoring and full implementation of the obligations under Article 66.2 of the TRIPS Agreement. The Ministers had also agreed that, to this end, developed country Members should submit, prior to the end of 2002, detailed reports on the functioning in practice of the incentives provided to their enterprises for transfer of technology in pursuance of the commitments under that Article. Given the need for early action to implement the Ministerial instruction and in light of the suggestions and discussions in the Council and informal consultations, the Chairman had circulated, prior to the Council's meeting in September 2002, an informal note (JOB(02)/118). This note suggested a number of elements for the consideration of the Council that could form the basis of a decision on this matter. Since delegations had appeared to need more time to consider these suggestions, the Council had agreed to revert to these elements at the present meeting. In the meantime, developed country Members were requested to make information on their implementations of Article 66.2 available for the present meeting. In doing so, they were invited to use the guidelines in the Chairman's informal note if they found them useful.

- *Reports received from developed country Members*

252. The Chairman informed the Council that reports had been received from the following developed country Members: Canada, New Zealand, Australia, Switzerland, Japan, and Norway. Reverting to this matter later in the course of the meeting, he said that reports had also been received from the European Communities and their member States, and the United States. These reports were being circulated in document IP/C/W/388 and addenda. Given that some of these reports had been received only very recently and were not yet available in all WTO languages, he intended to provide delegations the opportunity to comment on them at the Council's next meeting.

253. The representative of the United States said that his delegation had submitted a number of reports in the past, and he was happy to receive any questions or comments about those previous reports. His delegation was endeavouring to complete the report this year and submit it to the Council soon.

254. The representative of Norway said that her delegation had submitted a short and self-explanatory note to the Council, which in essence updated the one introduced in 2001.

255. The representative of Zambia thanked developed country Members for their continuing efforts to help his delegation understand the way they had implemented Article 66.2. Since the developed country Members' reports had been circulated very recently, his and other LDCs' delegations needed time to reflect on them and make more substantive comments at the Council's next meeting.

256. The Chairman urged those developed country Members that had not yet provided their reports to do so as soon as possible. He reiterated his intention to provide Members with an opportunity to give further comments on the reports already received at the Council's next meeting.

- *Implementation of Article 66.2*

257. The Chairman recalled the instruction that Ministers had given to the TRIPS Council to put in place a mechanism for ensuring the monitoring and full implementation of the obligations under Article 66.2. He also recalled that he had circulated prior to the Council's meeting in September 2002 an informal note (JOB(02)/118) in which he had suggested a number of elements for the consideration of the Council that could form the basis of a decision on this matter. The Council had received a communication from Zambia on behalf of the least-developed countries' group on this topic (IP/C/W/390). The Chairman said that he had consulted with the delegations most active on this matter. In the light of these consultations, he had circulated an informal note (JOB(02)/195), attached to which there was a draft decision for the Council's consideration. The draft decision was based on the elements contained in his previous note as well as on the suggestions made in his recent consultations.

258. The representative of Zambia said that he had given the Chairman's informal note to the LDCs group to study. Since the draft decision attached to the note was on a very important issue, he said that the LDCs group was not yet in a position to take decision on it.

259. Commenting on the paper submitted by Zambia, the representative of the European Communities said that he agreed that reports should contain as much information as possible. Referring to paragraph 6 of that paper, which suggested that information be submitted regarding the terms under which technology was being transferred by developed country enterprises, he believed, however, that a complete examination of transfer of technology undertaken by all enterprises to all partners in least-developed countries was impossible for several reasons. First, information was not always available even on licensing terms; no list of licensing agreements concluded in the world existed. Second, transfer of technology was often informal, especially in the case of transfer of know-how or transactions between different geographic entities of foreign firms.

Finally, a lot of information on transfer of technology was considered as business confidential information and, therefore, difficult, if not impossible, to obtain.

260. The Chairman proposed that the Council revert to this matter later in the course of the meeting in order to provide delegations more time to consider the draft decision.

261. Reverting to the matter, the representative of Zambia, speaking on behalf of the LDCs group, suggested to divide paragraph 1 of the draft decision into two parts, the first part remaining as paragraph 1 and the second part becoming paragraph 3. The decision should provide that initial reports be submitted by the end of 2002 and reviewed at the Council's first meeting in 2003. In addition, he suggested to delete the words "To this end, they" in paragraph 1 of the draft decision.

262. Regarding paragraph 3(a) of the draft decision, he said that developed country Members must show exactly what they had done in terms of the law or policy to implement their obligations. In other words, it was critical that developed countries would show that they had enacted either a specific law, identifiable policy or regulation to implement Article 66.2 rather than provide generalized statements. He emphasized that international obligations were always implemented by identifiable laws, regulations or policies, and that Article 66.2 was no exception. Concerning paragraph 3(c), he could not see the necessity to keep the words "to the extent available", because, in his view, it was the obligation for developed countries to gather the information and there was already a disclaimer for confidential business information.

263. Finally, regarding paragraph 6 of the draft decision, he believed that, based on the experience of the reviews under Articles 27.3(b) and 71, it was not enough to merely use "review". In his view, the decision must specify what the purpose of the review would be, namely that the purpose of the review was to examine how the system had worked in order to improve it. In conclusion, he said that as this decision was important to all LDCs, they needed more time to have further consultations before taking a decision on it.

264. The representative of Bulgaria said that he was open to the proposals by Zambia and prepared to join in a consensus on them. Although he felt uncomfortable with the term "developed country Members" in the draft decision, he was prepared to accept it on the understanding that Bulgaria would not be obliged to submit annual reports under it.

265. The representative of the European Communities said that the fifth recital of the draft decision did not actually reflect the mandate adopted at Doha. Referring to Zambia's remark on the words "to the extent available" in paragraph 3(c) of the draft decision, he said that these words were indispensable because the kind of information to which reference had been made in the following indents was often not available to the authorities of developed countries. Information referred to in the second, fourth and fifth indents of that sub-paragraph was indeed not normally available to the authorities of the European Communities and their member States. Therefore, it would be difficult to subscribe to a commitment which the European Communities could not deliver.

266. The Chairman proposed that the Council revert to the matter at its next meeting and that he hold consultations prior to that meeting.

267. The Council so agreed.

J. NON-VIOLATION AND SITUATION COMPLAINTS

268. The Chairman recalled that, at Doha, the Ministerial Conference had adopted a Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17). Paragraph 11.1 of the Decision stated: "The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of

GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement." Thus, the Council had a time-frame for its work, namely the fifth Ministerial Conference, to be held in Cancún, Mexico in September 2003. As requested by the Council at its meeting in March 2002, the Secretariat had circulated prior to its June meeting in document IP/C/W/349 a summary note of the points raised in the substantive discussion of this agenda item so far. At that time, he had also circulated an annotated agenda in document JOB(02)/66 raising a number of questions that Members might wish to address.

269. He recalled that the Council had agreed at its last meeting to continue its discussion of the matter on the basis of the annotated agenda and other material on the table at the present meeting. It had also set the first meeting of the Council in 2003 as a target date for the submission of specific proposals from delegations. This, however, was not to preclude earlier or later papers in an effort to find common ground. He also recalled that, at the Council's previous meeting, Peru had introduced a joint communication on this matter on behalf of a number of Members. The final version of this communication, received after that meeting, had been circulated in document IP/C/W/385. Since then, no new communications had been received.

270. The representative of Peru reiterated the need for the fifth Ministerial Conference to reach a consensus on non-violation and situation complaints with respect to the TRIPS Agreement. Given the high level of agreement and support of document IP/C/W/385, she hoped that this goal could be met. Those who had put forward document IP/C/W/385 felt that non-violation and situation complaints were not compatible with the TRIPS Agreement. The benefits accruing under the TRIPS Agreement were described in its preamble, objectives and principles. If there were to be additional benefits in the context of Article XXIII:1(b) of GATT 1994, complainants would be receiving more than what they had paid for. The application of non-violation and situation complaints to the TRIPS Agreement would entail serious risks, because such complaints would make the WTO Agreement inconsistent and adversely affect the balance of rights and obligations under the Agreement. Furthermore, it would make it difficult to settle any dispute and impair the flexibility under the TRIPS Agreement. Therefore, her delegation had proposed that the TRIPS Council recommend to the fifth Ministerial Conference that non-violation and situation complaints of the type identified in Article XXIII:1(b) and (c) of GATT 1994 be determined inapplicable to the TRIPS Agreement. Finally, she said that her and the other delegations who had put forward this proposal would be grateful if the Council would include it in its report to the General Council.

271. The representative of the Slovak Republic said that document IP/W/C/385 was a good basis for the Council's further discussion on this issue and raised some systemic issues arising from the application of non-violation and situation complaints to the TRIPS Agreement. Non-violation and situation complaints were an extremely delicate and complicated issue. He shared the view that the application of non-violation and situation complaints to the TRIPS Agreement would raise fundamental concerns. Despite the on-going discussion in the Council, there was still a great deal of uncertainty as to the nature of benefits that would be addressed by non-violation and situation complaints. The WTO dispute settlement mechanism should be secure, predictable and credible. However, the application of non-violation and situation complaints would increase legal uncertainty and threaten the predictability and security that the system guaranteed. Given the special nature of the TRIPS Agreement, it would be extremely difficult to appropriately transport non-violation and situation complaints into it. The nature of benefits under the TRIPS Agreement was significantly clearer than under an agreement with specific market-access commitments. He believed that after proper consideration, all Members would conclude that the Council should recommend to the TNC and the Ministerial Conference that non-violation and situation complaints should not apply to the TRIPS Agreement. The application of non-violation and situation complaints to the TRIPS Agreement might lead to a complication rather than a solution.

272. The representative of Pakistan said that, as a co-sponsor of Peru's paper, his delegation fully endorsed the views expressed by Peru. The introduction of non-violation and situation complaints to the TRIPS Agreement was unnecessary and would create tension with the security and predictability provided by the multilateral trading system. In the light of the concerns raised in the paper, his delegation fully endorsed the proposal that the TRIPS Council recommended to the fifth Ministerial Conference that non-violation and situation complaints under Article XXIII:1(b) and (c) of GATT 1994 be determined inapplicable to the TRIPS Agreement.

273. The representative of Malaysia, speaking on behalf of the ASEAN countries, said that ASEAN continued to be of the view that non-violation and situation complaints should not be made applicable to the TRIPS Agreement. The application of non-violation and situation complaints would introduce legal uncertainty and unpredictability, which should be avoided. Therefore, her delegation supported the recommendation that non-violation and situation complaints be made inapplicable to the TRIPS Agreement.

274. The representative of the United States reiterated his view that non-violation and situation complaints were entirely appropriate in the context of the TRIPS Agreement. In the spirit of compromise, his delegation had agreed in Doha to continue the examination of the scope and modalities of non-violation and situation complaints, but it had not seen a persuasive proposal for specific scope and modalities. Therefore, he expected that, in the absence of any such proposal, the temporary moratorium agreed at Doha would expire at the fifth Ministerial Conference.

275. The representative of Cuba said that, as a co-sponsor of document IP/C/W/385, her delegation agreed with the statement by Peru, in particular with respect to the recommendation to the fifth Ministerial Conference that non-violation and situation complaints should not be applicable to the TRIPS Agreement.

276. The representative of New Zealand said that, although her delegation was not a co-sponsor of document IP/C/W/385, in principle it supported the ideas presented in the paper.

277. The representative of Hungary reiterated his delegation's interest in continuing the discussion on the scope and modalities of non-violation and situation complaints outlined in previous informal or formal submissions and oral comments, including in document IP/C/W/191 that his delegation had tabled together with a number of other delegations. He said that he welcomed and agreed, to a large extent, with the contents of document IP/C/W/385 tabled by a group of developing countries. This was because the document reflected many points that his delegation had made earlier in the discussion. Furthermore, he highlighted four points raised in the paper he believed were particularly important. First, the TRIPS Agreement was not a market access agreement per se, but an agreement which set certain minimum standards of intellectual property protection. Secondly, the availability of non-violation and situation complaints under the TRIPS Agreement was not necessary to protect market access commitments embodied in the GATT. Thirdly, the nature of benefits under the TRIPS Agreement was significantly different from the nature of benefits under market access agreements. In his view, benefits under the TRIPS Agreement accrued to Members and were adequately described in the Agreement. Referring to paragraph 38 of IP/C/W/385, he said that the TRIPS Agreement did not create legitimate expectation of benefits that would go beyond the provisions of the Agreement. Fourthly, the availability of non-violation and situation complaints under the TRIPS Agreement would certainly undermine regulatory authority. Replying to the United States delegation's statement that it had not heard a convincing proposal to define the scope and modalities of non-violation and situation complaints and, therefore, the moratorium agreed in Doha would expire in Cancún, he said that he had not heard any convincing argument in favour of the availability of non-violation and situation complaints with respect to the TRIPS Agreement. Finally, he said that his delegation was open-minded, but for the time being, it tended to look with great sympathy at the proposal contained in document IP/C/W/385.

278. The representative of Peru said that she had not seen any proposal or document to date which would have made it clear that non-violation and situation complaints should be applied to the TRIPS Agreement. Indeed, all the documents her delegation had seen indicated that it would be very difficult to determine the advantages resulting from such application. She believed that Article 64.3 of the TRIPS Agreement clearly stated that the Council should consider the scope and modalities of non-violation and situation complaints and make a proposal to the Ministerial Conference. The proposal had to be approved by consensus. Until such time, non-violation and situation complaints were not applicable to the TRIPS Agreement.

279. The representative of India said that, as a co-sponsor of documents IP/C/W/385, his delegation fully associated itself with what had been stated by Peru. In his view, non-violation and situation complaints had no place in the TRIPS Agreement.

280. The representative of Switzerland said that the TRIPS Council had a mandate to work out the scope and modalities of non-violation and situation complaints with respect to the TRIPS Agreement. With the expiration of the five-year transitional period under Article 64.2 of the Agreement, he believed that the GATT principle of non-violation and situation complaints did apply to the TRIPS Agreement. The fact that there had not yet been a solution on the scope and modalities did not mean that non-violation and situation complaints had been determined to be inapplicable to the TRIPS Agreement. He suggested, as a compromise, that the moratorium mentioned in paragraph 11 of the Decision on Implementation-Related Issues and Concerns be prolonged so that non-violation and situation complaints would not be available at this time. However, he could not go along with the proposal to determine non-violation and situation complaints as inapplicable to the TRIPS Agreement. He thought that there were some merits in the arguments of the United States and Peru. While he did not have a strong view on this issue, he believed that the WTO was a rule-based organization, and the Council could not just delete an issue because it could not find a solution to it.

281. The representative of Egypt said that, as a co-sponsor of Peru's paper, he associated his delegation with the remarks made by Hungary, Peru and India.

282. The representative of Canada said that she shared a number of points made by other speakers and that she would come up with some suggestion on how to continue the work at the Council's next meeting.

283. Associating his delegation with the remarks made by Malaysia, the representative of Singapore said that, after a few years' debate, it was obvious that there was no agreement on this issue. On the one hand, it was argued that non-violation and situation complaints continued to apply unless the Council worked out certain modalities, and, on the other hand, that such complaints did not apply due to special considerations relating to the TRIPS Agreement. He suggested as a practical way to end the debate to have an indefinite extension of the moratorium.

284. The representative of the United States said that the Council needed to work out an appropriate scope and modalities. He recalled that the delegation of Australia had made a substantive contribution to this debate and proposed a specific scope and modalities. He suggested a return to a discussion on this concrete proposal in order to move the debate forward. He was fully prepared to enter into discussion of a specific proposal of the scope and modalities. It was clearly in the minds of Members during the Uruguay Round that non-violation and situation complaints would be available in the TRIPS context. He continued to believe that it was fully appropriate that Members lived up to the obligations that they had signed up to. It was inappropriate to have indefinite moratorium simply because Members were not going to put forward a concrete proposal on scope and modalities. Therefore, he could not agree to the indefinite moratorium.

285. The Chairman encouraged Members to come forward with specific written proposals by the agreed target date, the first meeting of the Council in 2003.

286. The Council took note of the statements.

K. ELECTRONIC COMMERCE

287. The Chairman informed the Council that no communications on this matter had been received from Members. He recalled that, at the Council's meeting in March 2002, the Secretariat had been requested to update its factual background note on intellectual property and electronic commerce circulated in document IP/C/W/128 in February 1999. The representative of the Secretariat said that, although the document had been pending for some time, the Secretariat had not been able to complete this work.

L. OTHER OUTSTANDING IMPLEMENTATION ISSUES (TIRETS 93 AND 94 AND PROPOSAL BY LDCS ON THEIR TRANSITION PERIOD)

288. The Chairman said that the Council had covered most of the outstanding implementation issues under the previous agenda items and recalled that the remaining outstanding implementation issues referred to in paragraph 13 of the Doha Decision on Implementation-Related Issues and Concerns were the following:

- Tired 93: The transitional period for developing countries provided for in Article 65.2 shall be extended.
- Proposal by Least-Developed Countries, 22 October 2001: The General Council agrees that the transition period for LDCs shall be extended so long as they retain the status of an LDC.
- Tired 94: Articles 7 and 8 of the TRIPS Agreement to be operationalized by providing for transfer of technology on fair and mutually advantageous terms.

289. The representative of Cuba said that the Council had so far not been able to analyse the problems and concerns relating to the issues covered by its agenda item L due to the workload under the Doha work programme. However, since the issues under item L were still major development issues with systemic implications for developing countries, it was essential that the Council would develop and make specific recommendations to the TNC.

290. With respect to Tired 93, she said that developing countries had made every effort to comply with all of the WTO Agreements, in particular the TRIPS Agreement. This had been demonstrated in developing countries' trade policy review reports and in particular by the national legislation review and notification process, which were still under way at the Council's meetings. She further indicated that the wide-ranging legal, institutional and infrastructure changes which developing countries had had to make under the TRIPS Agreement had caused them to run into a number of difficulties. Both paragraph 12 of the Doha Declaration and the adoption of the Decision on Implementation-Related Issues and Concerns served as ample proof of these difficulties. She noted that the basic principle underlying the issues and concerns covered by the Declaration and the Decision was that the transitional period granted to developing countries under Article 65.2 had proved inadequate in terms of allowing these countries to comply in full with the TRIPS Agreement. Therefore, she believed that it was reasonable to accord developing countries a longer transitional period than that stipulated in Article 65.2. She recommended that the Council inform the TNC of the need for the transitional period provided for in Article 65.2 to be objectively extended. She also proposed that the Council recommend that further work be carried out with a view to developing an appropriate method for objectively extending this transitional period, in particular in the areas which had aroused the greatest concern.

291. Regarding Tired 94, she said that the TRIPS Agreement struck a delicate balance both between the interests of producers and users of intellectual property rights and between the interests of developing and industrialized countries. Many developing countries had accepted the adoption of the Agreement on the basis that it would promote technological innovation and the transfer and dissemination of technology in a manner conducive to social and economic welfare. However, whereas the TRIPS Agreement did indeed lay down clear rules on how the interests of developed countries and producers of technology should be protected, there was very little in the operative part of the Agreement on how to ensure benefits for users or, in particular, how to cater to the interests of developing countries as regards technology transfer and industrial development. This imbalance became apparent in the operative section of the Agreement where the principles and objectives of technology transfer were not reflected, except for in brief references in Articles 66.2 and 40. As a result, the objectives and principles of the TRIPS Agreement, as endorsed in Articles 7 and 8, had been treated as compliance clauses and had not effectively resulted in or encouraged the promised technology transfer. In order to ensure such a transfer, she said that developing countries needed to be given greater policy space and options which went beyond the flexibility granted to control anti-competitive terms in licensing contracts. Articles 7 and 8 should therefore be meaningfully operationalized to ensure that a balance was struck between intellectual property protection and developmental and technological objectives. There was a need for these objectives and principles to be set forth in the operative part of the Agreement to ensure technology transfer in mutually beneficial terms. To that effect, she suggested that the Council recommend to the TNC that work be commenced with a view to developing a more effective framework for technology transfer and establishing parameters to ensure that this transfer was carried out on mutually beneficial terms.

292. With regard to the transitional period for LDCs, she said that Article 66.1 granted an automatic transitional period to LDCs for a period of 10 years, with the possibility of extensions. Therefore, she suggested that the Council recommend to the TNC that the General Council take a decision to the effect that LDCs should not be required to comply with the TRIPS Agreement for as long as they had LDC status.

293. The representative of the United States said that, regarding Tired 93, he opposed amending the TRIPS Agreement to extend the transitional period for developing countries provided for in Article 65.2. Two years had passed since the transitional period expired. Many developing countries, to their credit, had made significant changes to their laws in order to implement their obligations. It certainly would not be fair to those Members to take a decision to extend the transitional period for those Members who had failed to make that effort. Members had demonstrated tremendous flexibility and understanding concerning the effort undertaken by developing countries to meet their obligations. His delegation was prepared to work cooperatively with developing countries who were having difficulties in implementing their obligations. The WTO had not faced a rash of TRIPS dispute settlement cases although not all developing countries had implemented their obligations. Therefore, he thought there was no basis for the request of a further extension of the transitional period.

294. With respect to Tired 94, he said that Articles 7 and 8 of the Agreement had already been "operationalized". It was not possible to achieve the full objectives of Article 7 until Members had achieved full implementation of the Agreement. In addition, results would not be immediate. Article 8 had also been operationalized since 1995. Article 8 authorized WTO Members to adopt measures necessary to achieve identified objectives or needed to prevent anti-competitive practices related to intellectual property rights, so long as those measures were consistent with their obligations under the TRIPS Agreement. For these reasons, he believed that a general extension of transitional periods under the Agreement would be unwise and unnecessary. Means were already available to address whatever difficulties Members were facing in meeting their particular obligations. Therefore, in his view, no further work on these two Tireds was necessary.

295. The representative of Cuba clarified that she was not requesting any amendment to Article 65.2. She was requesting the Council to find a manner through which those Members who

had not been able to finalize their implementation of the TRIPS Agreement would have more time and leeway to do so.

296. The Council took note of the statements.

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

297. The Chairman recalled that, at its meeting in March 2002, the Council had urged those Members that had not provided responses to the checklist of questions contained in document IP/C/13 and Add.1 to do so before the present meeting, if possible. The Secretariat had issued airgram WTO/AIR/1756 on 26 March 2002 to remind Members of the Council's invitation to provide this information. Since the Council's meeting in September 2002, further responses had been received from Cuba and circulated in addendum 26 to document IP/C/W/117. He informed the Council that to date, responses to the Checklist had been received from 43 Members. These responses, except for the five most recent ones, had been summarized in a Secretariat note contained in document IP/C/W/253. At the Council's last meeting, Canada had introduced its communication JOB(02)/119 that provided information on the protection of geographical indications in Canada. Furthermore, he informed the Council that Australia had just submitted a communication providing a brief overview of the main features of its domestic regime for the protection of geographical indications (subsequently circulated as document IP/C/W/392).

298. Introducing its submission, the representative of Australia recalled that his delegation had made a similar presentation in 1999 in response to a checklist issued by the Secretariat (IP/C/W/117/Add.19, dated 9 July 1999). The aim of the document was to give an example of one national approach to the implementation of the TRIPS provisions dealing with GIs. The document also responded to the questions posed by the European Communities in June 2002. The document noted that Article 22 of the Agreement was predominantly implemented via the Trade Practices Act and via certification trademarks system. For example, "Ceylon tea", "Stilton", and "Thai Hom Mali rice" all received protection as certification marks. The document also pointed out that Australian wine GIs were protected by Australian Wine and Brandy Corporation Act. This Act provided protection for both Australian and foreign GIs. The number of European GIs vastly outweighed the number of Australian GIs protected under that system.

299. The representative of Canada said that her delegation did not have full answers to the three questions posed by the European Communities, partly because they were directly connected to their on-going bilateral relationship concerning wines and spirits.

300. The representative of the European Communities said that his delegation had tried to be constructive in the debate on this item. Noting that no new ideas had been contributed to this debate, he asked the Chairman to reflect on how the Council could conduct a debate on Article 24.2 in a more efficient way.

301. The Council took note of the statements.

N. TECHNICAL COOPERATION AND CAPACITY-BUILDING

- *Annual Updates on Technical Cooperation Activities*

302. The Chairman recalled that Members, intergovernmental organizations with observer status in the Council, and the WTO Secretariat had provided their annual updates of information on their technical cooperation activities prior to the Council's meeting in September 2002. Since then, the Council had received further information from the European Communities and the following member States: Austria, Finland, Germany, Italy, Portugal, Spain, Sweden and the United Kingdom; and from New Zealand and Switzerland. This information was being circulated in addenda to document IP/C/W/377.

- *Joint Initiative*

303. The Chairman recalled that the WIPO and WTO Secretariats had launched a Joint Initiative on Technical Cooperation for Least-Developed Countries on 14 June 2001. Since then, the WTO Secretariat had kept the Council informed about the implementation of the Joint Initiative.

304. The representative of the Secretariat confirmed that WIPO and the WTO were going to hold the second major regional workshop under the Joint Initiative in Dhaka, Bangladesh from 11-14 December 2002. This workshop was for the least-developed countries in the Asia and Pacific region. He expressed his appreciation to the Government of Bangladesh for hosting this event in co-operation with WIPO and the WTO.

305. The representative of WIPO joined the representative of the WTO in thanking the Government of Bangladesh for hosting the second regional workshop. She informed the Council that the Director General of WIPO had received a visit of the Director-General of the WTO on 22 November 2002. Both of them had confirmed their willingness to continue the co-operation in assisting developing and least-developed countries on IP issues.

306. The Council took note of the statements.

O. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

307. The Chairman recalled that, at its meeting of 16 October 2002, the General Council had approved the accession of the Former Yugoslav Republic of Macedonia to the WTO. The Protocol of Accession was now subject to the ratification of the FYR of Macedonia's Parliament. Thirty days after the Secretariat would receive an official notification of this ratification, the country would become a Member of the WTO. In paragraph 238 of the Report of the Working Party on the Accession of the FYR of Macedonia (WT/ACC/807/27), the representative of FYR of Macedonia had confirmed that his Government would apply fully all the provisions of the TRIPS Agreement from the date of accession to the WTO, without recourse to any transitional period. This commitment had been incorporated in paragraph 2 of the Protocol of Accession of FYR of Macedonia to the WTO (WT/L/494).

P. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

308. The Chairman recalled that, at the Council's meeting in June 2002, he had proposed, following consultations, that the Council grant observer status to ARIPO, OAPI and the GCC on an ad hoc basis, i.e. subject to review in the light of any further guidance from the General Council on the grant of observer status to other intergovernmental organizations. However, at that time, not all delegations had been prepared to take a decision on the matter. Given that this remained the situation also at the Council's meeting in September, he had indicated that he would hold consultations prior to the next meeting with a view to finding a solution which would be satisfactory to all delegations. In

the light of the consultation he had held on 22 November 2002, it seemed that the situation remained the same and that, therefore, the Council was not yet in a position to take a decision on this matter.

309. The representative of Egypt, concurring with the Chairman regarding the situation, said that he did not believe that there had been any change in the Council concerning the matter.

310. The Council took note of the statements.

Q. ANNUAL REPORT TO THE GENERAL COUNCIL

311. The representative of the Secretariat said that the Secretariat was still working on the draft annual report, which had to reflect the work done at the present meeting as well as at the previous meetings. He said that the draft was along the lines of the annual reports that had been agreed by the Council in previous years, namely essentially a factual description of the work that had been done, the items that had been discussed, the documents that had been prepared, the minutes that had been prepared and so on.

312. The Chairman suggested that the Council adopt the report ad referendum, i.e. that Members would have a period of time to provide any comments on the draft report once it was circulated by the Secretariat.

313. The Council so agreed.⁶

R. OTHER BUSINESS

(i) *Report to the TNC*

314. The Chairman recalled that paragraph 12 of the Doha Ministerial Declaration instructed the Council to report to the TNC on outstanding implementation issues by the end of 2002 for appropriate action. He said that, prior to the meeting, he had consulted with Members on how the Council should report to the TNC. There seemed to be agreement that a rather brief report might set out clearly the work that had been done in regard to each of the outstanding implementation issues, namely, the way these issues had been put on the agenda, the meetings at which they had been discussed, the way the discussion had been organized, the documents that had been submitted and prepared, and references to the records of the discussions that had taken place. However, certain Members had expressed their desire to go further than that as regards two matters among these issues.

315. He informed the Council that it had received, on 26 November 2002, a proposal for inclusion in the Council's report to the TNC by Bulgaria, Cyprus, the Czech Republic, the European Communities, Georgia, Hungary, India, Jamaica, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey (JOB(02)/194). These Members proposed that the Council recommend to the TNC to adopt specific guidelines for the negotiations on the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits. Furthermore, he recalled that a number of delegations had expressed, earlier in the course of the meeting, their wish that the Council's report to the TNC would refer to the proposal made by Brazil, China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe in paragraph 10 of document IP/C/W/356. These Members proposed, in relation to the issues of the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge, that the Council recommend to the TNC that it take a decision to the effect that the TRIPS Agreement should be amended in order to provide that Members should require that an applicant for a patent

⁶ The annual report was subsequently circulated in document in IP/C/27.

relating to biological materials or to traditional knowledge should provide certain additional information as a condition to acquiring patent rights.

316. The representative of the United States said that his delegation supported the Chairman's proposal for a brief factual report. However, if the Chairman's intention would be to include document JOB(02)/194 in the Council's report, his delegation would submit to the Council a counter-proposal on behalf of a number of Members as following:

"It is proposed that the TRIPS Council convey to the TNC, the following:

(a) Since the Ministerial Conference in Doha, the TRIPS Council has discussed the issues related to the extension of protection of geographical indications provided for in Article 23 to products other than wines and spirits.

(b) These discussions have not led to a consensus to recommend initiation of negotiations regarding such extension. It is clear from the discussions that a substantial number of Members oppose extension negotiations for several reasons, including, but not limited to the fact that there has been no demonstration that existing protection for geographical indications under Article 22 of the TRIPS Agreement is not sufficient. In addition, there are objections to the burdens that extension would impose on governments, the unwarranted costs to producers and consumers and the imbalance resulting from the fact that the relevant geographical indications of a few Members would number in the hundreds, while the majority of the Members have few, if any, such geographical indications. Finally, it is not clear that all Members have fully implemented existing standards of protection under Article 22.

(c) Given that the TRIPS Council has had exhaustive discussion on the issues related to the extension of geographical indications for products other than wines and spirits, and no consensus has developed in support of recommending to the Trade Negotiations Committee that negotiations be undertaken on extension, we recommend that the TRIPS Council advise the Trade Negotiations Committee that the Council has completed its discussion and that no further action be taken."⁷

317. Regarding the proposed recommendation on the relationship between the TRIPS Agreement and the CBD, he believed that no consensus had been reached in the Council on that issue. Furthermore, the Doha Ministerial Declaration did not contain a mandate to provide any recommendation on the issues referred to in its paragraph 19. Therefore, he could not support the inclusion of such a recommendation in the Council's report. As regards the proposal on Tirts 93 and 94, there was no consensus on continuing the discussion on those issues, which should accurately be reflected in the Council's report.

318. The representative of Korea said that, in the light of the discussion on the extension of protection of GIs at the present meeting, it was evident that Members had not been able to bridge the gap in their views on the matter. Therefore, he supported the Chairman's proposal to prepare a brief factual report, focusing on the state of play but refraining from suggesting future courses of action.

319. The representative of Sri Lanka recalled that Ministers had stated in paragraph 12 of the Doha Ministerial Declaration that they were determined to find appropriate solutions to the implementation-related issues and concerns raised by Members and adopted a Decision on Implementation-Related Issues and Concerns. In the area of intellectual property, the Council had a number of implementation-related issues which had been kept on the Council's agenda for several

⁷ On 29 November 2002, the TRIPS Council received this text in writing from Argentina, Australia, Canada, Chile, Chinese Taipei, Colombia, the Dominican Republic, El Salvador, Ecuador, Guatemala, Honduras, New Zealand, Panama and the United States (IP/C/W/395).

years. Issues relating to the extension of protection of GIs provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits was an issue to which her delegation attached great importance. The relevant bodies were to report to the TNC on the issues covered by paragraph 12(b) of the Declaration by the end of 2002 for appropriate action. Under the revised time line suggested by the Chair of the TNC in his statement of 3 October 2002, the relevant bodies were to address as a matter of priority, all outstanding implementation issues and submit their reports to the TNC. She expected that the Council, within its mandate, would address all implementation issues, including the issue of GI extension, as a matter of priority. This would ensure that the promised benefits of participation in the multilateral trading system would start to be diverted to developing countries and existing imbalances in the WTO Agreements effectively redressed; it would also ensure that the negotiations under the Doha work programme would comply with the objectives set forth in paragraph 50 of the Doha Ministerial Declaration.

320. Different positions had been expressed on the mandate of the Council in relation to implementation issues, including the issue of GI extension. It was her delegation's view that all implementation issues contained in the Decision on Implementation-Related Issues and Concerns and in the compilation of outstanding implementation issues were under negotiation. In support of her view, she said, that Ministers had adopted the Decision as the main instrument to address implementation issues and concerns. She also said that the third sentence of paragraph 12 of the Declaration expressly mandated negotiations on outstanding implementation issues by providing that "[w]e agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing [...]". In addition, the political intention in the pre-Doha process was to initiate negotiations to address these concerns, not just to have discussions. It was well-known that negotiations on implementation issues had been an immediate negotiation concession given to developing countries as a starting-point of the new work programme. Furthermore, the TNC, at its first meeting, had adopted the statement by the Chair of the General Council regarding the structure of the negotiations and a schedule of work. The Chair's statement had recognized that implementation issues were under negotiation and subject to the TNC's supervision by providing that other issues in paragraphs 18 and 19 of the Declaration would be addressed in regular meetings of the Council on a priority basis.

321. She noted that some Members had argued in the Council that not all implementation issues were under negotiation because of the existence of the Doha mechanism to address these issues, which was established under paragraph 12 of the Declaration. According to this interpretation, the issues under paragraph 12(a) were under negotiation, while the issues under paragraph 12(b) were not. In her view, this interpretation, which was based on the fourth sentence of paragraph 12, was not accurate. The words "[i]n this regard, we shall proceed as follows" in the fourth sentence of paragraph 12 were only procedural and explanatory and had no substantive implications on whether or not there was to be negotiation within the work programme on implementation issues and concerns. The existence of the two-track process stood on several factors, including priority over other negotiating mandates, monitoring requirements by the TNC and timeframes. She noted that sub-paragraphs 12(a) and (b) could not be de-linked from the negotiating mandate in the third sentence. The specific procedures set out in sub-paragraph 12(a) and (b) would have to be read in the light of the general mandate of the third sentence. According to paragraph 12(b), outstanding implementation issues, not covered by a specific negotiating mandate under the Declaration, should be addressed as a matter of priority within the relevant WTO bodies. In this sense, it was logical to affirm that the priority of the work programme was to initiate negotiations and not to simply discuss implementation issues. In her view, specific negotiating mandates for the TRIPS Council were included in the Declaration: in its paragraph 18 on extension and paragraph 19 on other issues. She regretted the fact that, in practice and for political reasons, none of these issues had been fully acknowledged as negotiating mandates. Extension of GI protection was, for her delegation, an important issue of a developmental nature with systemic implications.

322. She said that the Council's report to the TNC would form the basis for the TNC to take specific action aimed at finding appropriate solutions to those implementation issues. Therefore, it should not only report on the progress, but also contain accurate reflection of the deliberations, as well as specific and clear recommendations or directions on appropriate solutions to those implementation issues. It should, at least, help to identify the elements of the appropriate solution to the issues and concerns. Finally, she drew the Council's attention to the proposal presented by Sri Lanka and a number of other Members in document JOB(02)/194, which proposed that the Council's report recommend to the TNC the adoption of three guidelines contained therein for the negotiations on the extension of GIs.

323. The representative of Thailand supported the statement made by Sri Lanka and said that his delegation believed that the issue of extension was one of the implementation-related issues and concerns. Paragraph 12(a) of the Ministerial Declaration provided a specific negotiating mandate, and Members should engage in a negotiation to find an appropriate solution.

324. The representative of Canada said that it was clear that the Council had not yet reached agreement on either the extension of the protection of GIs or the need for negotiations under Article 27.3(b) of the TRIPS Agreement, or the relationship between the TRIPS Agreement and the CBD. The debate had been fully exhaustive and the Council remained unconvinced that enhanced protection of GIs was required. Similarly, she did not believe that the Council had a negotiating mandate for Article 27.3(b), or the relationship between the TRIPS Agreement and the CBD. She did not believe that negotiations were in order in the areas of Tires 93 and 94 either, which could be reflected in the Council's report. In concluding, she said that a factual report as proposed by the Chairman was the best way forward. She also indicated that if the Council decided to include the recommendation in document JOB(02)/194 in its report, her delegation would be a co-signatory to the proposal outlined by the United States.

325. The representative of Colombia said that Colombia had neither practical nor administrative experience on the issue of extension. So far Colombia only had a GI for one alcoholic beverage from a foreign country. Colombia's experience with trademark protection applied to its agricultural products, the quality of which was well-known at the international level because of the enormous efforts of producer associations and economic agents. The discussions on the matter since March 2002 had led him to conclude that the extension of GI protection would be very costly for both producers and consumers while benefits were not evident. It was sufficient to give protection to GIs of products other than wines and spirits through Article 22. His delegation did not agree with extending Article 23 to other products. Therefore, it considered that the TNC should be informed of the work carried out on this matter and that it was not necessary to take any further action.

326. The representative of Australia said that, in line with the Chairman's proposal, he believed that the Council's report to the TNC should provide a short factual account of discussions on implementation issues in the TRIPS Council. In his view, all implementation issues should be treated in the same way. The Doha outcome certainly had not established any hierarchy. The suggestions from some Members that GIs should be treated differently were completely unacceptable to him. He said that while he was prepared to deal with GIs in the context of the discussion on outstanding implementation issues, he had always been confused about how the issue of extension ended up in the implementation basket. Extension was all about establishing new rights and obligations, and certainly not about the implementation of existing obligations. In his view, the proposal by the demandeurs suggesting that there was already some kind of agreement on negotiations on this issue was not a factual reflection of the Doha outcome. He associated his delegation with the language that had been put forward by the United States, which he believed was a much better reflection of the discussions the Council had had that year. There remained a number of Members opposed to the extension of the protection of GIs. The Council had had detailed and exhaustive discussions, which illustrated that many costs, burdens and new legal rights would be imposed on Members. If instead of a brief factual report the Council wished to go into details, it would be appropriate to reflect in the report that the

Council had completed its discussion on the issue of the extension of the protection of GIs and that no further action was needed.

327. The representative of Uruguay fully supported the proposal by the United States, and said that Uruguay was not in favour of the extension of Article 23 of the TRIPS Agreement. The Doha Declaration did not foresee any mandate to negotiate the extension of the protection under Article 23 to products other than wines and spirits. It was very difficult for him to accept the proposal contained in document JOB(02)/194, because it was exactly the opposite of what his delegation had said in the Council and did not reflect the real state of the debate. He believed that a factual report as proposed by the United States was most advisable and realistic.

328. The representative of Kenya said that he understood that negotiations on the extension of GIs had been ongoing and that he was not sure whether those negotiations or discussions had been completed or not. In such circumstances, his delegation would not object to the Chairman's proposal that a factual report be presented to the TNC. Such a factual report should include the fact that a group of countries, including Kenya, had submitted a proposal to the TRIPS Council on this issue. Furthermore, he said that the Council's report to the TNC should indicate that traditional knowledge should be considered as part of prior art when determining patentability.

329. The representative of Turkey associated his delegation with the comments made by Switzerland and Thailand. His delegation's view was crystallized in document JOB(02)/194. In its view, the extension of the protection of GIs was clearly mandated by the Doha Ministerial Decision, and it expected that the Council would take appropriate action in line with the Decision.

330. The representative of Guatemala said that he disagreed with the statements made by some delegations that the Council had held negotiations on the issue of the extension of GIs. In his view, the Council had merely discussed this issue. Therefore, his delegation seconded the proposal submitted by the United States, Uruguay and certain other Members.

331. The representative of New Zealand said that her delegation shared the concern of Guatemala about the statements, to the effect that what the Council had been doing on the issue of the extension of the protection of GIs during the course of the year amounted to a negotiation. Her delegation strongly refuted those statements. She supported the factual approach proposed by the Chairman, which was the only way to fully respect and preserve the views on both sides on this complicated and controversial debate, in which Members were miles apart on both substance and form. Her delegation was not sure that consensus had been reached on a single point in the Council's discussions in the course of the year. As a co-signatory of the proposal read out by the United States, she said that New Zealand fully subscribed to that proposal. If the Council's report were to move beyond a factual approach, she requested that this proposal be included in the Council's report. She noted that there had been an unfortunate precedent set in some other committees, where it had been not possible to agree on a report to the TNC. Her delegation hoped that the Council could avoid that situation because it did not feel that it would be representative of the effort and the substantive and constructive engagement which the Council had had on this issue during the course of this year.

332. The representative of Hungary, a co-sponsor of document JOB(02)/194, noted that the second sentence of paragraph 12 of the Doha Ministerial Declaration made it possible for the Council to differentiate in the treatment of the implementation issues. Responding to Australia, he recalled that the second sentence of paragraph 18 of the Doha Ministerial Declaration read as follows: "We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration". He also referred to the third sentence of paragraph 12, stating that "[w]e agree that negotiations on outstanding implementation issues", including the issue of geographical indications which was referred to in the second sentence of paragraph 18, "shall be an integral part of the Work Programme we are establishing [...] ". This wording led him to the

conclusion that Ministers indeed had mandated negotiations on the issue of extension. Accordingly, his delegation thought that the US proposal was not only unacceptable, but also against the letter and the spirit of the Declaration. However, his delegation recognized that there was no agreement as yet on this issue.

333. Furthermore, his delegation regretted to hear that some major agricultural exporting Members were not only unable to move forward with the negotiations on extension, but also wanted to stop the negotiations. In his view, the negotiations on extension were clearly linked to the agricultural reform process. His delegation reminded those Members that, after the end of year deadline for appropriate action on the issue of extension, deadlines were going to follow in other negotiating areas. His delegation's ambition in some of these areas, particularly in the area of agriculture, would be greatly influenced by the Council's ability to agree to the proposed recommendations.

334. The representative of Cuba supported Sri Lanka's statement, in particular its interpretation of paragraph 12 of the Declaration. She was in favour of including in the Council's report the elements contained in document JOB(02)/194, the proposal made by Brazil, and the three elements mentioned by her own delegation earlier in the course of the meeting.

335. The representative of Chile said that he was surprised to hear that some Members believed that the Council was negotiating the extension of the protection of GIs. There was an obvious lack of consensus on the need and the feasibility of initiating negotiations concerning extension. In his view, the Chairman's proposal on a factual report was the most appropriate way forward. Nevertheless, his delegation supported the US proposal because it properly reflected the reality. Therefore, if the Council added document JOB(02)/194 to its report, his delegation, as a co-sponsor of the US proposal, requested also the addition of that proposal to the report.

336. The representative of the Dominican Republic supported the Chairman's proposal to prepare a factual report to the TNC. He also supported the US proposal, which reflected the real state of the discussion in the Council. If the Council were to include the proposal by a group of countries in its factual report, it should also include the US proposal.

337. The representative of Pakistan said that he was surprised to hear that the issue of extension was not an implementation-related issue. He endorsed the statement made by Sri Lanka, which described his delegation's position on the issue of extension. He said that the proposal made by a group of countries, including Pakistan, should be incorporated in the Council's report to the TNC.

338. The representative of Costa Rica said that the Council had not reached an agreement on the issue of GI extension. He could not support the proposal in document JOB(02)/194. He was in favour of a factual report along the lines proposed by the Chairman and by the United States.

339. The representative of the Czech Republic, a co-sponsor of document JOB(02)/194, said that the reference to "appropriate action" in paragraph 12 of the Declaration did not include the possibility of doing nothing or not having further action. The Council's report should, at least, include elements for appropriate action. If some Members were not ready to move forward in the area to which her delegation attached particular importance, they should not be surprised when her delegation might not have any substantive movement in other topics. In conclusion, she stressed that the extension of the protection of GIs was a systemic issue and that all Members would benefit from extended protection.

340. The representative of the Slovak Republic, another co-sponsor of document JOB(02)/194, said that his understanding was that paragraph 12 of the Doha Declaration instructed the Council to make some efforts to address these issues. A refusal to do so would not be in line with the spirit of the Doha Development Agenda. He supported a constructive and factual report, which, however, should not suggest to take off the table any topic.

341. The representative of Paraguay, referring to the statements made by Uruguay, Guatemala, New Zealand and others, said that the Council's report to the TNC should be a factual report reflecting the debates that the Council had had and any conclusion that it had reached. The report should not include any recommendations. This was not provided for in the Doha Ministerial Declaration, which stated that "the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee [...] for appropriate action". He indicated that the TNC had the responsibility to take decisions. It was not this Council to make any recommendations. He expressed his support to the US proposal on extension. He stressed that he objected to annexing any proposal put forward by any Member to the Council's report to the TNC. The report should be just one single document adopted by consensus and reflecting the Council's discussions.

342. The representative of India said that paragraph 12 of the Doha Declaration made it clear that outstanding implementation issues were part of the negotiations. These negotiations were an integral part of the work programme which had been established at Doha. Agreements reached at any stage in these negotiations should be treated in accordance with the provisions of paragraph 47 of the Declaration, which linked it with the overall balance of the negotiations. Given the time constraints and the fact that the majority of the time had been taken by one single most important issue in the Council, equal emphasis had not been given to other outstanding implementation issues during this year. As far as recommending appropriate action was concerned, there could be certain differences between various outstanding issues. The work programme on GIs had progressed to a considerable extent. Therefore, he said that more than a factual report was warranted as far as this particular area was concerned. With respect to the relationship between the TRIPS Agreement and the Convention of Biological Diversity, he said that the Council had been discussing this issue for some time and that a proposal had been made on this issue as well. Therefore, more than a factual report was also warranted on this issue.

343. The representative of Brazil reiterated its proposal that the Council's report to the TNC contain recommendations on the continuation of negotiations to amend Article 27.3(b) of the TRIPS Agreement in order to bring the TRIPS Agreement in line with the provisions of the Convention on Biological Diversity. His delegation agreed fully with India's statement that outstanding implementation issues were an integral part of the work programme of the Doha development round. He agreed with Australia's assertion that it was incorrect and not constructive to attempt to treat one outstanding implementation issue as if it was more important or more of a priority than other outstanding implementation issues. With respect to outstanding implementation issues, all demanders had the right to pursue appropriate work in the framework of a work programme of the Doha development round. He disagreed with the statements that the work in the Council on the relationship between the TRIPS Agreement and the CBD had been exhausted. He believed that paragraphs 12 and 19 of the Doha Ministerial Declaration provided Members with an appropriate mandate for the pursuit of negotiations to amend Article 27.3(b) of the TRIPS Agreement. Moreover, those paragraphs allowed the presentation of other proposals related to the issue of traditional knowledge and folklore. Brazil would certainly be interested in pursuing work on a regime of positive protection of traditional knowledge and folklore, and was looking forward to the presentation of negotiating proposals to that effect. In his view, it was incorrect to state that the outstanding implementation issues referred to in paragraph 12(b) did not have a negotiating mandate. The Council's report to the TNC should quote from paragraph 12 of the Declaration and reaffirm the fact that negotiations on outstanding implementation issues shall be an integral part of the work programme of the Doha development round.

344. The representative of Panama said that the Council's report to the TNC should be factual. The report should clearly reflect the fact that there was no agreement as to whether or not a negotiation should be begun on the matter of the extension of GI protection.

345. The representative of El Salvador said that he supported the Chairman's proposal on a brief factual report. Concerning the extension of the protection of GIs, he supported the US proposal. The fact that the Council's discussions on this matter had not led to consensus should be reflected in the report. His delegation could not support the proposal in document JOB(02)/194.

346. The representative of China fully associated her delegation with India's and Brazil's statements on the Council's mandate for negotiations on outstanding implementation issues. Referring to paragraph 12 of the Doha Declaration, she said that Ministers had declared that Members agreed that negotiations on outstanding implementation issues should be an integral part of the Work Programme and that agreements reached at an early stage in these negotiations should be treated in accordance with the provisions of paragraph 47. Referring paragraph 19 of the Declaration, she said that the TRIPS Council should be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and should take fully into account the development dimension. In this sense, China thought that negotiations on outstanding implementation issues, especially on the relationship between the TRIPS Agreement and the CBD, and on Article 27.3(b) of the TRIPS Agreement, were covered by the mandates. As regards the report to the TNC, her delegation believed that a recommendation should be made for an amendment of the TRIPS Agreement in order to resolve the problems related to the relationship between the TRIPS Agreement and the CBD.

347. The representative of the Philippines said that there was no question that the extension of GI protection was an outstanding implementation issue. However, after reflecting on paragraph 12 of the Declaration and the statements made by other delegations, he was of the opinion that the Council should make a distinction in the sense that paragraph 12 set out two ways to deal with outstanding implementation issues. First, where a specific negotiating mandate had been expressed in the Declaration, the relevant implementation issue should be addressed under that mandate. Second, other outstanding implementation issues should be addressed as a matter of priority by the relevant WTO bodies which should report to the TNC by the end of 2002. His delegation did not agree with the interpretation that a specific negotiating mandate was laid down in paragraph 18 of the Declaration as far as the extension of the protection of GIs was concerned. In his view, paragraph 18 referred to the issue of the extension of GIs, which only mirrored the language in paragraph 12(b). In conclusion, he said that the Council was not in the process of negotiating on the outstanding implementation issue of the extension of protection of GIs to products other than wines and spirits. The Council's discussions showed that no conclusion had been reached that the protection provided for in Article 23 of TRIPS Agreement should apply to all products, as suggested in document JOB(02)/194. He supported the proposal by the United States because it was more precise. He suggested that the Council keep its report to the TNC factual and report that no conclusion had been reached so far.

348. The representative of Malta, a co-sponsor of the document JOB(02)/194, said that the appropriate course of action would be for the Council to recommend to the TNC the adoption of the guidelines for negotiations contained in document JOB(02)/194.

349. The representative of the European Communities associated his delegation with the statements made by Sri Lanka, India, Hungary and others on the extension of GI protection. In his view, the Declaration indicated that the issue of GI extension would be under a negotiating mode. Commenting on the US proposal, he said that if the Council could not reach consensus, it should work further on this matter.

350. The representative of Argentina supported the Chairman's proposal that the Council's report to the TNC be factual and brief. In his view, there was a lack of consensus not only on the topic itself, but also on whether the extension of GI protection should be a topic for negotiation. This should be reflected in the report. He also expressed his support of the US proposal. He recalled that his delegation had presented document WT/MIN(01)/W/8 at Doha, in which it had already expressed its view that there was no mandate in the Declaration or the TRIPS Agreement to negotiate the extension

of the additional protection and that this issue could not be treated as an implementation issue. In his delegation's view, the most adequate action that the Council could adopt was to prepare a factual report describing how the questions had been discussed and referring to the minutes of the meetings.

351. The representative of Switzerland said that if the Council could not reach consensus, a decision would need to be taken by the TNC. As its co-sponsor, Switzerland was in favour of the proposal contained in document JOB(02)/194. He said that the Council could add to its brief factual report two paragraphs of identical length summarizing the demandeurs' and opponents' proposals on extension. This would at least enable the TNC to know what had been proposed. His delegation would trust the TNC to find some creative options which Members could not find in the Council. In concluding, he said that his delegation was willing to work on all outstanding implementation issues in a creative and open-minded way.

352. The representative of South Africa said that, with respect to the issue of the extension of GI protection, she supported the Chairman's proposal on a brief factual report.

353. The representative of Singapore said that, since differences still remained concerning the issues of GI extension, Article 27.3(b), and the relationship between the TRIPS Agreement and the CBD, the Council might prepare a brief factual report as proposed by the Chairman, combined with a recommendation to continue work on those issues until September 2003.

354. The representative of Hong Kong, China supported the Chairman's proposal on a factual report. There was no consensus to include in the report either of the proposals on extension. Concerning Singapore's suggestion that the Council should continue its work on this issue until the Cancún Ministerial Conference, he said that his preliminary view was that it could be left to the TNC to give guidance to the Council on such a matter.

355. The representative of Brazil supported Switzerland's proposal that the Council include in its report the recommendations that had been proposed by both the proponents and the opponents of the extension of Article 23 protection, as long it also included Brazil's recommendation regarding the relationship between the TRIPS Agreement and the CBD.

356. The representative of Estonia expressed her delegation's support for a factual report, which should include the proposal in document JOB(02)/194.

357. The representative of the European Communities said that the TNC should be informed about the various views expressed in the Council and, therefore, he could go along with the Swiss proposal to include in the report two paragraphs of identical length, as long as the factual report was limited to what had been proposed, not describing the arguments that had been used.

358. The representative of Argentina said that the Council's report should not refer to "proposals", because the Council had not engaged in a negotiation. What Members had tabled so far were just documents containing texts that exposed their views on the relevant topics. Therefore, the report should reflect the fact that the Council had discussed these topics on the basis of its agenda and that different views had been expressed without reaching consensus.

359. The representative of Australia reiterated his view that a short factual report that cross-referenced the discussions that had taken place would be adequate. From doing that, Members' positions on the issue of GI extension would be clear. It would not be productive to attempt to characterize these views.

360. The Chairman said that that there did not appear to be agreement on any recommendation that the Council could make to the TNC. He wondered whether Members could agree on his proposal to prepare a brief factual report that simply described what the state of play was and indicated that

consensus had not been reached in the relevant areas. The starting-point had to be such a factual report, but the question remained whether Members would wish to add anything to that. One option would be to refer to the two texts the Council had received on the extension of GI protection in two paragraphs of equal length. The report could also refer to the text on the disclosure requirement by some developing countries, again with a paragraph setting out the other views. In response to a question by India, he further clarified that the report would cover all outstanding implementation issues.

361. The representative of Paraguay said that it was adequate that a factual report would refer to the diverse views, but no documents should be annexed to it. The Council had discussed matters such as the cost of extension and products that would be affected, but it had not discussed the proposal in document JOB(02)/194 in the course of its meetings. The report should not include a reference to a document that had not been adopted by consensus in the Council. In response, the representative of Hungary referred the representative of Paraguay to paragraph 41 of document IP/C/W/353, which had been discussed extensively in the Council.

362. The representative of Canada supported the Chairman's proposal.

363. The Chairman suggested that he prepare a draft report for the Council's consideration later in the course of the meeting.

364. Reverting to the matter at a later stage, he noted that a draft report to the TNC on the Council's work on outstanding implementation issues had been circulated in document JOB(02)/199.

365. The representative of Bulgaria wondered whether the draft report could be adopted under agenda item "Other Business". While noting that the draft report was a good factual reflection of what had happened in the TRIPS Council, it did not fulfil the Council's mandate given by the Doha Ministerial Declaration, specifically its paragraph 12, which required the Council to present a report for action. A report for action was different from a factual report. This was the reason why his delegation could not accept the draft report.

366. The representative of Australia supported the draft report which he found to be a balanced and impartial record of what had transpired in the TRIPS Council.

367. The representative of Chile agreed with Bulgaria that the report was for action, but this did not mean that the Council had to agree on the action. It could be left to the TNC to take appropriate action.

368. The representative of Canada shared the view presented by the representative of Chile. In case the Council could not agree on the report, she wondered whether the Chairman could, under his own responsibility, give the TNC a sense of what had transpired in the Council. The representative of Switzerland said that, if the draft could be considered as the Chairman's report, it would be quite natural to forward it to the TNC for information. The Chairman said that the Doha Declaration mandated the Council to report to the TNC. However, he was ready to submit a report on his own responsibility if the Council would so decide.

369. The representative of India agreed with the Chairman's interpretation that the report had to be agreed upon by the Council. Regarding the issue of appropriate action, he referred to paragraph 12 of the Doha Declaration, which stated that other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the TNC by the end of 2002 for appropriate action. His understanding of paragraph 12 was that appropriate action should be taken by the TNC.

370. The representative of the United States reiterated that it was up to the TNC, not the Council, to decide on appropriate action. The Council's responsibility was to make a report to the TNC about its activities. Therefore, he believed that the Chairman's suggestion that the Council provide the TNC with a factual report of its activities had always been the best and most balanced way forward.

371. The Chairman asked whether the Council could agree to send the draft report in JOB(02)/199 to the TNC and leave it to the TNC to decide on appropriate action.

372. The representative of the European Communities recalled that several communications had recently been addressed to the Council, including one from the proponents of the debate and negotiations on the issue of GI extension (JOB(02)/194) and another in document IP/C/W/395. The latter document contained a statement in which its co-sponsors "recommend that the TRIPS Council advise the Trade Negotiations Committee that the Council has completed its discussion and that no further action be taken". This statement was in contradiction with the previous letter addressed to the Council by the proponents. He asked whether the item on the extension of GI protection would be automatically on the agenda of the next TRIPS Council meeting irrespective of what would be reported by the Council to the TNC and what the TNC might decide. The Chairman said that his understanding was that it would depend on the decision by the TNC on appropriate action. The representative of the European Communities said that, if that was the case, the contents of the draft report fell short of what was expected of the Council.

373. The representative of Hungary said that it would be easier for the TNC to decide on appropriate action if the documents containing the two communications on extension were not merely referred to but the views were also clearly explained in the report in equal length and form.

374. The Chairman concluded that, given the situation in the Council, he would have to inform the TNC that the Council had not agreed on a report to the TNC on its work on outstanding implementation issues.

(ii) *Date for the Council's Future Meeting*

375. The Chairman said that the Secretariat had tentatively scheduled the following dates for meetings of the Council in 2003:

- Tuesday to Thursday, 18-20 February;
- Tuesday to Thursday, 3-5 June;
- Tuesday to Friday, 18-21 November.

376. He also said that the Council might need to make adjustments to its schedule of meetings or organize additional meetings, including informal meetings, in the light of the continued work on the implementation of paragraph 6 of the Declaration on the TRIPS Agreement and Public Health as well as preparations of the Ministerial Conference in Cancún, Mexico scheduled for 10-14 September.

377. The Council so agreed.
