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

MINUTES OF MEETING

Held in the Centre William Rappard
on 1-2 December 2004

Chairperson: Mr. Tony Miller (Hong Kong, China)

The present document contains the record of the discussion which took place during the TRIPS Council meeting held on 1-2 December 2004.

<u>Subjects discussed</u>	<u>Page nos.</u>
A. ELECTION OF CHAIRPERSON	2
B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT	2
C. FOLLOW-UP TO REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION ALREADY UNDERTAKEN.....	3
D. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)	4
E. RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY	4
F. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE	4
G. REVIEW OF IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71.1	20
H. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2	20
I. DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH	21
J. REVIEW UNDER PARAGRAPH 8 OF THE DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH.....	27
K. SECOND ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT	28
L. TECHNICAL COOPERATION AND CAPACITY-BUILDING	29
M. REQUEST FROM MALDIVES FOR AN EXTENSION OF THE TRANSITION PERIOD UNDER ARTICLE 66.1 OF THE TRIPS AGREEMENT	30
N. NON-VIOLATION AND SITUATION COMPLAINTS	30
O. SPECIAL AND DIFFERENTIAL TREATMENT PROPOSALS REFERRED TO THE COUNCIL.....	34
P. TRANSITIONAL REVIEW UNDER SECTION 18 OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA	34

Q.	INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO	50
R.	OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS	50
S.	ANNUAL REPORT TO THE GENERAL COUNCIL.....	50
T.	OTHER BUSINESS	50

A. ELECTION OF CHAIRPERSON

1. The representative of the Secretariat recalled that, as the Council had been informed at its meeting in June, the former Chair of the Council had relinquished his post because of his return to his capital to take up new responsibilities. At its meeting of 20 October, the General Council had taken note of the consensus on a slate of names of chairpersons for certain WTO bodies. On the basis of the understanding reached, he proposed that the Council for TRIPS elect Mr. Tony Miller from Hong Kong, China as its Chairman for the remainder of the current term by acclamation.

2. The Council so agreed

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

3. The Chairman drew attention to the latest Secretariat note reflecting the status of the notifications of laws and regulations under Article 63.2 received from Members whose transitional periods under Article 65.2 or 65.3 had expired on 1 January 2000 or who had acceded to the WTO after that date which was circulated as document (JOB(04)/117). The note showed from which of the Members in question notifications had been received as at 3 September 2004. Among the 81 Members in question, there still remained three who had not yet submitted any notification concerning their implementing legislation. These were Papua New Guinea; Saint Kitts and Nevis; and Saint Vincent and the Grenadines.

4. Since its meeting in September, the Council had received a number of supplements and updates to earlier notifications of laws and regulations. Pakistan had notified its "Trade Mark Rules 2004"; Morocco had notified a decree relating to industrial property; and Japan had notified its amended unfair competition law. Furthermore, Bahrain had notified its laws related to patents and utility models, trade secrets, and geographical indications, which were, for the time being, available only in the original language. They would be circulated as soon as a version in an official WTO language was received. These notifications were being circulated in the IP/N/1/- series of documents.

5. The Chairman urged those Members whose initial notifications remained incomplete to submit the outstanding material without delay. He reminded other Members of their obligation to notify any subsequent amendments of their laws and regulations without delay after their entry into force.

6. The representative of Morocco said that his delegation had notified a decree implementing Morocco's industrial property law, which had been adopted. The decree was to enter into force on 18 December 2004. Therefore, he requested the Secretariat to update document JOB/04/117, which indicated that Morocco's notification concerned partly draft laws.

7. As regards notifications of contact points under Article 69, the Chairman said that, since the Council's meeting in September, a notification of a new contact point had been received from the Former Yugoslav Republic of Macedonia. Furthermore, updates to contact points notified earlier had been received from Belgium, Bulgaria, Canada, Croatia and Madagascar (IP/N/3/Rev.8 and addendum 1). There were now 121 Members who had notified contact points under Article 69.

8. The Council took note of the statements made.

C. FOLLOW-UP TO REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION ALREADY UNDERTAKEN

9. The Chairman said that the Secretariat had updated its informal note that listed the outstanding material required to complete the reviews that the Council had already undertaken (JOB(04)/178). The table attached to the note listed 15 Members whose reviews had been initiated at the Council's meetings since April 2001 but which remained on the Council's agenda. The table referred to submissions, including both responses and follow-up questions, received by 26 November 2004.

10. He recalled that, just prior to the Council's last meeting, Pakistan had provided a response to the last outstanding question posed to it. Since then, this response had been circulated in document IP/Q/PAK/1/Add.1. He suggested that the regular review of the legislation of Pakistan be deleted from the agenda, it being understood that any delegation could revert to any matter stemming from this review at any time.

11. The Council so agreed.

12. The Chairman turned to the remaining 14 Members, namely Armenia; Congo; Cuba; Egypt; Fiji; the Former Yugoslav Republic of Macedonia; Grenada; Mauritius; Qatar; Saint Kitts and Nevis; Saint Vincent and the Grenadines; Suriname; Swaziland; and Zimbabwe.

13. The representative of Egypt said that he was coordinating with the authorities in the capital and that he would provide the outstanding responses in the very near future.

14. The representative of Zimbabwe said that he would actively pursue the issue with the capital, but was yet not able to indicate when the information would be provided.

15. The representative of Fiji said she would contact her delegation in Brussels so that it could indicate when it would be able to provide responses to the outstanding questions.

16. The Chairman said that the Secretariat note also listed six 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 that connection, certain questions had been raised with regard to the implementing legislation of those countries. Since the circulation of the note, China had provided responses to all the follow-up questions posed to it by Japan (IP/Q/CHN/1/Add.3/Rev.1).

17. The representative of Argentina said that she had no new information to add to what she had already provided to the Council and that she did not know when her authorities would submit the responses to the interested delegations and the Secretariat.

18. The Chairman urged the delegations concerned to provide the outstanding material as soon as possible, so as to allow the Council to complete the follow-up to those reviews. He suggested that the Council request the Secretariat to write to those Members whose reviews were still pending and to update its note on pending reviews before the next meeting, and that the Council revert to this matter at its next meeting.

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

- D. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)
- E. RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY
- F. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

20. The Chairman suggested that, since the practice in the Council's past meetings had been that delegates address the three agenda items together, the Council again take them up at the same time. He recalled that the Council had received, just prior to its last meeting, a submission from Bolivia, Brazil, India, Pakistan, Peru, Thailand and Venezuela entitled "Elements of the Obligation to Disclose the Source and Country of Origin of Biological Resource and/or Traditional Knowledge Used in an Invention" (IP/C/W/429/Rev.1 and its addendum 1). In concluding these agenda items at that meeting, the Chair had said that Members might wish to revert to that document at the present meeting, given that it had been circulated just prior to that meeting. Furthermore, the Council had received three new submissions; one from Switzerland entitled "Further Observations by Switzerland on Its Proposals Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications (IP/C/W/433); another from the United States relating to these three agenda items (IP/C/W/434); and a third from India on behalf of Bolivia, Brazil, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela (subsequently circulated as IP/C/W/438).

21. The Chairman recalled that, at its last meeting, the Council had agreed that the future Chair would continue the consultations initiated by the former Chair on how future work on the three agenda items should be organized. He said that, pursuant to this, he had held consultations on the matter. However, the consultations had not yet developed to a point where he would have been able to put a set of suggestions to the Council at the present meeting.

22. The representative of Switzerland, introducing its new submission (IP/C/W/433), said that his delegation had presented this submission to the Working Group on the Reform of the Patent Cooperation Treaty (PCT) of WIPO in October 2004, elaborating further its proposals to amend the regulations under the PCT. He recalled that the Swiss proposal was an amendment that would explicitly enable parties to the PCT to require patent applicants to disclose the source of genetic resources and traditional knowledge in patent applications. The present submission contained further observations on these proposals and addressed in greater detail the formal *versus* the substantive nature of the disclosure requirement, the optional *versus* the mandatory introduction of the disclosure requirement in national legislation and the concept of "source". He said that his delegation was looking forward to continuing discussions on its proposals in WIPO's Working Group on Reform of the PCT, and was hopeful that progress on the issue could be made in due course. He promised to keep the TRIPS Council informed about further activities of his delegation with regard to the proposals and any progress achieved in the Working Group on Reform of the PCT.

23. The representative of the United States, introducing its new submission (IP/C/W/434), said that it was intended to assist progress in discussions pursuant to the mandate given to the TRIPS Council. He said that his delegation, like a significant number of WTO Members, saw no conflict between the TRIPS Agreement and the CBD and believed that the two Agreements could be implemented in a mutually supportive manner and that no amendment to the TRIPS Agreement was required. He said that his delegation viewed with utmost caution any proposals that would add uncertainties in patent rights and could undermine the role of the patent system in its primary purposes of encouraging innovation, technological progress and economic development. Further, based on recent discussions in the TRIPS Council aimed at fulfilling the Doha Ministerial mandate, and written contributions submitted in that context, Members appeared to share several broad policy objectives. Those objectives included: ensuring authorized access to genetic resources, that is, that prior informed consent was obtained; achieving equitable sharing of benefits arising from use of

traditional knowledge and genetic resources; and preventing the issuance of erroneously issued patents.

24. He said that new patent disclosure requirements would not work to guarantee that prior informed consent was obtained. It must be recognized that it was the relevant prior consent agreement itself, usually constituting a contract between two entities, and not a disclosure in a patent application that manifested prior informed consent. A new disclosure requirement in the patent system would not prevent misappropriation since those who had the intent to act in bad faith would not be deterred by disclosure requirements. He stated that a transparent prior informed consent regime was needed to ensure that a researcher or collector knew where to go, who to contact and which persons were authorized to grant approval in order to conduct his or her research and activities in an appropriate manner. He said that the examples of misappropriation that had been cited by proponents of new patent disclosure requirements appeared to relate to the improper collection and/or use of genetic resources or traditional knowledge. Contrary to some assertions, he said that the act of patenting, *per se*, did not amount to misappropriation and that patent rights could be an effective tool, in conjunction with a benefit-sharing agreement, to transfer benefits.

25. Similarly, a new disclosure requirement in the patent system *per se* would not ensure that benefits were equitably shared with the provider of the traditional knowledge or genetic resources and that a mechanism to transfer benefits needed to be established. If a new patent disclosure requirement was adopted and a non-compliant disclosure was discovered that would invalidate a patent or prevent a patent from being granted, any benefits from that invention would be greatly diminished. If a patent were issued but later invalidated or if an application were published but a patent never issued, the invention would have been disclosed to the public and third parties that could most likely use and commercialize the knowledge or resources disclosed without any obligation of sharing benefits. Further, if a patent were never issued and the information never published, the patent applicant could still be able to commercialize the invention without disclosing the invention to the public and without any obligation to share benefits. He added that a new disclosure requirement could have further significant, unintended consequences where a patent applicant had entered into a valid benefit-sharing agreement with the custodians of the traditional knowledge or genetic resources but, due to uncertainties in the law, a disclosure could be found invalid. He said that if, for example, there was improper disclosure that resulted in revocation of a patent due to litigation by a third party not affiliated with a traditional knowledge or genetic resources holder, that would actually upset the pre-existing benefit-sharing agreement. A new patent disclosure requirement could fail to address benefit-sharing resulting from commercialization that occurred outside the patent system and could be meaningless if products derived from or based on traditional knowledge or genetic resources were commercialized but not patented.

26. He said that the proposed new patent disclosure requirements would not only be ineffective in achieving the goal of preventing erroneously granted patents but would also undermine an already overburdened patent system as none of the suggested new patent disclosure requirements aimed at ensuring compliance with patentability requirements. Information such as that indicating the country of origin or *ex situ* collection sites would do little to ensure the ascertainment of appropriate inventorship, novelty or inventive step, because such information did not generally address the considerations underlying the requirements, such as acts of invention or the state of the relevant art.

27. He added that new patent disclosure requirements would add new uncertainties in the patent system, particularly where the sanctions for non-compliance included invalidation of a patent. That would create a "cloud" of uncertainty over the patent right by opening new avenues for litigation and in other ways that would undermine not only the role of the patent system in promoting innovation and technological development but also any potential benefit-sharing.

28. A new patent disclosure requirement could also lead to significant administrative burdens for the patent offices of Members. It did not seem possible that patent examiners could make the relevant determinations with any degree of legal certainty, particularly decisions that involved interpretations of foreign laws to determine the validity of prior informed consent or adequate benefit-sharing according to the custodian country's legal regime, thereby compounding the uncertainties both in granted patent rights and in the process of granting patents. He added that the proponents of a new patent disclosure requirement had also wrongly assumed that it would be an effective monitoring system.

29. Although his delegation shared many of the objectives raised by various Members, it was not convinced that new disclosure requirements in patent applications were an appropriate solution. Rather, the real challenge was how the objectives could most effectively be achieved.

30. With respect to the objective of obtaining appropriate access and benefit-sharing, he said the experience had shown that the most effective means to achieve this was through the development of national laws outside the patent system. It was imperative that governments implemented laws that required prior informed consent from a clearly delineated point of contact, such as the government and/or indigenous representatives, before a party sought to use or collect traditional knowledge or genetic resources. Points of contact could include the persons authorized to provide access to materials. For example, countries could establish permit systems that imposed civil and/or criminal penalties for extracting genetic resources without a permit, where such permits would serve as evidence of prior informed consent.

31. Continuing, the representative of the United States said that a contract-based system could be used to effectively control the collection of resources and ensure the sharing of benefits from their use as this could provide a great deal of flexibility in determining both monetary and non-monetary benefit-sharing and on issues such as choice of law. Contracts could also provide an effective monitoring system by requiring mandatory disclosure to appropriate authorities of any future commercial application utilizing the relevant traditional knowledge or genetic resource, whether patented or not. A contract-based system, such as the kind described by his delegation in previous submissions to the TRIPS Council, could be easily adaptable to other legal systems, and could provide countries the flexibility to protect their traditional knowledge or genetic resources without certain risks that they had mentioned.

32. He noted that many Members had not yet implemented access and benefit-sharing regimes. He said that many proponents of disclosure requirements did not challenge the necessity of an effective, contract-based, access and benefit-sharing regime but argued that patent disclosure requirements were needed to improve compliance with such mechanisms. His delegation disagreed with such a policy approach as it was unnecessarily burdensome to the patent system. Moreover, such a legal regime, if in force, could be adequately enforced without resort to patent law requirements. He said that effective enforcement regimes for access and benefit-sharing should be part of civil and criminal codes specifically designed to enforce access and benefit-sharing laws. Patent law was not designed to regulate or enforce misconduct issues, such as misappropriation of traditional knowledge or genetic resources, but to promote progress of useful arts. He noted that restrictions could be placed and were placed on the use of certain inventions to ensure safety and efficacy, to protect the environment or to protect domestic or national security. He further noted that those restrictions were enforced outside the patent system by separate regulatory mechanisms. He said that the case had not been made as to why a contractual access and benefit-sharing system would not serve the purpose effectively, just as health and safety codes applied to their spheres. As was the case with other distinct regulatory systems, criminal provisions and/or civil liability for failure to comply could be included in the country's laws for those few who took genetic resources without entering into an access agreement with the required party.

33. He said that in order for the TRIPS Council to more fully consider the concerns raised by the proponents of disclosure requirements, Members could more fully examine national experiences with respect to access and benefit-sharing systems currently in place in order to better understand the perceived shortcomings of such existing systems. He suggested that the Council could consider the extensive work that continued in the Intergovernmental Committee on Intellectual Property, Genetic Resources and Folklore of WIPO, which had been specifically created to deal with many of these and related matters.

34. His delegation agreed that it was important to prevent erroneously granted patents and noted that several tools could be, and were being, used to address such concerns. Patent examiners worldwide could use organized, searchable databases of genetic resources and traditional knowledge when examining patent applications. This could help in the discovery of relevant prior art and thereby improve examination of patent applications in the relevant fields. He also said that Members could consider a provision, such as that used by his country, which required patent applicants to disclose any information relevant to patentability. The information was directly related to the questions of patentability and could help examination of patent applications in a manner that disclosure of source and/or origin of genetic resources or traditional knowledge could not.

35. He said that implementation of post-grant opposition or re-examination proceedings could rectify the situations in which patents had been issued erroneously. Those procedures were far less costly than litigation and could alert national patent authorities when new information was discovered that was relevant to the patentability of the invention. He noted that a number of granted patents had been successfully challenged when it was demonstrated, through opposition processes, that they should not have been granted. Those included patents relevant to turmeric and neem in the United States and European patent offices. He said that his delegation was unaware that any of the perceived instances of misappropriation cited in the TRIPS Council involving a wrongful determination of inventorship or prior art which could not have been satisfactorily addressed by any means he had mentioned or that a patent disclosure requirement for source and/or origin would have corrected.

36. He said that the patent system had been and continued to be a highly effective tool for technological and economic development and that the WTO should be wary of upsetting the delicate balance, particularly when it was doubtful that any suggested changes would actually achieve the stated objectives. Rather than focus on proposed new patent disclosure requirements, the TRIPS Council should focus with more precision on what Members were trying to achieve, review past experiences and situations that prompted various concerns and consider any appropriately tailored solutions. As many of the broader objectives were widely shared, his delegation was confident that appropriate solutions could be reached to address the concerns of all Members.

37. The representative of India introduced the paper submitted by Bolivia, Brazil, Cuba, Ecuador, India, Pakistan, Peru, Thailand and Venezuela (IP/C/W/438). He recalled that a group of Members, including the co-sponsors of the present document, had submitted a checklist of issues for facilitating discussion on the relationship between the TRIPS Agreement and the Convention on Biological Diversity (IP/C/W/420 and Add.1). He also recalled that, at the last TRIPS Council meeting, this group had made a first submission pursuant to the checklist entitled "Elements of the Obligation to Disclose the Source and Country of Origin of Biological Resources and/or Traditional Knowledge Used in an Invention" (IP/C/W/429/Rev.1). That submission had addressed the first set of questions raised in the checklist. The present submission addressed the second set of questions raised in the checklist relating to elements of the obligation to disclose evidence of prior informed consent under the relevant national regimes. He said that the purpose of the present submission was to carry forward the process of facilitating a more focused, structured and results-oriented discussion on the relationship between the TRIPS Agreement and the Convention on Biological Diversity. He said that the group was encouraged by the many constructive comments received on the first paper and noted that both submissions needed to be read together.

38. He stated that the present submission addressed five issues: the first dealt with how furnishing evidence of prior informed consent would facilitate achievement of the objectives of the CBD and would specifically facilitate the monitoring, and along with other laws, the enforcement of the provisions of the CBD. The objectives and principles of the TRIPS Agreement justified the need for evidence of prior informed consent to be available in the patent system, thus establishing a mutually-supportive and harmonious relationship between the CBD and the TRIPS Agreement. The submission also explained why contractual arrangements by themselves would not suffice since there was no obligation to legislate on the issue of prior informed consent in international law, particularly for Members not party to the CBD. While contractual arrangements could have a role to play, the lack of an obligation to enter into or enforce a contract in the first instance made these insufficient both due to the unequal bargaining strength of the parties to a contract as well as due to the need for enforcement of such contracts outside the country of origin of the biological resource and/or associated traditional knowledge.

39. The second and third issues dealt with how the evidence of prior informed consent should be provided for. He said that the submission recommended that this be done by obligating Members to require evidence of prior informed consent as a condition for acquiring patent rights. Such requirements would not only be fully compliant with the TRIPS Agreement, but would be of significant advantage to patent applicants by facilitating future access and reducing costs. The submission recommended further that such an obligation be discharged by a declaration in the patent application accompanied, where relevant, with the evidence of prior informed consent, for example in the form of a certificate issued by a relevant national authority. He said that assuming that a patent applicant adhered to the law applicable to his activities, he would not find it cumbersome to simply fill up another column in his application form and attach a certificate that he already possessed. The fourth issue dealt with the situation where there was no national prior informed consent regime in the country of origin. He said that in such a situation, the applicant would simply state the fact and in cases where consent had been nevertheless obtained from the authority or community in charge of the location where he had accessed the resource and/or traditional knowledge, inform of such consent.

40. The final part of the submission dealt with the legal effect of not providing evidence of prior informed consent. At the stage of processing of the patent application, the legal effect could be that the processing of the application would be delayed until the necessary declaration and evidence of prior informed consent reached the authorities. He said that the type of time-limits that could be introduced and the penalties that would ensue before the application would be deemed to have been withdrawn could be discussed further. However, discovery of the failure to have provided evidence of prior informed consent once the patent had been granted would involve revocation of the patents. Outside the patent system, other administrative, civil or criminal sanctions could also follow. He said that the co-sponsors of the paper were ready to discuss how such legal effects could be further developed and whether judicial review as a mechanism to implement those concepts could be explored. He said that conceptually the objective was that deterrent, compensatory and equitable consequences should flow from any non-adherence to the obligation to obtain prior informed consent or furnish evidence thereof.

41. Turning to other submissions, the representative of India noted the usefulness of documents IP/C/W/433 and IP/C/W/434 and said that his delegation would provide detailed comments on these at the next TRIPS Council meeting. He said that the characterisation of the ultimate objective of the group of developing countries as "new patent disclosure requirements" connoted a disconnect with the existing disclosure requirements in the TRIPS Agreement and this was not the case. He said that it was necessary to clarify which of the stated and commonly agreed objectives were addressed by the existing disclosure provisions and how they could be changed so as to address the balance of objectives. He said that, for the group, an overarching objective was to ensure certainty that their genetic resources were not misappropriated and that their traditional knowledge and art were not usurped.

42. Addressing concerns raised in the paper from the United States (IP/C/W/434), particularly in its paragraph 10, he said that there was an inextricable link between the objectives of the disclosure requirement and that of prior informed consent and access and benefit-sharing. For example, in addressing the prior informed consent issue, the proposal of the group ensured that the act of patenting did not encourage misappropriation, thus making it an effective tool to arrest misappropriation. Similarly, in addressing the benefit-sharing objective, the proposal was a means to avoid monopolies being created where none were envisaged in the patent system, thus allowing the market forces to play their role. He stated that existing disclosure requirements already helped in preventing bad patents by providing means for examiners to investigate issues like inventorship, novelty and non-obviousness, areas clearly within their mandate in any patent system. He said that what was being suggested was additional to what already existed in the TRIPS Agreement. He disagreed with the assertion in document IP/C/W/434 that national systems could and should take care of the objectives. His delegation had already stated that the post-grant opposition or re-examination proceedings were costly and had pointed out that there had been misappropriation cases addressed under the existing patent regime through tortuous, costly, long winded, post-grant revocation proceedings during which time the true right holders of genetic resources or traditional knowledge continued to suffer.

43. The representative of the European Communities recalled that, at the last meeting, his delegation had informed the Council that it was working internally on the issue of disclosure of origin of genetic resources and traditional knowledge in patent applications. He reported that his delegation would submit effective, balanced and realistic proposals for the introduction, at the global level, of a disclosure system to WIPO by the end of the year, as had been announced at the WIPO General Assemblies in September 2004. He said that this proposal built on the concept paper that had been submitted to the TRIPS Council in September 2002 and would be characterized by the principle that disclosure in patent applications of the country of origin of genetic resources should be a mandatory requirement and not an option. Further, the disclosure requirement should apply to all national, regional and international patent applications and the system envisaged should be as simple as possible and not lead to unnecessary administrative burdens for patent offices and applicants. He said that his delegation would keep the Council informed of any new developments.

44. Commenting on document IP/C/W/434, he said that his delegation like that of the United States, believed that there was no conflict between the TRIPS Agreement and the CBD and that both instruments could be, and should be, implemented in a mutually-supportive manner. His delegation supported the three broad policy objectives highlighted in the document and said that his delegation could support several other ideas. For example his delegation believed that sound national regulations on access and benefit-sharing were essential to guarantee legal certainty for all parties involved in order to protect the rights of providers of genetic resources. In this respect contractual arrangements also had an important role to play.

45. He said that while the introduction of new patent disclosure requirements was certainly not the only solution to achieve the stated objectives, it was a tool that could contribute to a solution along with other elements. He understood the concerns in document IP/C/W/434 with regard to the possible negative impact that the introduction of patent disclosure requirements could have on the patent system as a whole and believed, like the United States, that the patent system should continue to be a highly effective tool for technological and economic development. The view of his delegation was that the introduction of patent disclosure requirements would not necessarily be burdensome to the patent system, to patent offices or to applicants. He said that in the proposal his delegation was working on, the patent applicant would be required to declare the country of origin of genetic resources if the applicant was aware of it and that no additional research on the applicant's part would be required. The patent office would not be required to make any assessment on the content of the disclosed information and its role would be limited to examining whether the formal requirements had been fulfilled and whether the applicant who declared that the invention was based on genetic resources had subsequently disclosed the information. In order to facilitate the monitoring of the respect of any benefit-sharing arrangements, patent offices would be required to notify the disclosed

information to a centralized body. The introduction of such measures, should not lead to unnecessary administrative burdens for the patent offices.

46. In his delegation's view, issues relating to disclosure of source and origin were prime candidates to move the discussion forward and constituted an area where there were possibilities for convergence of views. He said that document IP/C/W/429/Rev.1 had raised relevant points on which his delegation could comment without prejudice to the outcome of his delegation's internal reflection on the issue and to his delegation's position in a possible formal negotiation process in the WTO or elsewhere. He said that his delegation considered that a disclosure requirement, provided it was properly calibrated, would positively contribute to the mutual supportiveness between the intellectual property systems and access and benefit-sharing regimes. He said it would help the countries providing access to genetic resources to monitor compliance with access and benefit-sharing rules as well as with the contractual arrangements between providers and users of genetic resources as facilitated by information received through foreign patent offices. It would increase confidence among bio-collectors, whether private enterprises or research centres, and biodiversity-rich countries and indigenous communities and would generate less complex or burdensome and more effective access and benefit-sharing regimes, thus creating a win-win situation for both providers and assessors. It would help prevent inappropriate patenting of genetic resources or traditional knowledge by allowing patent offices to establish prior art more accurately by making more focused searches and would act as a strong incentive for patent applicants to comply with domestic rules on access and benefit-sharing, where they exist, and/or contractual arrangements.

47. It was the view of his delegation that to trigger the disclosure obligation, the genetic resource had to form part of the claimed invention or have been necessary for the development resulting in the invention. In other words, the invention would not have been made without the genetic resource. He said that the proposal in document IP/C/W/429/Rev.1 that any use would be sufficient to trigger the disclosure obligation, even cases of incidental use, went too far. Regarding the administrative and cost burdens, he said that document IP/C/W/429/Rev.1 stated that the applicant should have at least employed all reasonable measures to determine the origin of the material. It was the view of his delegation that it could be burdensome for the applicant if he had to carry out further research. He noted that document IP/C/W/429/Rev.1 did not examine the possible impact of the disclosure obligation on the patent office and that it would be interesting to know what the envisaged role of the patent offices would be. For example, how would they verify whether the patent applicant had obtained the relevant material in a way compatible with access and benefit-sharing and prior informed consent rules? He said that it was the view of his delegation that the role of patent offices should be limited to the strict minimum. He said that the applicant should be requested to provide all reasonably available evidence of the source or origin of the genetic resource or traditional knowledge and it should be up to those who wished to contest such disclosure in an administrative procedure or before a court to provide proof of the contrary, in accordance with the usual rules of law on the burden of proof.

48. Regarding the nature of the obligation, he said that the interest of the distinction between substantive and formal requirements lay in the consequences of non-respect of that obligation. Regarding the legal effect of wrongful disclosure or non-disclosure, he noted that several proposals had been made, ranging from far-reaching sanctions within the patent system to sanctions outside the ambit of patent law. His delegation's view was that a requirement could only be effective if its non-respect gave rise to sanctions but that, at this stage, it believed that such sanctions should lie outside the ambit of patent law using, for example, civil or administrative sanctions.

49. Regarding the manner in which the proposed obligation of disclosure of source or origin should be introduced in the TRIPS Agreement, he said that at the present stage his delegation had no views on the issue. However, if the possibility of inserting a disclosure obligation in the TRIPS Agreement were envisaged, such an obligation had to be properly calibrated. As to how and where such a requirement could fit in the TRIPS Agreement, he said that this was a technical issue which his

delegation did not consider to be important at the present stage since the answer would depend upon what was agreed on in substance.

50. The representative of Peru said that the requirement of prior informed consent accepted by all Members would enable Members to ensure compliance with the requirements of Article 15 of the CBD and would also ensure transparency in the administrative procedures for the grant of a patent. Thus, it would ensure that patents were being obtained legally and ensure legitimate access to genetic resources and/or traditional knowledge being used in a new invention. He said that the submission by the United States, laying out specific common objectives to be pursued in the Council, demonstrated good progress in continuing the debate even though there were no new arguments in the paper. He said that his delegation did not understand why, as stated in paragraph 3 of the document, national laws were stated to be the best way of guaranteeing access and benefit-sharing. He pointed out that his country had one of the most progressive legislations dating back to 2002, but his country was suffering from cases of bio-piracy and that, in the absence of international obligations, it would be very difficult for the problem to be addressed. His delegation did not believe that contracts could solve the problems with respect to bio-piracy as these were between private individuals and if illegal acts of bio-piracy were carried out, he did not think that such individuals would sit down to negotiate and sign a contract with those who held traditional knowledge or genetic resources.

51. With respect to paragraph 11 of IP/C/W/434 that rules outside the patent system on commercial confidentiality and competition may help, he said that while marketing of a product could be monitored and controlled by these rules, it had nothing to do with the patent system *per se*. The disclosure requirement under the patent system was intended to ensure that if one knew of the origin of a given resource, failure to disclose would not meet the various requirements for the granting of a patent. Further, he noted that from Part V onwards, the United States had presented various options which would prevent the granting of erroneous patents, including the existence of organized databases, information on patentability and post-grant opposition or re-examination procedures. He pointed out that Peru had databases and carried out searches and shared all possible information before a patent was granted, but that did not solve the problem. Further, in various cases of misappropriation in Peru, they had used administrative measures such as post-grant opposition or re-examination of certain patent applications but found such administrative measures were burdensome. It was also very difficult for the holders of genetic resources and traditional knowledge in developing countries to go to different jurisdictions and ask for opposition because the costs were high. He said that there could be a much lower burden if there was an obligation to declare the origin. Regarding the suggestion by the United States that disclosure would not prevent misappropriation, he noted that if all applicants respected their duties and obligations, this would be the case. He said that Members were trying to improve the current system and the requirement of disclosure would help in improving what was available and guarantee a better system which would make it more difficult for those involved in acts of misappropriation and benefit the victims of such acts.

52. The representative of Korea said that his delegation believed that there was little possibility for conflict between the TRIPS Agreement and the CBD and that these could be implemented in a mutually supportive way. Implementation at the national level was the most important element in ensuring the effective functioning of the two legal instruments. Consideration of the issue in the TRIPS Council should take into account work in other relevant international organizations, such as WIPO, in order to avoid unnecessary duplication of work.

53. Regarding the submission by the group of developing countries in IP/C/W/429/Rev.1, his delegation was not convinced that there was any need to amend the TRIPS Agreement at present to provide for the requirement of disclosure of the source and country of origin of genetic resources or traditional knowledge. Such a requirement would not ensure that the CBD was implemented in an effective way. In many cases inventions that had utilized biological or genetic resources and traditional knowledge were from more than one country of source and it was therefore difficult for patent authorities to verify the authenticity of information provided. Efforts by patent authorities to

verify the information would impose a great amount of administrative and financial burden. The TRIPS Agreement already had provisions that allowed Members to take measures in accordance with the CBD and Articles 29 and 62.1 have been mentioned in this context. His delegation supported both the United States and Swiss submissions.

54. The representative of Canada said that the relationship between the TRIPS Agreement and the Convention on Biological Diversity, as well as the protection of traditional knowledge and folklore, were of clear importance to his delegation. His delegation believed that Members' renewed commitment to paragraphs 12 and 19 of the Doha Declaration in the July 2004 Framework Agreement, as well as recent discussions in WIPO's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC), demonstrated that other WTO Members also shared that view. The importance of preventing misappropriation in the collection and/or use of genetic resources and traditional knowledge was widely recognized and his delegation supported finding a way forward. He said that the complex nature of the issues could benefit from a more structured discussion in TRIPS Council, provided that it did not lead to a duplication of demands on Members' resources. Purposeful discussions in TRIPS Council on the issues should not supplant the useful, substantive work that was already ongoing at the WIPO's IGC. Rather, the technical work done in the WIPO committee could continue to inform the discussion at the WTO.

55. On the specific matter of patent disclosure, he said that the number of proposals already on the table underscored that the concern about misappropriation and "bio-piracy" was widespread amongst both developing and developed countries as the issue was of importance to the many providers and users of genetic resources and traditional knowledge. He noted that the approaches suggested in each of the proposals were quite distinct and that each proposal had some merit and each raised some concerns. It was the view of his delegation that one way of advancing understanding at the present stage, and moving beyond the political deadlock, would be for the TRIPS Council to undertake an in-depth, "diagnostic" examination based on the various disclosure proposals put forward. That is, an examination of how the mandatory, voluntary and contract approaches, as well as any other proposals that would be submitted in the future, could have addressed the high-profile, real-world complaints about so-called "bad patents" on, for example, neem, turmeric and basmati rice. He said that it would be helpful if the Members advocating each proposal submitted facts and evidence indicating how their respective proposals on patent disclosure would have addressed or remedied those real world situations if their proposals had been in place at the time. In addition to providing Members with a useful basis for comparing the effectiveness of those proposals, his delegation considered that such a diagnostic analysis would provide the TRIPS Council with valuable, fact-based insights into how best to respond to common concerns about misappropriation and "bio-piracy".

56. His delegation was currently undertaking a domestic review in the area. He pointed out that, at the international level, WIPO continued to work on examining the interrelation between access to genetic resources and disclosure requirements in intellectual property rights' applications, including in response to an invitation from the CBD. He said that his delegation hoped to be in a position to submit a paper to WIPO on the issue before the end of the year.

57. The representative of Colombia said that her delegation supported an amendment of the TRIPS Agreement requiring patent applicants to disclose the origin of the genetic resources and provide evidence of prior informed consent and benefit-sharing so as to avoid bio-piracy at the international level. She supported document IP/C/W/429/Rev.1 that, while pointing out the shortcomings of the existing approach, recommended making it compulsory to disclose the source and country of origin of the genetic resources used in inventions. This would make it possible to identify whether the patent application corresponded to a true invention and not just a discovery by making the information available on genetic resources on a systematic basis. Her delegation was open-minded about discussing the best possible way of amending the TRIPS Agreement. She said that IP/C/W/438 could further contribute to better structuring discussions in the TRIPS Council and that her delegation would make further comments on it in the near future.

58. The representative of New Zealand said that her delegation thought it important to have discussions on the issues in a structured manner that would enable all suggestions or approaches to be considered. She said that one issue where there appeared to be scope for progress and on which work could be focused was disclosure. Her delegation considered that the contract-based approach suggested in document IP/C/W/434 and the possibility of disclosure in applications for patents or plant variety rights, as suggested by the group of developing countries, were not mutually exclusive. While the contractual approach could be useful there was certainly merit in considering additional mechanisms, such as disclosure, in support of CBD objectives.

59. In response to document IP/C/W/434, her delegation agreed that there was no direct conflict between the TRIPS Agreement and the CBD as it was possible to implement both instruments consistently. Her delegation however saw the potential for a conflict and recognized that it might be possible to implement the two Agreements inconsistently. This meant that there was need for a discussion on the relationship between the two Agreements and on the various ways that they could be implemented in a mutually-supportive and flexible way. Her delegation also agreed with document IP/C/W/434 that disclosure in patent or plant variety rights applications alone would not ensure that prior informed consent was obtained and national access and benefit-sharing systems should first and foremost be established to enforce prior informed consent criteria and sanction any abuses. She stated that her delegation did not find "bio-piracy" a useful term in relation to intellectual property and patenting of inventions based on genetic resources was not, in and of itself, misappropriation. For the most part "misappropriation" in the access and benefit-sharing context related to improper collection or use of genetic resources or traditional knowledge, not the act of patenting *per se*.

60. She said that her delegation also saw potential merits in some of the proposals included in documents IP/C/W/429/Rev.1 and IP/C/W/438 and was interested in considering whether and how disclosure through the intellectual property system could supplement or support access and benefit-sharing systems, including prior informed consent requirements, in addition to the contractual approach and other legal or administrative sanctions. It would be interesting to explore further how the existing flexibilities in the TRIPS Agreement could be used to support disclosure of origin in the patent system. Disclosure in patent or plant variety rights applications was not a solution in itself as intellectual property could only play a modest supporting role, perhaps in monitoring and transparency in relation to benefit-sharing and prior informed consent. In regard to the proposals on enforcement of prior informed consent and access and benefit-sharing, the view of her delegation was that this was not the role of the intellectual property system and such proposals would not necessarily achieve the intended objectives.

61. She said that WIPO's IGC had a very important role to play in the process and that, while her delegation was willing to explore the issue in the WTO context, Members should be careful and avoid unnecessary duplication and try and take full advantage of valuable work of WIPO's IGC. Her delegation supported the proposal by Canada of an in-depth diagnostic approach as a way to assist the development of the various proposals on the table.

62. The representative of Australia said that his delegation saw no conflict between the TRIPS Agreement and the CBD and said that the two Agreements could be implemented in a mutually supportive manner. He said that his delegation shared the three objectives outlined in document IP/C/W/434 and thought it was useful to approach the questions from the perspective of shared objectives. He noted that there were differences between delegations on the issues but that there were also points of agreement that needed to be recognized. He noted that there had been difficulties in coming to a common understanding on the nature of the problems to which certain amendments to the TRIPS Agreement had been proposed as solutions. He pointed out that one way of coming to a shared understanding of the problems would be by taking a closer look at real-life experiences of countries that had tried to implement disclosure systems. The practical focus would help in achieving progress on the issue by establishing where there were real problems and how best to address them.

He said that his delegation was interested in knowing more about the experiences of countries that had implemented the disclosure system to find out how effective these systems were, whether or not there had been particular problems or successes and what users and owners of knowledge thought of the system.

63. He informed the Council that his country was still in the process of implementing an access and benefit-sharing regime, including an intergovernmental agreement on genetic resources management, for controlling access to and the use of genetic resources on commonwealth lands and waters. This system included measures to ensure that any benefits arising from the use of such resources would be equitably shared. He said that his delegation took seriously the need to prevent the issuance of erroneous patents and, to this end, Australia had recently amended its Patents Act to increase the information available to the Commissioner of Patents regarding the patentability of an invention. He said that the amendments required applicants to provide the results of searches carried out by or on behalf of foreign patent offices in relation to corresponding applications. That change was one of a number of amendments that had been made domestically to try to ensure as far as possible that the Australian Patent Office only granted patents for inventions that met the patentability requirements.

64. His delegation noted that some useful work had been done in WIPO on the recognition of traditional knowledge and genetic resources in the patent system. The WIPO Secretariat had received over 50 responses to a questionnaire it had issued on the matter which could provide useful information on existing measures for identifying relevant traditional knowledge and genetic resources, thereby helping to prevent patent offices from granting erroneous patents. He said that the work in the IGC continued to be central to the overall way in which work would be taken forward, particularly given its technical nature.

65. Regarding document IP/C/W/429/Rev.1, he said that it was not clear to his delegation how linking the introduction of a mandatory disclosure requirement with the possible effects of wrongful disclosure, as outlined in paragraph 13, would address the problem of bio-piracy. He said that, as Canada had suggested, it would be helpful if an illustration of how such a provision would work in a specific instance, for example in the case of the neem tree were provided. Referring to paragraph 5 of document IP/C/W/429/Rev.1, he questioned how the method of disclosure outlined in the paper would prevent the system from suffering from cost problems, particularly in the resolution of disputes arising under such a system. Further, referring to paragraphs 8 and 10 of the same document, he asked the co-sponsors to clarify whether the standard of proof would be a subjective one, that is what the patentee knew, or an objective test, that is what the patentee ought to have known.

66. He said that the national experiences so far indicated that there was no one-size-fits-all solution to the various problems associated with access and benefit-sharing of genetic resources. He said that his delegation was not closed to a discussion of the role that the patent system could play as part of a possible solution, but that there were also other approaches equally deserving of attention and all options needed to be taken into account.

67. The representative of Kenya associated his delegation with the statement made by India on behalf of the group of developing countries and those made by other delegations in support of document IP/C/W/438. He said that his delegation believed that the CBD and the TRIPS Agreement should be mutually-supportive, especially when it came to implementation of the two agreements. His delegation was advocating a system that would guarantee benefit-sharing between patent holders and owners of genetic resources used in patents under an enforceable legal framework such as the TRIPS Agreement. He said that such a system would guarantee that a patent office could refuse to grant a patent if the disclosure requirements were not complied with at the time of making the application. Such a system would guarantee that a patent granted could be revoked on the ground that disclosure requirements had not been met at the filing of the application. He said that contracts could not substitute such a system because the greater majority of owners of genetic resources were

not aware of the benefits of their resources, let alone of the patent system. It was the view of his delegation that governments had an obligation to protect owners of genetic resources by availing themselves of systems that would guarantee such protection.

68. He observed that in the patent system there was no need to ascertain the authenticity of all information that was provided as part of the disclosure requirement during the filing of the application. In case the information was not accurate and a patent was granted based on information available at the time of filing, the patent system allowed for revocation of that patent on the ground that the information was not accurate. That deterred applicants from providing inaccurate information because they risked the patent being revoked after grant.

69. The representative of China said that his delegation supported and associated itself with the joint proposal (IP/C/W/429/Rev.1) and believed that the elements mentioned in the proposal could be a good basis for future discussions. He said that his delegation endorsed the proposal that where there was failure to meet the disclosure requirements, the patent application should be deemed withdrawn or rejected and any patents already granted should be invalidated. He noted that the proposals in document IP/C/W/429/Rev.1 provided specific suggestions on how to implement the disclosure requirements that his delegation supported and called on other Members to establish their own access and benefit-sharing system after fully evaluating their specific needs as this would facilitate further discussions and eventually the conclusion of relevant international rules.

70. Regarding the discussion on the relationship between the TRIPS Agreement and the CBD, he said that Members should focus not only the positive role of biotech development and its intellectual property protection, but also on the protection of biodiversity itself. It was necessary to amend the TRIPS Agreement to support the CBD because it did not adequately consider principles of national sovereignty, prior informed consent and access and benefit-sharing as provided for in the CBD. He said that the international community should focus more on countries with abundant biodiversity and establish reasonable and balanced mechanisms.

71. The representative of Chinese Taipei said that her delegation appreciated the constructive suggestions made so far on the review of the provisions of Article 27.3 (b) and said that, even though there were differences in approach, the concepts were helpful and could be developed further when Members reflected on the possible mechanism to implement such concepts. Regarding document IP/C/W/429/Rev.1 she sought clarification of the criterion of "insufficient, wrongful or no disclosure" where legal effects were proposed in paragraph 12 of the document. She questioned how the examiner would evaluate whether or not the requirement had been met where the applicant had not provided any information on the disclosure of source and/or country of origin of biological resources. She noted that a number of Members already required such disclosure and expressed the need for sharing of experiences in this regard. Finally, she noted the Swiss proposal to amend the regulations of the Patent Cooperation Treaty (PCT) of WIPO and pointed out that not all WTO Members were Contracting Parties in WIPO and questioned how such WTO Members would implement an agreement or decision concluded in WIPO.

72. The representative of Norway said that the contributions from United States, Switzerland, and the two papers from the group of developing countries were useful contributions on which her delegation would comment in detail at the next TRIPS Council meeting.

73. The representative of Switzerland said that the declaration of the source of genetic resources and traditional knowledge in patent applications as proposed by his delegation, in the context of the work of WIPO's PCT reform group, would allow States that were party to a contract on access and benefit-sharing to verify whether the other contracting party was complying with its obligations arising under that contract. This would not only facilitate and support the enforcement of contractual obligations but would also allow verification of whether prior informed consent of the country providing the genetic resources had been obtained, and whether provision had been made for fair and

equitable benefit-sharing. The Swiss proposal was intended not only to increase transparency in the context of access and benefit-sharing but also to build trust among the various actors involved. He pointed out that, should patent applicants additionally be required to provide evidence of prior informed consent and fair and equitable benefit-sharing in patent applications, they would have to submit double and triple the amount of information that would bring little advantage to the contracting parties of the contract regulating access and benefit-sharing. Furthermore, a number of practical and legal problems would arise, which he said were addressed in greater detail in paragraphs 13-19 of his delegation's submission, IP/C/W/400/Rev.1

74. Commenting on IP/C/W/429/Rev.1, he said that it was the view of his delegation that it should be left up to the national legislator to decide whether such a requirement would be introduced in the national patent legislation or not. That optional nature of the disclosure requirement had been chosen because of the great divergence in the views on transparency measures, and because the discussions on disclosure requirements at the international level have not brought any final results. Such a requirement would allow the national governments and the international community to gain experience, without prejudice to further international efforts. He pointed out that his delegation was proposing a formal disclosure requirement and that the current provisions of the TRIPS Agreement were flexible enough to allow its introduction. He noted that paragraphs 12 and 13 of document IP/C/W/429/Rev.1 addressed the possible legal effects of failure to disclose or wrongful disclosure of the source in patent applications discovered either prior to or after the grant of a patent. In the view of his delegation, the sanctions currently allowed for under the PCT and the PLT could apply to such cases. With regard to the sanctions called for in paragraph 13 of document IP/C/W/429/Rev.1, his delegation held the view that those legal effects were already possible under current patent legislation. He referred Members to paragraphs 24 to 26 of document IP/C/W/423 for a more detailed analysis of the possible sanctions for failure to disclose or wrongful disclosure of the source advocated by his delegation.

75. Commenting on IP/C/W/434, he said that the issues of access and benefit-sharing could not be fully resolved through a contract-based approach alone. This applied in particular to cases where no contract on access and benefit-sharing was concluded and to cases of trans-boundary use of genetic resources and traditional knowledge. Accordingly, contracts alone could not deter those with intent to act in bad faith. He pointed out further that Article 15, in paragraphs 4 and 7, of the CBD required access and benefit-sharing to be on mutually agreed terms, which would generally be laid down in contracts. Thus his delegation did not challenge the contract-based approach. However, measures increasing transparency, in particular the disclosure of source as Switzerland proposed, could further facilitate the operation of the system. Requiring the disclosure of source in patent applications was only one measure among a large number of other mostly non-intellectual property measures which could assist access and benefit-sharing. While disclosing the source in patent applications would not be sufficient to resolve all issues, in combination with those other measures it presented a simple and effective measure to help access and benefit-sharing. His delegation shared the view of the United States that post-grant opposition or re-examination of granted patents had been used in cases such as the neem tree and clearly showed that the patent system worked well. In such cases, disclosing the source of genetic resources or traditional knowledge would, however, have simplified the task of those intending to oppose such patents or to request their re-examination.

76. In order to further improve the effectiveness and facilitate the operation of the disclosure requirement, his delegation proposed that patent offices transmit the information disclosed to the national authority of the country competent to receive such information. The list of competent national authorities could be maintained by WIPO, in close cooperation with the CBD. By making the list available on the internet, patent offices would have easy access to it and could, without much administrative burden or cost, provide the competent national authority with the information. He said that, contrary to what was stated in IP/C/W/434, the proposal was not made because his delegation recognized the shortcomings of the disclosure of the source requirement. He said that his delegation agreed with the United States that it would be beneficial to the Council's discussion on the issues

mentioned in paragraph 19 of the Doha Declaration, if, by examining national experiences with respect to access and benefit-sharing systems currently in place, the Council could gain thorough understanding of the problems and shortcomings that proponents faced in practice.

77. The representative of Japan said that although disclosure of origin of genetic resources was one of the issues being discussed, the discussions should not be limited only to that issue under these agenda items. It was the view of his delegation that the checklist approach in document IP/C/W/420 was not the best because the scope of the list was not broad enough to cover all concerns. The most appropriate forum to deal with the issues was the IGC of WIPO. Under the patent system, there were reasons why disclosure was necessary in patent applications, either as a formal or substantive requirement, as these were directly related to evaluate the patentability of invention or useful for prior art searches in the course of examination. He said that information not related to the grant of patents was not required to be disclosed. His delegation saw no reason why disclosure of origin of genetic resources was necessary in a patent application for the grant of a patent. Even without such disclosure, examiners could examine an application to determine patentability. He said that his delegation shared many of the views put forward by the United States and supported the proposal by Canada to have an in-depth diagnostic approach.

78. The representative of Brazil said that the WTO remained the best-placed, neutral and appropriate forum to address the issues under the agenda item. His delegation associated itself with the statement delivered by India on behalf of a number of developing countries, including his own, introducing document IP/C/W/438. He said that the position of his delegation regarding the first and second issues listed in the checklist were set out both in submission IP/C/W/429/Rev.1 and IP/C/W/438. He said that the two submissions by the group of developing countries on the first two issues in the checklist provided responses to the points raised in the submissions of the United States and Switzerland.

79. With respect to IP/C/W/434, he said that his delegation was concerned that many of the comments contained on the proposed disclosure requirements seemed to be based on assumptions that betrayed a diagnosis of the situation that did not do full justice to the nature of the bio-piracy problem and, in some cases, were based on an apparent misunderstanding of the nature and the intentions behind the proposals made by his delegation and the group of developing countries. He contested the assertion made in paragraph 6 of the US submission that national measures alone would constitute the most effective means to address problems of bio-piracy and misappropriation of genetic resources and associated traditional knowledge. The suggestion was problematic because it was widely recognized that bio-piracy was an international problem which could not be resolved by way of national means alone. He said that international measures were needed to address the problem as pointed out in submissions, including IP/C/W/429/Rev.1.

80. With respect to references made to the issues of prior informed consent and benefit-sharing in document IP/C/W/434, he said that it should be borne in mind what role the TRIPS Council, and the WTO more generally, could be expected to perform in discussing the issue in light of its mandate. His delegation did not think it was up to the TRIPS Council or its Members to prescribe to parties to the CBD, who have sovereign rights over their genetic resources, how they should implement their national access and benefit-sharing regimes. He said that Members who were interested in and committed to discussions on access and benefit-sharing *per se* should join the CBD and engage constructively in discussions taking place in that forum on, for example, the establishment of an international regime on access and benefit-sharing. The role of the TRIPS Council was to consider how it could be ensured that the TRIPS Agreement made its contribution in promoting a harmonious and mutually supportive relationship between the patent system and the CBD. His delegation's view was that the proposed mandatory disclosure of origin would make a significant, positive contribution to filling a perceived normative gap that allowed for bio-piracy to continue unabated, thereby rectifying a glaring inequity of the international patent system that allowed patent applicants for inventions derived from genetic resources to be rewarded for violating national access laws in the

countries of origin of those resources. He said that to argue that measures to effectively address bio-piracy should be pursued separately from the patent system, as suggested by the United States, seemed to miss the point.

81. He said that IP/C/W/434 also contained misunderstandings as to how the proposed disclosure requirements would relate to arrangements for fair and equitable benefit-sharing. The proposed disclosure requirements were not intended to replace measures on access and benefit-sharing *per se* but to offer an effective incentive for patent applicants to comply with prior informed consent and fair and equitable benefit-sharing. Applicants with good intentions committed to lawfully accessing genetic resources of mega-diverse countries would have nothing to fear from the proposed disclosure requirement. His delegation did not understand the continued resistance to the group's proposals. He recognized the importance of the establishment of national access and benefit-sharing regimes to implement the CBD and pointed out that his delegation and a number of other countries already had those regimes. However, for reasons pointed out in previous discussions and in the new submissions, his delegation believed that relying solely on such national regimes would not be enough to effectively prevent bio-piracy and that a mandatory disclosure of origin requirement would constitute a necessary complementary measure.

82. He pointed out that suggestions had been made on how disclosure of origin and prior informed consent requirements could operate in respect of countries that had not yet established national access and benefit-sharing regimes. He said that his delegation did not agree with the assertion that disclosure requirements would add uncertainty to the patent system and said that the proposal was intended to provide greater certainty and predictability in the patent system for all stakeholders in promoting the sustainable use of the components of biodiversity. The current patent system did not provide that level of certainty for all stakeholders, particularly those from the mega-diverse countries and indigenous and local communities in those countries who had been victimized by the misappropriation of their knowledge and resources. A mandatory disclosure requirement would constitute an important confidence building measure, that would help restore the trust of all stakeholders in the patent system. It would provide greater clarity and predictability and could even help the facilitated access to biological resources and associated traditional knowledge which bio prospectors and researchers were interested in. On the other hand, he said that a malfunctioning patent system that condoned misappropriation was deleterious to innovation.

83. On the issue of possible administrative burden, he pointed out that the disclosure proposal was entirely reasonable given the nature of the serious problems that were sought to be addressed as well as the need to ensure that the international intellectual property system, particularly the patent system, was balanced and equitable and took on board the concerns of all stakeholders. He said that the fact that the patent system was presently perceived by some as over-burdened was no testimony to its effectiveness or relevance to the objectives of promoting innovation. On the contrary, evidence suggested that the patent system today was not functioning well. There were incentives for applicants to file applications relating to "questionable inventions" and anecdotes on this had proliferated. His delegation's view was that a more rigorous patent system that did not allow for the grant of patents for inventions of questionable merit was important to ensure its robustness, sustainability and relevance to the pursuit of the actual objectives of the intellectual property system, which was, to a large degree, what the proposal by developing countries on disclosure of origin was meant to accomplish. He stated that the objectives and principles of the TRIPS Agreement were clearly stated in its Articles 7 and 8 and needed to be materialized through the proposals on a mandatory disclosure requirement of origin and prior informed consent requirements. His delegation therefore did not understand the suggestions contained in document IP/C/W/434 that characterized the proposals of the developing countries as an attempt to misuse the patent system for the pursuit of objectives not linked to the patent system.

84. He said that document IP/C/W/434 also referred to the possibility that the proposed disclosure mechanism could bring unintended consequences that would run contrary to the purported objectives. He pointed out that his delegation was sensitive to the issue and that the proposed system would put in place a mechanism that was carefully calibrated and would not bring unintended consequences. With respect to the issue of the legal effects, the group was ready to discuss and further elaborate on these in the future. He said that his delegation also disagreed that the options suggested by the United States would effectively address the issues before the TRIPS Council. With respect to the three basic points addressed by Switzerland, he said that answers had been provided in the submission by the group of developing countries.

85. He said that the assertions that the intellectual property system had been a power tool for economic growth and that the patent system put in place through the TRIPS Agreement was beneficial to developing countries could not stand in the face of serious empirical tests and that, at present, there was no known statistical empirical evidence that would support these assertions. On the contrary, the evidence pointed in the opposite direction that, in fact, the patent system and the TRIPS Agreement had been beneficial for the developed countries and had not brought any of the purported benefits to developing countries. He said that the TRIPS Agreement should be an agreement for all countries and that the developing country proponents of the disclosure proposal wanted to see the patent system work well for all stakeholders in an equitable manner.

86. The representative of Indonesia said that his country was important in terms of global diversity because it was one of the ten mega-diverse countries. He said that biodiversity referred to all aspects of life support systems, which included the social, economic and environmental dimensions, knowledge systems, ethics and the relationship between the various aspects. His country was rich in traditional knowledge as there were traditional communities throughout Indonesia. Those valuable aspects should be wisely exploited for the benefit of the communities and the state, with sustainable use of the environment for future generations. Thus, his delegation supported the proposed obligation of disclosure of relevant traditional knowledge and genetic resources in patent applications.

87. The representative of Turkey said that his delegation, like others, was concerned about misappropriation of genetic resources, traditional knowledge and folklore. The discussions needed to be focused on eliminating those concerns and be based on real cases. There was need to strike a delicate balance so as not to unreasonably increase the workload of the patent offices.

88. The representative of Hong Kong, China said that IP/C/W/434 focused on how best to achieve the shared objectives among Members and some of the concerns of the United States were whether the disclosure requirement could help prevent misappropriation, and about the administrative burden or cost of such a system. She said that even though a disclosure system may not completely preclude misappropriation, it could help monitor and ensure compliance with obtaining of informed consent and benefit-sharing. Her delegation looked forward to a better understanding of the implications of the various proposals from different Members and also to a sharing of Members' experiences with national disclosure requirements.

89. The representative of Sri Lanka said that his delegation supported the submission from the group of developing countries contained in document IP/C/W/438 and that he would present detailed comments at a later date.

90. The Chairman observed that there had been useful discussions, that there were several new and substantive submissions and a number of useful and constructive contributions, including suggestions and counter suggestions for a more structured discussion on some of the issues and approaches. The Chair said he would reflect on those matters and would continue his consultations on how future work on the three agenda items should be organized.

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

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

92. No statements were made under this agenda item. The Council agreed to revert to the matter at its next meeting.

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

93. The Chairman recalled that Article 24.2 provided that the Council should keep under review the application of the provisions of the geographical indications section of the Agreement.

94. The representative of the European Communities said that his delegation attached great importance to this agenda item and that there was a need to move forward in finding a more focused and structured way to continue work on it. Recalling that, at the Council's meeting in June, his delegation had encouraged the Chair to reflect on the possibility of presenting an options paper which would help delegations to move forward, he wondered whether the Chair could indicate how he intended to pursue the matter.

95. The representative of Australia said that, at present, her delegation was not pushing the Chair to present an options paper but would not stand in the way of this. Once more procedurally embedded in the other work on GIs under way outside the TRIPS Council, her delegation would have a better understanding on where it would want to take this agenda item. If the Chair were to proceed with some kind of process, Members should be involved in consultations from a very early stage.

96. The representative of Switzerland, associated himself with the European Communities' statement, reiterated the importance that he attached to this agenda item and the subject-matter covered by it. Also his delegation saw a need to move forward in a more focused and structured way and encouraged the Chair to consult with Members on how that could be done. One idea was to base the work on the updated Secretariat summary note in document IP/C/W/253/Rev.1, which summarized the information provided by Members in response to a checklist of the way they were providing protection for geographical indications. The Council had already earlier agreed on this way of structuring discussions and work along those lines had been started last year, but, given other priorities, progress had not yet been made on the work.

97. The representative of the United States said that it was important to have Members' participation in the future work on the item and that his delegation would be happy to be involved in any consultations that the Chair might undertake in the near future.

98. The representative of Romania said that her delegation was very interested in the subject of geographical indications and therefore associated itself with the interventions by the European Communities and Switzerland.

99. The Chairman said that he would continue to reflect on the matter. He said that he had not yet come to a view on whether it was appropriate at this time to enter into consultations but, if he came to such a conclusion, he would be in touch with all Members interested in the subject.

100. The Council took note of the statements made.

I. DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

101. The Chairman recalled that, at its meeting in June, the Council had agreed to continue its work pursuant to paragraph 11 of the General Council decision on "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" (hereinafter referred to as "the Decision") on the preparation of an amendment to the TRIPS Agreement with a view to the TRIPS Council making a recommendation by the end of March 2005 so that the General Council could conclude its work on the amendment at its first meeting thereafter. He drew attention to a new communication received from the delegation of Nigeria, on behalf of the African Group, which contained a proposal for amending Article 31 of the TRIPS Agreement (subsequently circulated as document IP/C/W/437).

102. He also recalled that, as had been agreed at the Council's meeting in September, he had held consultations on the action to be taken pursuant to paragraph 11 of the Decision. At an informal consultation held the day before, many delegations had presented their initial reactions to the proposal by the African Group. The general view expressed by many delegations had been that it would be useful for him to hold informal consultations in various formats prior to the Council's next meeting with a view to carrying the work forward expeditiously so as to meet the March time-frame.

103. The representative of Barbados informed the Council that the Commonwealth Secretariat, together with the ACP Geneva Office and the AITIC, had hosted a workshop on the Decision on 12-14 October 2004. The discussions at the workshop had been based on national case studies from Bangladesh, Barbados, India, Kenya, Mauritius, South Africa, Tanzania and Uganda that had been commissioned by the Commonwealth Secretariat. Some of the issues considered at the workshop included registration and granting of marketing approvals for generics produced under compulsory licences; the legislation and institutional framework that could be adopted by exporting countries, such as Canada and Norway, which had capacity to produce pharmaceutical products, as well as by countries interested in importing those products; and how to benefit from the Decision with respect to the production and imports of pharmaceutical products on a regional basis. She said that the report of the workshop would be sent to the WTO Secretariat on behalf of the three sponsoring organizations. Her delegation looked forward to having an exchange of views on the implementation of the findings and recommendations contained in the report at the next Council meeting.

104. The representative of Kenya associated himself with the statement made by Barbados.

105. Introducing document IP/C/W/437, the representative of Nigeria, speaking on behalf of the African Group, recalled that Members had agreed that the amendment would be based, where appropriate, on the Decision. In this regard, the appropriateness of particular elements should be understood to refer to those elements in the Decision that were necessary to ensure that the amendment is legally predictable, secure and economically and socially sustainable. He said that the proposal by the African Group was aimed at providing the basis for such an amendment. It was proposed to amend Article 31 of the TRIPS Agreement by adding a second paragraph to the Article, so that the current text of Article 31 would become Article 31, paragraph 1 and the amendment text would become Article 31, paragraph 2. The proposed amendment would be based on the Decision with modifications, as appropriate.

106. It was proposed to eliminate a number of provisions in the Decision that were redundant in the context of an amendment or where their purpose would otherwise be served by existing provisions of the TRIPS Agreement, such as the provisions on compulsory licences or enforcement. For consistency and clarity, the actual text of the amendment had been modified, including the arrangement of paragraphs to fit into the TRIPS Agreement. He also noted that the footnote would be renumbered as appropriate to follow the numbering of the TRIPS Agreement.

107. He further explained that the Preamble of the Decision had been eliminated because it was only meant to provide the context for the Decision. Also, the last sentence of paragraph 1(b) had been eliminated because it represented flexibility like other provisions contained in the TRIPS Agreement. Similarly, the second paragraph was also eliminated since the elements contained therein were those relating to the conditions for the use of the Decision whose purpose would be served by other existing provisions of the TRIPS Agreement, such as the provisions on enforcement and those contained in the current Article 31. For example, on the specification of quantities, the patent holder would be informed and the legal validity of the licence was subject to judicial review or review by any other independent authority as contained in paragraphs (i) and (j) of Article 31 of the TRIPS Agreement.

108. With regard to paragraph 4 relating to re-exportation, the proposal had adequately addressed the matter under its sub-paragraph (d). Similarly, the provision contained in paragraph 8 of the Decision was not necessary once the amendment came into force as this paragraph was only applicable to waivers as required by Article IX:4 of the Marrakesh Agreement Establishing the WTO. The Annex to the Decision had been eliminated, since it established a self-selection criterion and did not add any value. This was evident from the fact that any Member notifying the intention to use the system would clearly and explicitly indicate that it lacked manufacturing capacity.

109. He concluded that the proposal presented a viable basis for undertaking the amendment as foreseen in paragraph 11 of the Decision. He noted that the proposal was not meant to re-open discussion on the Decision but was aimed at taking the process forward in a constructive manner. He said that his delegation would be willing to engage with Members with a view to concluding the process in an expeditious manner.

110. The representative of Korea said that the African Group paper provided a very useful starting point for substantive work on this issue. His delegation would carefully consider the submission and come back with more substantive comments at a later stage. Reiterating the position of his delegation on this issue, he said that the amendment process should be a technical exercise that did not reopen the substantive or the legal issues of the package that was reached on 30 August 2003. He said that his delegation supported the suggestion to hold informal consultations and hoped that the amendment exercise would be completed by March 2005.

111. The representative of Cuba said that the African Group proposal was the first working document offering viable alternatives in the amendment process, without prejudice to other possible positions. She said that a solution should be based on discussions between Members and that the core issues should be dealt with from a technical standpoint. The Council should go beyond a mere literal transposition of the provisions of the Decision into the Agreement and should discuss the various concerns expressed by the different categories of Members. She said that during the informal consultations, an appropriate balance of membership should be observed in order to achieve wording for this provision based on the needs and concerns of all Members.

112. The representative of Argentina said that the African Group submission represented an important step in order to move forward in the amendment process. She said that her delegation would be ready to look into it with an open mind and in a positive manner. She hoped that the submission would serve a good basis to move forward and reach a conclusion by the date that the Council had set. She supported the proposal to hold informal consultations before the next Council meeting.

113. The representative of India noted that the submission by Nigeria, on behalf of the African Group, was the first contribution on substantive aspects for discussion on this agenda item and supported the suggestion of having informal consultations on this matter.

114. The representative of the European Communities said that his delegation was not yet in a position to make substantive comments on the African Group proposal. On a preliminary basis, he said that the Decision had been the result of long negotiations and constituted a delicate balance of rights and obligations whose integrity should be preserved. The Decision could already be effectively used by Members. He reiterated his delegation's position that the amendment process should be a purely technical exercise, faithfully transposing the Decision into TRIPS language without any re-opening of substance. He noted that the African paper took a different approach, eliminating some provisions of the Decision and redrafting others. This, in his view, was not a promising way forward and his delegation would make further comments at a later stage. He supported the proposal to undertake informal consultations to enable the TRIPS Council to meet the March 2005 deadline.

115. The representative of the Philippines said that the African Group's long-awaited proposal was a good basis for taking the work on the amendment forward. It appeared to be a simple and clear adaptation of the basic elements of the Decision that had eliminated what was surplusage of language in the Decision while, at the same time, maintaining the fundamental elements and substance. Therefore, contrary to what others had indicated in their preliminary remarks, the integrity of the Decision was by no means compromised by the proposal from the African Group. He said that the proposal addressed concerns that his delegation had often expressed in relation to the obligations imposed on importing Members with respect to preventing the re-exportation or unlawful importation into their territories of the products covered by the Decision. He also found that it provided a more appropriate provision to address the issue of remuneration. It also rectified provisions in the Decision which might not have lent themselves to an expeditious use of the Decision. He looked forward to participating in the consultations as constructively as possible.

116. The representative of the United States expressed the support of his delegation for the proposal to undertake informal consultations on this matter and said that the United States remained fully committed to reach an agreement on the amendment by the March 2005 deadline. He said that his delegation continued to believe, as did many other delegations, that substantive issues should not be re-opened and that the amendment process should be a purely technical exercise. He reiterated that it was essential that this amendment preserve the entire agreement that had been reached in August 2003 and needed to include an express reference to both the Decision and the Chairman's statement.

117. Referring to the submission by the African Group, he said that his delegation would need more time to fully consider it. However, upon an initial review, he had concerns over the apparent absence of several provisions of the General Council Decision text, the apparent re-wording of other provisions and the lack of reference to the Chairman's statement. He expressed interest in learning why the African Group believed that including the entirety of the provisions would impede the faithful implementation of the August 2003 solution, particularly in light of the statement of the representative of Nigeria that it was not the Group's intention to re-open the August 2003 solution. As the European Communities had stated earlier, the solution had been the result of long negotiations and reflected an important and delicate balance. What might seem like surplusage to some delegations was essential to others. The Chairman's statement was an essential part of the agreement of 30 August 2003 as there would have been no agreement without it. There was no basis to suggest that the concerns that were addressed by the Chairman's statement would not arise in the context of adopting the amendment. If the intention was to have a pick-and-choose approach, it might only delay the adoption of the amendment, calling into question the March deadline and, in this context, he wondered what objectives would possibly be accomplished by such an approach.

118. The representative of Japan said that his delegation intended to check whether the African Group proposal properly reflected the Decision and the Statement, and that he would make comments on it at the next opportunity. He supported the proposal to conduct informal consultations on this issue and said that Japan looked forward to participating in the session of consultations in a constructive manner.

119. The representative of Kenya pointed out that the proposal of the African Group was based on paragraph 11 of the Decision and that it did not deviate from it. The African Group had taken from the Decision what had been appropriate to include in the TRIPS Agreement, without disturbing the equilibrium. The TRIPS Agreement set the minimum standards, and the Group had not seen the sense in disturbing that part of the equilibrium. Besides, the amendment would be part of the TRIPS Agreement, and there should be no risk that the amendment could somehow be interpreted as eliminating the application of previously existing provisions.

120. Addressing Members who had said that the proposal did not contain some provisions of the Decision, he asked them to see whether these provisions would make sense if they were inserted in the TRIPS Agreement. For example, he asked if it would make sense to include the preambular paragraphs of the Decision in the Agreement. He explained that the preamble was basically meant to provide the context for the Decision and did not contain any substantive issues. Besides, the TRIPS Agreement itself had introductory paragraphs as its preamble. Similarly, paragraph 8 of the Decision was based on annual reviews of waivers and was not applicable to the permanent solution. The last part of paragraph 1(b) dealing with Members that might voluntarily not use the system or that might use the system only in limited circumstances, introduced a flexibility. Just like with other flexibilities under the TRIPS Agreement, Members were free to choose whether to use the flexibility or not and there was no need for prior declarations and it was for this reason that this part of the paragraph had been left out of the proposal. He said that paragraph 9 simply reaffirmed the rights that Members already had and did not confer any new rights. Clearly, paragraph 11 of the Decision, was aimed at providing a roadmap towards the amendment and therefore it had to be left out. Some other provisions had been left out, for example on enforcement, because these were already in the TRIPS Agreement.

121. Regarding the Chairman's statement, he said there was a need to clarify that the Statement had not been intended to be made part of the amendment. He said that the Group did not believe that the statement formed part of the amendment because it would negate the solution itself as mandated in the Doha Declaration on TRIPS and Public Health. The Declaration had foreseen two problems: one was lack of manufacturing capacity in developing and least-developed countries and the other was the inability to make use of compulsory licensing. The Chairman's statement did not encourage technology transfer, which went against the principles and objectives of the TRIPS Agreement. Therefore, the African Group wished to have a system that encouraged technology transfer to developing and least-developed countries so that they could make effective use of compulsory licences. Moreover, the Chairman's statement had already served its purpose of allaying the fears of some pharmaceutical companies at that time and there had been many other important statements made at the time, such as the one by the South African delegation which had been crucial in galvanizing the consensus. He said that the African Group was ready to engage in informal consultations and hoped that the deadline could be met.

122. The representative of Brazil said that, upon a first reading of the African Group's proposal, it seemed to be a constructive one and a positive contribution to the debate, which he hoped would help to make progress in the negotiations on an amendment to the TRIPS Agreement in accordance with the mandate of paragraph 11 of the 30 August Decision. He supported the proposal to undertake further informal consultations on the amendment and said that his delegation would be available to contribute positively.

123. The representative of Sri Lanka said that, as a country that did not have domestic manufacturing capacity for pharmaceutical products, Sri Lanka attached a great importance to this agenda item. He regretted that his delegation was not able to provide substantive comments on the African Group proposal at this stage and said it would do so during the informal consultations.

124. The representative of Switzerland said that the African Group paper was a concrete proposal on implementation and would help focus consultations. His delegation would offer its comments as soon as possible. He reiterated the Swiss position that the work on the amendment should be concluded before the deadline of March 2005. He emphasized that any solution would have to faithfully reflect the entirety of the substance of the solution found and agreed to by the membership on 30 August 2003. He recalled that this solution was the result of a long and difficult negotiation and represented a delicate balance. What remained to be done was for the Council to find a form to technically transpose the solution found into the TRIPS Agreement in the most expeditious and efficient manner. For reasons of expeditiousness and efficiency, Switzerland favoured the footnote approach for the implementation as a solution, as it was a simple and straightforward one, allowing by way of reference to incorporate the 5-page long text of the Decision into the TRIPS Agreement without upsetting the structure of the Agreement or prejudicing its readability or comprehensibility.

125. The solution of 30 August 2003 included the Decision or the so-called "Motta text" and the Statement of the Chairman of the General Council which had enabled the breakthrough for a consensus on the solution. The contents of the statement, as read by the Chairman, had been made with the collective understanding and agreement of the Membership and was therefore to be clearly distinguished from other statements that were made on the 30 August 2003 by individual delegations. The Chairman's statement therefore needed to be adequately reflected in the implementation solution. His delegation agreed that this needed to be done in a manner that would not change the legal status or the relationship that the Decision and the accompanying statement had had on the day of the adoption of the solution.

126. He supported the proposal to continue informal consultations and expressed willingness to contribute actively and constructively to this process.

127. The representative of Turkey said that his delegation was in favour of an amendment which would be of a technical nature, the aim of which should be to transpose the Decision into the text of the TRIPS Agreement. In his view, this exercise should not alter the rights and obligations of Members stemming from the TRIPS Agreement and WTO obligations in general. He said that his delegation would comment on the African Group's contribution later. He also signalled his delegation's willingness to participate constructively in the consultation process.

128. The representative of Malaysia said that the African Group had provided a substantive contribution which would assist in focusing the discussions on the amendment. The proposal aimed at containing elements of the Decision without re-opening discussions on substance and yet other delegations had raised the issue of the Chairman's statement which was not reflected in the Decision. Her delegation saw the need for further consultations that would allow the Council to conclude the exercise by March 2005.

129. The representative of Norway said that her delegation was not able to make any substantive comments on the African Group proposal but that they would like to do so during the proposed consultations. She reiterated that her delegation saw this process as a technical exercise in implementing the Decision and that it was open to any form that could be used to keep the substance intact.

130. The representative of Canada said that his delegation would revert to the African Group proposal in future meetings. He said that the solution that had been reached in August 2003 had been the product of many months of intensive negotiations and reflected a very difficult and delicate balance among the interests of different WTO Members. No delegation had been entirely happy with the outcome of those negotiations, but everybody had agreed on the basis of consensus to a solution which included the General Council Decision and a Statement by the Chair on the interpretation of the Decision. He agreed with the comments made by the delegation of Switzerland about the status of the Chairman's statement. He reminded the Council of the third sentence of the Chairman's statement,

which placed on record that the statement represented several key shared understandings among Members regarding the Decision and the way in which it would be interpreted and implemented. At the time this had been adopted by the General Council, no delegation had objected to it.

131. Agreeing that the system put into place in August 2003 was already in effect, he encouraged all WTO Members to take the necessary steps to implement and use it. In the view of his delegation, it was not the time to reopen and renegotiate any aspect of the entirety of the solution that had been agreed to at that time. Therefore, the amendment process should be a technical exercise to faithfully transpose the entirety of the solution found into the TRIPS Agreement. His delegation looked forward to working intensively, including in informal consultations, in order to meet the March deadline.

132. The representative of the Chinese Taipei said that his delegation was not able to comment on the substance of the African Group proposal. However, he noted that some language used in the proposal was different from that in the Decision such as in the paragraph of the definition of eligible importing Members. He said that his delegation supported the proposal on informal consultations. He reiterated that his delegation viewed the amendment as a technical exercise that should be completed by the end of March 2005.

133. The representative of Nigeria, responding to the intervention of Chinese Taipei regarding the paragraph on eligibility, said that the African Group believed that this paragraph had already been taken care of by Article 31(b) and (c) of the current TRIPS Agreement. He reassured the Council that the Group was ready and willing to engage constructively in the informal consultations to be undertaken.

134. The representative of China said that his delegation thought that the African Group's proposal was constructive and positive and that its elements could be the basis for future negotiations. He supported the proposal to undertake informal consultations in order to meet the deadline.

135. The representative of Hong Kong, China, noting that the concrete proposal made by the African Group would provide useful input to facilitate further discussion, said that his delegation would provide comments on its substantive content at a later stage. He reiterated that his delegation viewed the amendment exercise as a purely technical one, transposing the Decision into an amendment without any reopening of the substantive issues. He supported the proposal to hold informal consultations in order to meet the deadline that the TRIPS Council had set for itself.

136. The representative of Peru hoped that the African Group proposal would serve as basis for a speedy and appropriate solution. He supported the convening of informal consultations to speed up the process.

137. The representative of Australia recalled her delegation's position that the amendment process should be maintained as a technical exercise that transposed the agreement that had been reached in its entirety. She also stated that her delegation looked forward to participating in the informal consultations.

138. The representative of Colombia said that the African Group has made an important contribution and that her delegation would give its comments in due course. She supported the proposal of holding consultations with a view to finalizing the process by March 2005.

139. The representative of New Zealand said that the African Group proposal was a useful contribution on which to focus the efforts of the Council. Her delegation was very open to ideas as to how the Decision might be faithfully reflected in the TRIPS Agreement and agreed that it should be a technical exercise that led to an outcome that faithfully reflected the solution both in terms of

substance and status. She expressed her delegation's commitment to the process and interest in the informal consultations.

140. The representative of the European Communities informed the Council that, on 29 October 2004, the European Commission had adopted a proposal for a regulation on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to certain countries with public health problems. The main objective of this proposal was to create a legal basis, at European Union level, to enable the authorities to grant compulsory licences for the production and export of pharmaceuticals to eligible developing and least-developed countries. The proposal was based on the Decision and avoided introducing new conditions or restrictions, in particular with regard to the scope of products and diseases. It established the conditions for the application and grant of compulsory licences which reflected those found in voluntary licensing agreements. In particular, the proposal imposed clear conditions upon the compulsory licensee with regard to acts covered by the licence, the identification of the medicines manufactured under the licence and the countries to which these products would be exported. In addition, compulsory licences were non-exclusive and non-assignable. The proposal envisaged equitable remuneration to the patentee. In order to prevent trade diversion, the proposal specified that the re-importation of pharmaceuticals manufactured under the regulation should be treated as counterfeit goods.

141. The initiative of the European Commission was the starting point of the legislative process within the European Union, involving the European Union Council and the European Parliament. He hoped that the legislative process would develop expeditiously so that this new mechanism could be operational as soon as possible. He encouraged other WTO Members to implement the Decision and recalled that the European Union had made two written communications to the TRIPS Council in which it had offered its support for the implementation of the Doha Declaration and in which it had called upon all the technical assistance providers to integrate the health dimension into their technical assistance programmes.

142. The representative of the Philippines said that, in relation to the Chairman's statement which accompanied the Decision of 30 August 2003, his delegation had made it clear at that time that it saw a difference between the Chairman's statement which provided the interpretative context, and the Decision itself. On previous occasions, several delegations, including Argentina, had made the distinction between these two elements which other delegations had supported. He recalled that his delegation had made a statement at the TRIPS Council meeting that had adopted the 30 August Decision in which it had provided its understanding of the Chairman's statement. In that respect, it provided interpretative context to what had been accepted as the Decision.

143. The representative of Thailand expressed the interest of his delegation in participating in the consultations suggested by the Chairman.

144. The Chairman suggested that he hold intensive consultations in various formats prior to the Council's next meeting with a view to carrying forward the work expeditiously so as to meet the March 2005 time-frame.

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

J. REVIEW UNDER PARAGRAPH 8 OF THE DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

146. The Chairman recalled that paragraph 8 of the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health provided that the Council for TRIPS should review annually the functioning of the system set out in the Decision with a view to ensuring its effective operation and should annually report on its operation to the General Council.

Furthermore, the paragraph provided that this review should be deemed to fulfil the review requirements of Article IX:4 of the WTO Agreement.

147. The representative of Canada said that his country had passed legislation relating to the Decision in May 2004. The draft regulations to bring Canada's legislation into effect had been published for public record and comment on 2 October 2004. The 75-day period announced for comment would end soon, and he hoped that the regulations and the legislation would come into force some time in early 2005.

148. The representative of Switzerland said that it was important to hear about Members' national implementation of the paragraph 6 Decision. In this regard, he recalled that Canada and Norway had already announced that they had adopted implementing legislation as exporting countries and that the European Communities had provided information on the preparation of similar legislation. Switzerland was preparing, in the context of the revision of its Patent Law, a proposal on the implementation of the paragraph 6 solution. Switzerland had been confident in initiating this work based on the WTO waiver Decision currently in place, without waiting for the outcome of the efforts to incorporate it in the TRIPS Agreement, trusting, however, that these efforts would leave the substance of that Decision intact. All substantive elements of the Decision would be faithfully reflected in this legislation, including effective and deterrent measures to avoid such pharmaceuticals being diverted to other markets for commercial purposes.

149. Switzerland had opted out of the paragraph 6 solution as an importing country, but intended to provide the possibility of compulsory licensing of patented pharmaceuticals for exportation purposes, in order to assist countries without, or with insufficient, manufacturing capacity that needed to address a public health problem such as HIV/AIDS, tuberculosis or malaria. Rather than seeing compulsory licensing in the forefront as a solution to improve access to medicines in needy developing countries, he believed that negotiations with the right holders of patented pharmaceuticals needed in these countries promised a swifter and a more suitable solution to affordable prices. Nevertheless, Switzerland had responded to the concerns of Members most interested in the paragraph 6 issue by joining the consensus on the paragraph 6 Decision and was willing to follow suit at the national level. The Swiss delegation was interested in hearing about national implementation efforts also from those Members which had made the case for the high degree of urgency for this solution throughout the negotiation process at the multilateral level.

150. Turning to the TRIPS Council's report to the General Council foreseen in paragraph 8 of the Decision, the Chairman said that, in anticipation of this, the Secretariat had prepared a draft cover note to this report which was available outside the room. The draft cover page contained factual information on the use of the system established under the Decision and on the work on the preparation of an amendment to the TRIPS Agreement pursuant to paragraph 11 of the Decision. He suggested that the Council agree on the contents of the draft cover note and that the part of the minutes of the meeting reflecting the discussion held under this agenda item be attached to it.

151. The Council so agreed.

K. SECOND ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT

152. The Chairman recalled that, at its meeting in February 2003, the Council had adopted a decision on the "Implementation of Article 66.2 of the TRIPS Agreement". Paragraph 1 of the Decision provided that developed country Members should submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they were to provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports were to be submitted prior to the last Council meeting scheduled for the year in question.

153. The Council had taken up its first annual review of developed country Members' reports on their implementation of Article 66.2 of the TRIPS Agreement at its meeting in November 2003. At its meeting in June, the Council had agreed to request developed country Members to submit updates to the reports they had provided in 2003 on actions they had taken or planned in pursuance of their commitments for the present meeting. On 13 July 2004, the Secretariat had issued airgram WTO/AIR/2360 to remind developed country Members of this request.

154. To date, the Council had received updated information from the following developed country Members: New Zealand; Japan; Switzerland; the European Communities and certain member States (the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, the Slovak Republic, Spain, and Sweden); Canada and the United States. The resulting documentation was being circulated in document IP/C/W/431 and addenda.

155. He recalled that, with regard to the purpose and conduct of the review of this information, paragraph 2 of the Decision on the Implementation of Article 66.2 of the TRIPS Agreement explained that the annual review meetings should provide Members with an opportunity to pose questions in relation to the information submitted and request additional information; discuss the effectiveness of the incentives provided in promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base; and consider any points relating to the operation of the reporting procedure established by the Decision.

156. He urged those developed country Members that had not yet provided reports to do so. Given that some of the information had been received only very recently, and most of it was, so far, available only in its original language, he said that it was his intention to provide a further opportunity, at the Council's next meeting, for Members to make comments on the information submitted for this meeting that they might not yet have been able to study.

157. The Council took note of the information provided and agreed to proceed as suggested by the Chair.

L. TECHNICAL COOPERATION AND CAPACITY-BUILDING

(i) Annual updates on technical cooperation activities

158. The Chairman recalled that the Council had held its annual review of technical cooperation at its meeting in September. At that meeting, the Chair had said that Members would be provided with a further opportunity to make comments on the information submitted for the September meeting that they might not yet have been able to study. In addition to the material submitted for the September meeting, the Council had received certain additional material. The European Communities had supplemented its earlier report on the technical cooperation activities by it and its member States by submitting contributions prepared by the Office for Harmonization in the Internal Market and the European Patent Office (IP/C/W/426/Add.5/Suppl.1). Furthermore, the Council had received information on TRIPS related technical cooperation activities from Australia (subsequently circulated as document IP/C/W/426/Add.6), as well as from the International Union for the Protection of New Varieties of Plants (IP/C/W/424/Add.3).

(ii) Joint Initiative

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

160. The representative of the WTO Secretariat referred to two activities foreseen for the upcoming months that fell under the Joint Initiative, namely a national seminar in Niger to be organized jointly with WIPO later in December, and a national seminar in Lesotho to be held in January 2005. The WTO had received a number of requests from Pacific island countries, including LDC Members and countries in the process of acceding to the WTO. With a view to responding to these requests, the WTO was organizing, together with the Pacific Islands Forum Secretariat, a sub-regional workshop on the TRIPS Agreement that would take place in Fiji at the end of January 2005.

161. One of the major programmes of technical cooperation that the WTO had undertaken in 2004 in favour of developing and least-developed countries generally was the organization of seven regional workshops on certain topical issues in regard to intellectual property. Since the Council's meeting in September, three more such regional workshops had taken place: one, organized jointly with WIPO, in Moldova for the countries of the Central and Eastern Europe, the Central Asia and the Caucasus; another in Saint Lucia for the Caribbean, co-organized with the Institute for the Integration of Latin America and the Caribbean (INTAL) and the Caribbean Regional Machinery; and the third in the Dominican Republic for the Latin American countries, also co-organized with INTAL. The last of these workshops would be held the following week in the United Arab Emirates for the Arab Countries.

162. He thanked the host countries and the co-organizers, as well as the Geneva-based delegates and the staff members of WIPO and WHO, who had kindly accepted to speak at these events.

163. On behalf of her organization and her colleagues, the representative of WIPO thanked the Government of Moldova for its excellent preparation and hospitality, and said that she looked forward to the national workshop to be held in Niger.

164. The Council took note of the statements made.

M. REQUEST FROM MALDIVES FOR AN EXTENSION OF THE TRANSITION PERIOD UNDER ARTICLE 66.1 OF THE TRIPS AGREEMENT

165. The Chairman recalled that, at its meeting in September, the Council had had before it a request from the Maldives for an extension of the transition period under Article 66.1 of the TRIPS Agreement (IP/C/W/425). The Council had agreed that consultations be held on this request, and that the arrangements for these be coordinated between the Chair of the TRIPS Council and the Chair of the CTD.

166. Since then, the delegation of the Maldives had not been able to attend the meetings of the CTD and there had therefore not yet been an opportunity to organize consultations on this matter. At the meeting of the CTD held on 26 November, the Chair of that body had informed Members that the Maldives was working on a plan to achieve a smooth transition to developing country status. The CTD had agreed to revert to this matter at its next meeting on 22 February 2005, at which the delegation of the Maldives was expected to attend and to present its transition plan.

167. The Chairman suggested that the Council continue to proceed as agreed at its meeting in September.

168. The Council so agreed.

N. NON-VIOLATION AND SITUATION COMPLAINTS

169. The Chairman recalled that the General Council decision of 1 August 2004 on the Doha Work Programme provided, under the title "Other elements of the Work Programme", that the moratorium on non-violation and situation complaints covered by paragraph 11.1 of the Doha Ministerial Decision

on Implementation-Related Issues and Concerns was extended up to the Sixth Ministerial Conference. At its last meeting, the TRIPS Council had considered what action it should take pursuant to this Decision. The Council had agreed that the item on non-violation and situation complaints be put on the agenda of the present meeting, and that the Secretariat be requested to update its earlier summary note, circulated in June 2002 as document IP/C/W/349, on the points raised in the Council's substantive discussion of this matter so far. Since then, this update had been circulated as document IP/C/W/349/Rev.1.

170. The representative of Peru thanked the Secretariat for the update, which, like the original summary note, was objective and factual, giving a very good summary of what had happened in the past discussions on non-violation and situation complaints held in line with Article 64 of the TRIPS Agreement and the Doha Declaration. Since the Note contained an objective report, it depicted the positions expressed by delegations in the Council, but it did not mention the numbers of delegations that supported each of the different positions. He said that there was a vast majority, basically consensus-minus-one, which was of the view that this type of complaint should not be applicable to the TRIPS Agreement. The arguments supporting this position had been discussed at length in many meetings of the Council's meetings, and they had been clearly presented in document IP/C/W/385 submitted by a number of developing countries. Given this, there was very little left to be said. This type of complaint was relevant to a different type of situation in an entirely different context than the one of TRIPS.

171. The present situation resembled the story where a sheep had got lost, while the rest of the flock remained together. In this case, the job of the shepherd was to try and find the lost sheep and bring it back to the flock, convincing it of the right path to take. Once this matter had been solved, there would be more certainty on how to better apply the intellectual property system and more time to find effective solutions to more substantive and important problems.

172. The representative of Canada said that he was pleased that this item was back on the agenda. Canada had been active since the Uruguay Round in focusing the TRIPS Council on the mandated examination of the scope and modalities of non-violation and situation complaints, or non-violation nullification and impairment (NVNI). His delegation had examined this issue in detail in its capital, spoken about it to many colleagues at the WTO, and submitted several detailed communications on the subject. Throughout this examination, his delegation had consistently expressed concern that transplanting this type of remedy into the TRIPS environment would introduce into the Agreement a measure of uncertainty, resulting ultimately in constraints in domestic policy-making beyond what Members agreed to when they negotiated the TRIPS Agreement.

173. His delegation had arrived at this view from the basic premise that the TRIPS Agreement was a *sui generis* agreement among trade agreements; and that, as such, a remedy that had been designed to deal principally with issues arising in market access agreements was not suitable for application in the context of an agreement that dealt with the creation of minimum standards. There remained considerable disagreement among Members to the appropriateness of this remedy and, as Peru had also noted, he believed there was a near consensus around the view that non-violation and situation complaints should not apply to TRIPS.

174. In that light, he encouraged those few delegations who supported the application of NVNI in the TRIPS Agreement to better elaborate their rationale for advocating this potentially important change in the balance of rights and obligations in the TRIPS Agreement. It was clear, after all, that because NVNI had not so far applied in TRIPS, agreeing to apply it now would shift the balance WTO Members had maintained since the Uruguay Round. In Canada's view, the onus was therefore now on those few delegations to explain why the Council should agree to change that status quo. He concluded by expressing his hope that in future meetings Members could arrive at the consensus required to fulfil the responsibility under Article 64.

175. The representative of Argentina was pleased to see the item back on the agenda, since this gave a possibility of further debate. Like the preceding delegations, she believed that non-violation complaints were inherent to agreements dealing with trade and directly linked to market access. As pointed out by the delegation from Canada, the TRIPS Agreement was a *sui generis* agreement and it was not a market access agreement. Therefore, she believed that the possibility of non-violation complaints would lead to uncertainty with respect to the legality of governmental measures which could legitimately be adopted by a Member, opening the possibility that these measures could be legally challenged by other Members. This would cause an imbalance in the rights and obligations under the TRIPS Agreement. She recalled that document IP/C/W/385, to which Peru had referred and which was co-sponsored by Argentina, contained a proposal that this type of complaint be determined inapplicable to the TRIPS Agreement.

176. The representative of the United States recognized that Members had agreed to extend the moratorium on non-violation complaints. This had been a significant concession on the part of the United States. Nonetheless, his delegation continued to consider that non-violation complaints were fully appropriate in the TRIPS context and it expected the moratorium to expire at the Sixth Ministerial Conference.

177. The possibility of non-violation nullification and impairment disputes had been part of the GATT dispute settlement system since the beginning. Failure to allow this possibility in connection with the TRIPS Agreement could invite Members to look for creative ways to avoid their TRIPS obligations. In that light, neither the TRIPS text nor the GATT practice supported the contrary view. Furthermore, the United States considered that Article 26 of the Dispute Settlement Understanding provided all the necessary assurances and safeguards for Members to handle any disputes that might arise alleging non-violation nullification and impairment under TRIPS and to prevent any abuse of the dispute settlement process.

178. The representative of the European Communities recalled that his delegation had already pointed out that it was difficult to transpose the non-violation and situation complaint concept from GATT to the TRIPS Agreement. This view was based on a number of considerations. First, such transposition would introduce elements into the TRIPS Agreement that might create uncertainty and lack of clearness. Secondly, the objective of the Agreement was not market access or tariff concessions; the TRIPS Agreement obliged Members to put in place clearly described legislation and to enforce it, and any failure to comply with TRIPS obligations could be directly addressed as a violation of the TRIPS Agreement. Thirdly, any behaviour that restricted market access or reduced benefits under tariff concessions could be addressed under GATT or GATS. And finally, as a consequence, there seemed to be little practical scope for non-violation and situation complaints under the TRIPS Agreement. While being open to continue discussing this issue further, he believed that non-violation and situation complaints should not be applicable in the TRIPS context.

179. The representative of Australia, while being in favour of continuing discussions on the matter, said that her delegation had already shared some of its real concerns regarding the possible applicability of non-violation and situation complaints to the TRIPS Agreement.

180. The representative of Switzerland recalled that his delegation had said at earlier Council meetings that it was important to take into consideration the fact that Article 64.1 of the TRIPS Agreement made the full dispute settlement mechanism, negotiated in the Uruguay Round, applicable to the TRIPS Agreement, including non-violation and situation complaints. The fact that Members had included in paragraphs 2 and 3 of Article 64 a five-year moratorium for the examination of the scope and modalities for such complaints in the TRIPS context seemed to confirm this. The very nature of a moratorium was that it was temporary and thus the availability of such complaints followed after the end of the moratorium in accordance with the modalities agreed. He could not see why the burden of proof would now have shifted on to those Members who read this Article in this light. Given many Members' concerns about transparency and predictability and their desire to

continue the discussion on the scope and modalities, Members had agreed to extend the moratorium until the next Ministerial Conference. He assured the Council that his delegation was willing to engage in the discussion.

181. The representative of Brazil said that it was clear that there was an emerging consensus in the Council that non-violation and situation complaints should not apply in the context of the TRIPS Agreement, a view that was supported also by his delegation. He encouraged the few remaining Members that had not yet subscribed to this prevailing view to do so as quickly as possible in order to discharge the mandate that the Council had had for some time.

182. The representative of India said that the discussions so far had shown that there was an emerging consensus that there was no occasion to apply non-violation and situation complaints in the TRIPS context. India's position and the reasons behind it were contained in document IP/C/W/385. He restated the principle behind this position, which was that non-violation and situation complaints did not apply in the TRIPS context and that the moratorium, as some delegations called it, was without prejudice to Members' positions on the applicability of non-violation and situation complaints in the TRIPS context. Nevertheless, his delegation was prepared to discuss the issue.

183. The representative of Malaysia welcomed the 1 August 2003 Decision to extend the moratorium on non-violation and situation complaints, although she wished that it had been a decision that had resolved this issue. Like the vast majority of Members, Malaysia had serious doubts about the need for the application of non-violation and situation complaints to the TRIPS Agreement. This was not necessary for the security and predictability of benefits under the Agreement, since it contained a large number of provisions that supported strong enforcement and implementation of TRIPS obligations. In fact, the application of non-violation and situation complaints could lead to greater uncertainty and to an imbalance of Members' rights and obligations. She hoped that the Council could reach a decision in the near future on the non-applicability of such complaints to TRIPS.

184. The representative of Kenya reiterated his delegation's position that non-violation and situation complaints should not apply to the TRIPS Agreement.

185. The representative of Egypt recalled that his delegation was one of the co-sponsors of document IP/C/W/385. The WTO dispute settlement mechanism was a major contribution to the stability of the global economy, making the trading system more secure, predictable and credible. She believed that non-violation complaints in general were difficult to justify in a rules-based system and that their use would increase legal uncertainty and threaten the predictability and security that the system sought to guarantee. Given the special nature of the TRIPS Agreement, it was inappropriate to transpose into it rules that were appropriate in an agreement concerning market access and reciprocal concessions. Her delegation supported the conclusion that the non-violation and situation complaints be made inapplicable to the TRIPS Agreement.

186. The representative of Turkey said that the views of his delegation had been expressed in document IP/C/W/191, which it had cosponsored with several other countries. He supported the statements made by other delegations, particularly Peru, Argentina, Canada and the European Communities, and echoed the suggestion made by Malaysia.

187. The representative of Hong Kong, China said that the application of non-violation and situation complaints raised systemic issues, which needed to be discussed in detail. She expressed her delegation's interest in participating in such discussions.

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

O. SPECIAL AND DIFFERENTIAL TREATMENT PROPOSALS REFERRED TO THE COUNCIL

189. The Chairman said that, in its Decision on the Doha Work Programme of 1 August 2004, the General Council had recalled the Ministers' decision in Doha to review all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational, and recognized the progress that had been made so far. As regards all those WTO bodies to which proposals in Category II had been referred, the General Council had instructed them to expeditiously complete the consideration of these proposals and report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005.

190. At its meeting of 21 September 2004, the TRIPS Council had considered what action it should take pursuant to this Decision in regard to special and differential treatment. The Council had agreed to request the Secretariat to summarize in an informal note the Council's work so far on the Category II proposals on special and differential treatment referred to in it, and to revert to the matter at the present meeting. The Secretariat's summary note had been circulated in document JOB(04)/164.

191. No statements were made under this agenda item. The Council agreed to revert to the matter at its next meeting.

P. TRANSITIONAL REVIEW UNDER SECTION 18 OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

192. The Chairman recalled that paragraph 18 of China's Protocol on Accession required the TRIPS Council to review the implementation by China of the TRIPS Agreement each year for eight years and report the results of such review promptly to the General Council. He further recalled that paragraph 18 required China to provide relevant information, including information specified in Annex 1A, to the TRIPS Council in advance of the review. He informed the Council that the information submitted by China to it as required under Annex 1A of the Protocol of Accession, dated 26 November 2004, had been circulated in document IP/C/W/436. In addition, the Chinese Delegation had made available two room documents entitled "White Paper on Intellectual Property Rights Protection in China in 2003" and "Status of China's Intellectual Property Rights Protection". Questions and comments in connection with the transitional review had been submitted by Japan, the United States and the European Communities, which had been circulated in documents IP/C/W/430, 432 and 435, respectively.

193. The representative of China, briefing the Council on China's implementation of the TRIPS Agreement and the relevant commitments since the last review, said that the Chinese Government had always attached much importance to the protection of intellectual property rights and would fulfil its international commitments in a serious and positive manner. Since the introduction of opening up and reform policies in the late 1970s, China had established an advanced legislation framework, an administrative network and enforcement mechanism, which were sophisticatedly structured and were consistent with international rules. Moreover, China had participated in and ratified major international treaties and conventions on IPR protection. This remarkable process, which had taken developed economies over 100 years, had been completed by China in around two decades. She said that the Chinese Government was fully aware that resolute and effective enforcement was the essential link for the legislation to exert its protective functions.

194. With respect to law enforcement, she said that China's IPR protection featured both administrative and judicial channels which operated in a complementary way simultaneously. China had investigated and dealt with infringement cases, combated offences and protected interests of right holders through administrative enforcement, criminal proceedings as well as closer cooperation between administrative departments, public security authorities and people's procuratorates.

195. To further step up IPR protection, China's Government had set up, at a national level, an IPR protection working group consisting of all judicial and administrative enforcement authorities involved in IPR protection. This working group was mandated to coordinate national IPR protection work and supervise the handling of major violation cases. The State Council had also laid out a year-long special campaign across the country for strengthening IPR protection commencing from September this year.

196. Recognizing the legitimate concerns and interests in IPR protection of foreign companies and entities operating in China, the Chinese Government had institutionalized a coordinating mechanism for regular communication and exchange with foreign enterprises and trade associations. This mechanism had recently been expanded to include representatives of foreign commercial chambers in China to better attune to comments and opinions from representatives of a broader range of interests in a timely manner. These concerned foreign parties had played a positive role in cooperating with enforcing authorities by reporting infringing acts and making suggestions and also by jointly promoting the protection of IPR. These policies and measures were in line with the specific situation of China and had achieved concrete results.

197. During a special IPR protection campaign in the first half of this year, which mobilized several authorities concerned, industrial and commercial authorities had investigated and dealt with 4,036 trademark infringement cases with a total fine of nearly 30 million RMB. 12,000 copyright enforcement personnel had inspected over 8,000 software and audiovisual product dealers and had confiscated over 1.5 million pirated discs. In this respect, she referred to the Xiushui market in the city of Beijing, as an example. This market had been a place renowned for fake goods, especially clothes, and had almost become a sign of Beijing. In the transitional review of last year, some Members had raised questions concerning this particular market. Nevertheless, if one went to that market now, one would find that things had changed dramatically. On 20 July 2004, the Beijing Administration of Industry and Commerce had published a decree banning all clothes and accessory markets from selling commodities bearing 25 trademarks such as Prada, Burberry etc. Vendors continuing to sell such commodities would be investigated as suspected trademark infringers. Vendors with repeated offences would be evicted from the market and vendors suspected of criminal activities would be transferred to the judicial authorities for investigation. This measure indicated China's strong commitment to combating IPR offences and a serious regard to Members' concerns and at the same time served as a testimony to enhanced competence and accumulated experience.

198. China's IPR protection was getting more systematic in terms of organization, more extensive in terms of territory, more regular in terms of time and more institutionalized in terms of enforcement. She pointed out that IPR protection was not a passive response to fulfil China's accession commitments, but that it responded to an increasing need to build a sound trade and investment environment, promote scientific and technical innovation and to speed up economical development of China. She said that China's Government spared no effort in establishing a strong and effective IPR protection system, which was in the interest of both China and other Members. However, the Chinese Government hoped that Members could understand that, given that China had started building its IPR protection only 20 years ago, it still had a long way to go before it could have a highly advanced protection system. Lastly, she said, Members should view the IPR situation of China from a developmental perspective and should continue to provide support and assistance for China's painstaking efforts to improve IPR protection.

199. She said that China had prepared two documents for this meeting, namely: "White Paper on Intellectual Property Rights Protection in China in 2003" and "Status of China's Intellectual Property Rights Protection" which had been made available as informal room documents. She expressed her hope that these documents could put together the big picture for Members and help them better understand the measures and achievements of China on IPR protection. Although the communication from the European Communities had reached the Chinese delegation only three working days before

the review, as a cooperative gesture, China had provided answers to the European Communities' questions.

200. In answering the specific questions from Members, the representative of China first took up the general issues. With regard to on-line application and information disclosure, he said that the office of the national working group on intellectual property protection was set up in the Ministry of Commerce, namely MOFCOM. Its website at ipr.mofcom.gov.cn provided a great deal of information on IPR protection in China.

201. He said that the e-filing of patent applications was in a trial operation phase. Patent examination deadlines and public information such as published patent applications, patent rights and the register on layout-designs were available on the website of the State Intellectual Property Office ("SIPO") at www.sipo.gov.cn.

202. The Trademark Office had already realized on-line trademark publication and had publicized all the opposition decisions on the website of the State Administration for Industry and Commerce ("SAIC"). At present, China was making efforts to speed up the automation process of trademark registration. In China, the acquisition of patent and trademark rights was subject to a registration procedure, while the copyright subsisted when a work was created, without prior examination by a governmental agency. Accordingly there was no plan concerning on-line applications for or examination deadlines on copyright protection. He said that the on-line application and search system for registration of IPR protection of the General Administration of Customs of China ("GCA"), had come into use in September 2004. Anyone could browse information on all registered IPRs in the GCA website at www.customs.gov.cn/ipr/ipr2001c/default.asp. The detailed information of a registered IPR contained the name of the registered holder, name of the product, type and the content of the right etc., by the registration system. The right holder could submit his application for a registration on-line, find out the process of verification for IPR in the GCA and managing or maintaining its registration information.

203. According to China's Copyright Law, works by a foreigner may be protected under an agreement concluded between China and the country or Member to which he belonged or under an international treaty, to which both Members were parties, even if they had not obtained marketing approval. For instance, in 2004, the National Copyright Administration of the People's Republic of China ("NCAC"), at the right owners' request, had undertaken special measures to confiscate pirated audio-visual products of the US film "Shrek 2", which had not yet gained access to China's market at that time. The relevant Articles stipulating punishment were Articles 5, 10, 21 and 25 in the Law on Unfair Competition.

204. Regarding changes in polices or restrictions on representation of intellectual property rights, he said that there had been no change in the rules on the qualification of patent agents. Pursuant to the regulations on patent representations issued by the State Council in 1991, law firms seeking to practise patent representation were required to have at least three attorneys at law with patent agent qualifications and approved by SIPO. China had not so far established any special requirement in respect of copyright representation. The representative also suggested that the legal consultant firms should be asked for help regarding useful information for foreign right holders to lodge complaints directly to Chinese officials.

205. Regarding legislation and the judicial interpretation, he said that the enactment of a systematic and universal civil code had always been an important legislative task for China. In the ninth National People's Congress ("NPC"), a draft civil code had been filed and reviewed while in the tenth NPC the enactment of a civil code had been deemed an extremely important task. However, the universality and complexity of issues concerning civil codes made it difficult to tell the exact time for promulgation. Moreover, as China's economy and society developed, some detailed articles of the

draft civil code would need further rectification and modification. More research ought to be done to find out how and what to do with the modification.

206. As to judicial interpretation regarding IP that were currently planned for enactment or revision, the Supreme People's Court and the Supreme People's Procuratorate had discussed the "Judicial Interpretation and Application of the Laws dealing with Criminal Offences of IPR" (hereinafter the "Interpretation"), which would be promulgated soon. In drafting the Criminal Interpretation to IPR, the Supreme Court and the Supreme Procuratorate had solicited the comments and questions from the standing committee of the NPC, public securities court, procuratorates, administrative bodies for enforcement and the academy. Moreover, comments and the recommendations from enterprises, chambers and associations of the US, EU and Japan had been duly considered. After the comments and questions had been summarized, the Interpretation would carry out clearer and more definite standards for verdicts and lower the threshold for criminal acquisition. When the new Interpretation took effect, the provisions of the relevant judicial documents that were inconsistent with the new Interpretation would automatically be nullified.

207. The Anti-Monopoly Law was on the legislative agenda of the tenth NPC. Since the organization of the State Council in 2003, the Ministry of Commerce was responsible for checking monopolies. Therefore, it had the mission of drafting Anti-Monopoly Law, which had been the mission of the former state economy and the trade committee.

208. Based on the legislative research and sufficient discussion, MOFCOM had completed the draft of the Anti-Monopoly Law and had submitted it to the State Council in March 2004. The draft contained articles regulating monopoly agreements, abuse of dominant market status, large scale concentration of enterprises, authority and legal duties. Due to China's situation, the draft also included the articles regulating administrative monopolies and abuse of intellectual property. After the deliberation of the State Council's legislative affairs office, the draft of Anti-Monopoly Law would be submitted to the State Council. If the State Council approved, the draft would be submitted to the standing committee of the NPC for further deliberations.

209. Regarding the amendment of the Law to Counter Unfair Competition, since 1998 SAIC had already done a lot of research about the amendment of the law to counter unfair competition and was now starting to draft the amendment.

210. The regulations on the protection of the right of communication through information network, mentioned in Article 58 of China's Copyright Law, had been brought into the 2005 legislative agenda of the State Council. Currently, this task was carried out in an orderly way.

211. He said that China consistently attached great importance to public participation in legislation. Article 5 of the Law on Legislation, which had come into effect on 1 January 2000, stipulated that legislation should embody people's will, develop socialist democracy and protect the people's right to participate in legislation through various ways.

212. On 22 March 2004, the State Council had published the guidelines for implementation of the promotion of legitimate administrative activities, among which paragraph 16 had stipulated that "the present way of legislation by the government should be changed and the government should extend public participation into governmental legislation. Legislators, juristic enforcers and law professionals should communicate with each other and thus a professional consultation and a reasoning system should be established. In drafting laws, regulations, rules and documents as a basis for administrative management, the government should solicit comments through various channels, such as hearing, documentation, symposium, discussion or publishing the draft. The will of the majority was to be respected and people's own good should be embodied. After drafts of laws, regulations, rules and documents as a basis for administrative management are passed, they should be

published in a governmental gazette, popular newspapers and governmental websites. Citizens, cooperations and the corporate body should have easy access to the governmental gazette".

213. Regarding questions on patents, in 2003, the number of patent applications filed by US applicants had been 12,221, while the number of Chinese applicants had been 251,238, among which 56,769 had been for inventions, 127,842 for utility models, while 86,627 had been for industrial designs. The statistics relevant to foreign applications in China was available in SIPO's annual report. The report could be browsed on the SIPO website. SIPO did not collect and compile data on foreign patent applications by types. No work was done on examination duration of foreign applications alone.

214. Pursuant to Article 23 and 45 of the Patent Law, any entities or individuals, including foreign nationals, could request a patent right to be declared invalid on the grounds that the patent for design was identical or similar to any design before the date of filing. In addition, pursuant to rule 79 and rule 86 of the implementing regulations of the Chinese Patent Law, where there was a dispute over the ownership of patent rights, the parties concerned could request administrative authority for patent affairs to mediate or institute legal proceedings with a People's Court. Where a People's Court or an administrative authority held that the ownership of the patent right should belong to the plaintiff, the plaintiff could request SIPO to make a registration of change in ownership of the patent right by producing an effective judgement or decision.

215. As for legal protection for layout-designs of integrated circuits, the regulations on protection of layout-designs of integrated circuits and its implementing rules had been promulgated and had come into effect a long time ago. The Supreme People's Court had also formulated a notice on trial of cases concerning layout-designs of integrated circuits, which provided the legal basis on the way of relief to protect the layout-designs of integrated circuits. Up to the present, there had not been any lawsuit on layout-designs of integrated circuits and SIPO had not received any request for settlement on disputes relating to them.

216. A State Food and Drug Administration (SFDA) was now conducting an investigation into the linkage between patent approval and drug approval processes. As for measures taken to protect undisclosed data, pursuant to paragraph 2 of Article 35 of the Implementation Rules on the Drug Law, the SFDA would not approve an application that was based on other applications' undisclosed experimental data. Pursuant to Article 14 of the Methods on Administration of Registration for Drugs, applicants should make a commitment that all the data to be provided had been obtained by themselves, when an application for drugs registration was submitted. Pursuant to Article 21 of the Method on Administration of Registration for Drugs, proof of legitimacy of source would be needed for submission of application for drugs registration if the data had been obtained abroad. Pursuant to Article 22 of the Method on Administration of Registration for Drugs, the SFDA had reserved the right to request the applicant to re-experiment, to prove that the data had been obtained by himself. Pursuant to Article 52, during the verifying period of approval for new drugs, technical requirements for new drugs would not be lowered even if the drug had already entered into the foreign market. That was to say there would be no dependence on data. The SFDA was obliged to keep secret only the experimental data which had been obtained by the applicant alone. Punishment would be exercised pursuant to Article 72 for the leakage of unreleased experimental data. Pursuant to paragraph 3 of Article 35 of the Implementation Rules on the Drug Law, the SFDA would accept applications concerned when public interests were involved or measures had been taken to ensure that the data would not be used for unjustified commercial purpose.

217. One of SIPO's key tasks was to tackle examination backlogs. After adoption of measures such as recruiting a large number of examiners on a continuous basis, updating the automation system and optimising the examination process etc., the average period of examination for patent applications for inventions by SIPO in 2003 had been 30 months., while from January to July in 2004, the average

period had been further reduced to 28 months. Otherwise, SIPO had no statistics on the average period of examination in specific technical fields.

218. Regarding the protection of plant varieties, there was no specific plan to implement the UPOV 1991 Act. China had always been increasing the number of new varieties of plants under protection and expanding the scope of new varieties of plants under protection. This list of newly added varieties was available to the public on the website of the Ministry of Agricultural and the State Forestry Administration.

219. Regarding the prevention of misappropriated applications, pursuant to Article 23 and 45 of the Patent Law, any entity or individual including foreign nationals, could request a patent right to be declared invalid. In addition, pursuant to rule 79 and rule 86 of the implementing regulations of the Chinese Patent Law, where there had been a dispute over the ownership of patent rights, the parties concerned could request the administrative authority for patent affairs to mediate or institute legal proceedings with the People's Court.

220. Regarding the improvement of licensing regulations, Articles 24 and 25 of the Regulation on the Administration of Import and Export Technology were reasonable and did not contradict the TRIPS Agreement. Article 28.2 of the TRIPS Agreement provided that patent owners should also have the right to assign or transfer by succession a patent and to conclude licensing contracts. This provision granted the right of licensing patents to the patent owner. However, it did not mean that the licensor did not need to undertake any obligation and that he could license the patent without any restriction. As the transferor held the technology and should know the ownership and the capacity of the technology, it conformed to the principle of equity that the transferor was required to guarantee his legitimate ownership over the technology provided and to guarantee that the technology provided was capable of obtaining the contracted goal. It was also consistent with the principle of tort law that the transferor should bear tort liability if the transferee infringed legitimate rights and interests of others due to use of technology according to the contract. The laws on transfer of technology in many countries had similar provisions, so the said provisions conformed to the international usage and did not impose unreasonable restriction to the honest and bona fide transferor.

221. Turning to protection of trademarks and enterprise names, he first took up the issue of pending opposition and cancellation proceedings at the Trademark Office and their respective pendency. Currently, the Trademark Office of China had over 2,100 pending cancellation proceedings involving registered trademarks that had not been used for over three years and that the pendency was about one year. The office had 29,000 pending opposition proceedings and, in 2002-2003, the average pendency had been about two years. China was now revising its examination guidelines and would publish them after the revision.

222. Regarding the related goods and services in trademarks examination, the Office had adopted the concept of similar goods and services in this process. When examiners made a substantive examination on prior trademark rights, they made cross examination on similar goods or services in different classes. In determining whether they were similar goods or services, factors as the purpose, function and sales channel of the goods or services would be taken into consideration.

223. Turning to the determination of well-known marks, he said that, for the People's Court, the recognition of well-known trademarks was essentially the determination of the facts of the case which was a constituent part of jurisdiction exercised by the People's Court. The decisions made by the People's Court to determine a well-known trademark was in conformity with the international conventions. The Interpretation by the Supreme People's Court of the Application of Laws Dealing with Cases Concerning Dissension on Internet Domain Name and the Interpretation by the Supreme People's Court to the Application of Laws Dealing with Civil Cases Concerning Dissension on Trademark Rights made clear regulations on the issues above. According to statistics, since the amendment of the Trademark Law, Chinese courts had determined 17 well-known cases, three of

which concerned foreign brands. According to Article 22 of the Interpretation by the Supreme People's Court on the Application of Laws Dealing with Civil Cases Concerning Dissension on Trademark Rights, the recognition of well-known trademarks should be based on the rules made in Article 14 of the Trademark Law. The People's Court would not verify the trademark when one party of the previous applied to protect a well-known trademark that had been determined by the concerned administrative authorities or by the People's Court, if the other party had no dissension on the well-known trademark concerned. If the other party submitted its dissension, the People's Court would make a re-verification according to Article 14 of the Trademark Law.

224. The Customs of China had no right to determine a well-known trademark if Courts or authorities of the SAIC had already determined a well-known trademark. On a request to the Customs to help enforcement, the Customs would assist in enforcement.

225. There had not been a commonly accepted practice in the recognition of well-known trademarks. However, the revised Trademark Law and its subsequent regulations made clear and detailed prescriptions on this matter, which were completely in conformity with the requirement of the TRIPS Agreement. Therefore, pursuant to these regulations, two factors would be taken as the standard for recognition of well-known trademarks when authorities of public security were dealing with the concerning criminal cases. First, pursuant to the provisions on the determination and protection for well-known marks by the SAIC and the Interpretation by the Supreme People's Court to the Application for Laws Dealing with Civil Cases Concerning Dissensions on Trademark Rights, the status of well-known trademarks should have been granted by the authorities of the SAIC or determined by the People's Court. Second, pursuant to Article 213-215 of the Criminal Law, a well-known trademark in the sense of the Criminal Law should be registered in the Trademark Bureau in China.

226. Turning to the protection of geographical indications ("GIs"), he said that the AQSIQ System of GI protection and the system of GI protection established by the China's Trademark Office in the form of collective and certification trademark were different intellectual property rights protection measures and that applicants could chose either of the two systems voluntarily for GI protection.

227. The State Council had endowed AQSIQ with both the function of general administration and law enforcement. AQSIQ had enforced GI protection for registered GIs (PDOs) in the light of the Law on the Quality of Products, the Law on Standardisation, the Regulations on the Product of Destination of Origin and a compulsory national standard entitled "The General Specifications on Product of Destination of Origin". Supervision and spot checks as well as other law enforcement measures had been taken against counterfeiting of such domestic GIs as Chinese Longjing tea, Shaoxing wine and Longkou Vermicelli. Sanctions were taken against the counterfeiting of Cognac wine in China.

228. In the light of the Law on the Quality of Products, quality and a technical supervision agencies could impose punishment on counterfeiting GI products, while consumers could impose civil liabilities on the misfeasor only in the light of the Law on the Quality of Products, and the Law on the Protection of Consumers' Rights.

229. The application for protection under the GI system of AQSIQ had been carried out on a voluntary basis. Applicants already possessing a trademark, certification or collective mark could also apply for GI protection under the GI system of AQSIQ voluntarily.

230. AQSIQ would follow an active and pragmatic approach to strengthen the communication and the cooperation on GI protection with other countries. Based on consensus between the two parties, AQSIQ and the Ministry of Productive Activities of Italy had signed a memorandum on bilateral cooperation regarding GI protection with a view to enhanced information exchanges and technical cooperation between the two parties.

231. The representative of China said that, since last year's transitional review, there had been no new rules on the protection of enterprise names. Ever since joining the Paris Convention, China had been strictly observing the principle of national treatment providing equal protection for domestic companies' trademarks and marks registered in China by foreign companies. He said that the saying that "foreign enterprises in China did not enjoy the same protection for their well-known marks as domestic enterprises in China" did not have any factual grounds. Since the implementation of provisions on determination and the protection of well-known marks on 1 June 2003, the Trademark Office and the Trademark Review and Adjudication Board had totally determined the status of 153 well-known marks, among which 24 were from abroad, 12 from the US, 12 from other Members. He said that if the registrant of a well-known mark needed a competent authority to determine his mark as well-known based upon the provision of Article 13 of the Trademark Law, he or she should, in line with Article 14 of the Trademark Law and the relevant provisions on the determination and the protection for well-known marks, submit written evidence which he or she believed could prove that his or her mark was well-known. Moreover, there was no uniform requirement for the content or formats of written documents. He said that recently a court in Tianjin had determined the Japanese mark YAMAHA as a well-known mark in a civil case ruling.

232. Turning to copyright issues, the representative of China said that, according to China's Copyright Law, copyright protection was the same even for works appearing in different media. Thus, whether distributed as hard publications or communicated as soft Internet content, all of them could be protected under the Copyright Law. At present, China was actively working on increasing the personnel involved in copyright enforcement.

233. In the Notice on 2004 Special Control Action of fighting against software piracy, the NCAC had explicitly demanded that the administration of enterprises' commercial use of software should be strengthened and that the enterprises which installed, or used pirated software in their computer system or which installed software beyond the scope prescribed in the purchaser's sale contract, should mend their act within a specific time. Otherwise they would be severely punished by the operation of law. Consequently, in case of using pirated software by a commercial institute, the copyright administrative department may impose penalty without a prior judgement of whether the act impaired public rights and interests or not. According to China's Copyright Law the use of pirated software in a Internet cafe was an infringing act, which was also prohibited by law. The "temporary reproduction" issue was being studied by the Chinese Government at present and would be properly dealt with in the Measures for the Protection for the Right of Communication through Information Network, which had been brought into the 2005 legislative agenda of the State Council.

234. Where an ISP did not remove the relevant content regardless of a copyright owner's notice or knowing that the Internet content provider infringed another copyright through network and where this omission impaired public rights or interests, the ISP should be liable for administrative infringement. The National Copyright Administration NCAC and the Ministry of Information Industries were drafting the Administrative Measures on the Protection of the Rights to Communication through Information Network, in which the administrative procedure of notice-and-take-down would probably be included to reduce network piracy. It was expected that these departmental rules would be issued by the end of 2004. According to China's laws and regulations, as well as future Administrative Measures on the Protection of the Right of Communication through Information Network, which was still in draft, the Ministry of Information Industries had the authority to revoke ISPs' business licences.

235. He said that, undoubtedly, China was cautious as well as active about the accession to the two new treaties, the WIPO Copyright Treaty ("WCT") and WIPO Performances and Phonograms Treaty ("WPPT") and China had made great efforts for this goal. The Administrative Measures on the Protection of the Right of Communication through Information Network was being drafted by the NCA and the Ministry of Information Industries and would be issued by the end of this year. In

addition to effectively implementing the two new treaties to which China would accede, the State Council had brought these measures into its 2005 legislative agenda.

236. It was known that the obligation regarding the removal and alteration of electronic rights' management information ("RMI") stemmed not from the TRIPS Agreement but from the WCT and WPPT. Nevertheless, this problem was being actively taken into account. Currently, the State Council was doing the legislation planning on these matters so that the protection of RMI would be properly dealt with.

237. Regarding the payment of royalties for copyright the NCAC and the State Administration of Radio, Film and Television were working on broadcasting payment measures. At present, the task was in the process of investigation, study and drafting.

238. In respect of retroaction, he said that Article 9 of the Implementing Measures on Copyright Administrative Penalty entirely conformed with the Article 29 of the Law on Administrative Penalty, which prescribed "Where an illegal act is not discovered within two years of its commission, administrative penalty shall no longer be imposed, except as otherwise prescribed by law. The period of time prescribed in the preceding paragraph shall be counted from the date the illegal act is committed; if the act is of continuing or continuous nature, it shall be counted from the date the act is terminated". Therefore, the prescription of administrative penalty was different from that of civil procedure. The latter was counted from the date on which the injured party had known or should have known the infringement of its rights, while the former was counted from the date on which the illegal act had been committed or terminated.

239. Regarding some further copyright questions, he said that China had recently indicated that it would join the 1996 WIPO Internet treaties, the WCT and WPPT, but neither had it indicated joining before 2005, nor had it intended to complete a draft for the Internet-related implementing rules before the end of 2004. According to the Copyright Law of China, the measures on the protection of the right of communication through information network had been brought into its 2005 legislative agenda. He said that currently this task was being carried out in an orderly way.

240. Regarding the protection of sound record producers' rights, he said that the Chinese copyright legislation was totally consistent with the TRIPS Agreement and that China would provide the rules on collecting societies to Members concerned once these were ratified.

241. Turning to the issue of enforcement, he said that the State Council had promulgated a special action plan for the protection of IPRs this year and SAIC had issued its action plan for the campaign of exclusive trademark rights protection in June. All these plans were being made available on the website of the state office of the IPR working group at ipr.movcom.gov.cn or on the website of SAIC. One may also refer to the NCAC's Implementing Plan on Special Action for the Protection of IPRs of September 2004, which would be available at www.ncac.gov.cn.

242. Regarding the case numbers of administrative enforcement, according to statistics, in 2003 and in the first half of 2004, the people's courts at various levels throughout China had completed trials of 220 cases of fake registered trademarks, 85 cases of selling commodities with fake registered trademarks, 167 cases of illegal production and sale of registered trademarks, 22 of copyright infringement, 4 cases of selling copyright infringing duplicates and 69 cases of commercial secret infringement.

243. The statistics in 2003 showed that 37,489 law-breaking cases of various kinds had been handled by Administrations for Industry and Commerce ("AICs") at all levels throughout the country, among which there had been 11,001 general trademark offences and 26,488 trademark infringement and counterfeiting cases. Besides, 84,755,000 pieces or sets of illegal representations of trademarks had been seized and/or removed. 15,597 mould plates and other tools directly used for the

infringements had been confiscated and 5,754.92 tons of infringing goods had been destroyed. The fine had totalled 242m RMB and 52 persons involved in 45 cases had been transferred to judicial organs for criminal liability.

244. In the first three quarters of 2004, 13,922 law-breaking cases of various kinds had been dealt with, among which there had been 3,407 general trademark offences and 10,515 trademark infringement and counterfeiting cases. In addition, 12,232,900 pieces and sets of illegal representations of trademarks had been seized and/or removed. 16,894 mould plates and other tools directly used for the infringements had been confiscated and 10,952 tons of infringing goods had been destroyed. The total value involved had reached 452m RMB, the fine had amounted to 99m RMB and 16 persons involved in 14 cases had been transferred to judicial organs for criminal liability. In 2003, SIPO at various levels throughout China had accepted 1,527 patent dispute cases among which 1,237 cases had been completed.

245. Further, in the enforcement against producing and selling fake commodities and infringing IPRs, the Supreme People's Procuratorate this year had required a particular supervision by the People's Procuratorate at various levels over criminal cases of this kind. From January to October 2004, the People's Procuratorate at various levels had approved the arrest of 2,118 criminal suspects involved in the production and sale of fake commodities and prosecuted 1,522 of them. There had also been approval of the arrest of 483 criminal suspects and the prosecution of 488 involved in other IPR infringements. 70 more cases had been marked as priority cases by the Supreme People's Procuratorate, either monitored directly by itself or required to be monitored by the High People's Procuratorate at the provincial level. In the first three quarters of 2004, 6,275 unfair competition cases on the infringement of IPR had been investigated into and dealt with by AICs at all levels throughout the country. The total value involved had been 385.61m RMB, among which 6.94m had been confiscated and 35.58m had been the fine.

246. In 2003 the copyright administrative departments at all levels had accepted 23,013 cases and had settled 22,429 of them. 21,032 cases had resulted in penalty. 1,173 cases had led to mediation and 224 had been removed to judicial departments. In the same year, the local copyright administrative department had captured 67.97m of various kinds of pirated products, including 24.75m pirated books, 1.78m pirated periodicals, 26.45m pirated audiovisual products, 6.62m pirated electronic publications, 7.22m pirated software and 1.14m other pirated products.

247. He said that China had always attached great importance to IPR protection and fighting IPR infringement and that China was also prepared to cooperate with other Members, either in the bilateral or the multilateral legal framework. He said that for criminal actions, the foreign affairs bureau of the Supreme People's Court coordinated the contacts with foreign members and the hearing of the IPR-related cases was undertaken by the third civil court of the Supreme People's Court. At present, the National Copyright Administration (NCAC) had established a good relationship of interactive cooperation with BSA, MPA, IFPI, Customs of Hong Kong SAR and MPIA. As China believed that striking piracy was an unshirkable international duty for the governments of all Members, including developed Members, China was ready to continuously consult and cooperate with the relevant departments of other governments in this respect, so as to jointly crack down on piracy.

248. With respect to patents according to Article 57 and 68 of the Patent Law, he said that administrative enforcement was to be carried out by the administration responsible for patent-related work. Therefore, there was no mechanism for coordinated action with foreign governments.

249. On the customs enforcement front, the Chinese Customs authorities and the Customs authorities in Hong Kong, China had established an excellent cooperation relationship, which included joint enforcement action, information exchange, investigation assistance, personnel training etc. The Chinese customs authorities enjoyed good cooperation with the Asean-Pacific Regional Intelligence Liason Offices ("RILOs") of the World Customs Organization ("WCO") in respect of

information exchange. In recent years, quite a number of cases had been disclosed with the information provided by the Asean-Pacific RILOs of the WCO. An agreement between China and the EU on customs administrative mutual assistance would also be signed at the end of 2004, which would initiate the cooperation between the Customs authorities of the two sides with respect to IPR protection.

250. According to China's laws, regulations and departmental rules, copyright owners could seek relief at the enforcement department of the place where the infringer had its seat of business or its principal operative office, or where the infringement was committed or the infringing result took place. The People's Procuratorate, at its four levels from supreme down to the local county, internally had all special bodies or relatively fixed personnel to deal with IPR-related criminal cases. He said that, in the Supreme People's Procuratorate, the examination, prosecution and appearing in court of IPR cases was undertaken by the prosecution office. The prosecution office was also responsible for providing coordination, guidance and personnel training for the prosecution offices at various levels of the People's Procuratorate when dealing with cases of this kind. The prosecution office also had an inter-agency meeting mechanism with the investigating authorities dealing with cases of this kind to exchange information, start crime prevention measures and also comment on the evidence establishing work of the investigating authorities. In the People's Procuratorate at all local levels it was also the prosecution offices that were responsible for the examination, prosecution and appearing in court for cases of this kind. They accepted guidance from the higher level, the People's Procuratorate, on application of law and criminal penalty criteria etc. in cases of this kind and also had inter-agency coordinating mechanisms with the investigating authorities at the same level.

251. With regard to the issue of private investigating firms, he said that the Ministry of Public Security of China was taking active steps to consider it. However, there was still no new regulation being issued.

252. Regarding the elimination of localism, he said that in order to fight against and eliminate local protectionism, the State Council had issued, on 21 April 2001, stipulations on the prevention of local blockades in market economy activities. This was a special regulation fighting against local protectionism. On IPR protection specifically, a special action programme on IPR protection had been issued by the State Council on 26 August 2004, in which the elimination of local protectionism was also an important content.

253. Turning to administrative enforcement, he said that the NCAC was the government body responsible for copyright administrative protection in the Internet environment. Data on the administrative enforcement showed that, in the first three quarters of 2004, 20,371 unfair competition cases of various kinds had been investigated and dealt with by AICs at all levels throughout the country.

254. According to the Law on Administrative Procedure, if an administrative punishment decided by the enforcement department was obviously unreasonable, the People's Court could modify it by verdict. According to the Law on Administrative Procedure and Articles 44 and 56 of the Interpretation on Issues Concerning the Implementation of the Law on Administrative Procedure by the Supreme People's Court, the People's Court could make an order or a verdict to reject the lawsuit or the claims of the lawsuit.

255. According to the aforesaid law and interpretation, all the parties of a law suit had an equal right to entrust a lawyer and all the evidence needed to be shown and enquired in the court hearing. Evidence which had not been enquired by the opposing party in a court hearing was never adopted for the grounds of deciding the case, except if the evidence involved confidential information of the country, commercial secrets, individual privacy or was to be kept secret based on definite provisions of laws. He said that the People's Court had to deliver the judicial documents including the verdict,

order and decision to the relevant parties of the lawsuit, otherwise these judicial documents would not go into effect.

256. Regarding obligations of administrative agencies to provide written decisions with interpretations for their enforcement decisions, he said that his delegation believed that this question was not relevant to the IPR system and that his delegation was not obliged to answer it here.

257. Regarding the degree of deference extended to administrative case decisions, he said that his delegation believed this question to be about how the court made its judgement upon facts recognized and laws applicable in administrative enforcement. He said that in the administrative lawsuit system of China, the principle of validity review of specific administrative behaviour was applied. In case administrative behaviour needed to be carried out upon case notes pursuant to the relevant law, the court practised the principle of "records exclusivity", that was to say that the court would not introduce or accept evidence beyond the record. In other cases, the court would conduct an overall review on the recognition of the facts and laws applicable in administrative enforcement. Under special circumstances, the court could collect evidence by authority.

258. According to the Law on Administrative Punishment of China, the amount of fines of administrative punishment was prescribed by laws or administrative regulations. Competent authorities of copyright administration on various levels were obliged to conduct their administration legally and were not allowed to lower or raise the amount of the fine.

259. Turning to civil enforcement, he said that pursuant to the Law on Civil Procedure, the period of first instance of civil law cases was six months, while the period of second instance of civil law cases was three months. The period could be extended and the procedure for extension would have to be followed. In practice, most IPR cases could be finished within the trial period, though some complicated cases could take longer time. When circumstances appeared for lawsuits to be suspended according to the law, the court would suspend the lawsuit. The compensation amount was determined by the court on the basis of the principle of complete compensation prescribed in laws and judicial interpretations and of the specific case including the reasonable amount of money paid to stop the infringement. The retaining fee for lawyers, which was consistent with the relevant regulations, could be calculated in the compensation on the basis of the request of the plaintiff and the specific case. If one party had dissensions on the compensation amount, he or she could appeal to a court of a higher level. The court of the second instance would verify all the requests, but in practice, hardly any changes were made to a compensation amount determined by the court of the first instance.

260. The present Patent Law, Trademark Law and Copyright Law and corresponding judicial interpretations all contained regulations concerning judicial injunctions before the lawsuit. The concerned right holder could file to the court. After the court had accepted the application, it would actively and with caution determine whether judicial injunctions would be implemented. Actually, statistics showed that the Chinese courts had awarded injunctive relief to right holders in several hundred cases. Courts that awarded injunctive relief before lawsuits were mainly those situated where the defendant was or where the infringement had occurred. Even if some injunctions had to be enforced in places other than where the court was situated, the concerned court would assist in the enforcement. Meanwhile, China's courts were trying hard to ensure the enforcement of verdicts.

261. Turning to criminal enforcement, he said that in legal terms, it was possible that both civil and criminal IPR cases were heard by courts of the same level, but this was really rare. According to Article 20 of the Law on Criminal Procedure of China, criminal cases by foreigners were heard by the middle level People's Court. Pursuant to Article 23 of the Law on Criminal Lawsuits of China, the upper level People's Court could, if necessary, hear the case which should be heard by a court on a lower level; if the court on the lower level regarded the case as extremely serious, it could request to transfer the case to an upper level People's Court.

262. Article 7 of the General Administration of Customs Notice No. 742 of 1998 had stipulated that, once the People's Procuratorate thought that there was enough evidence for a suspicion of smuggling and cases should be heard by the lowest level People's Court, the People's Procuratorate could sue the case at the local intermediate People's Court according to Article 23 of the Law of Criminal Procedure. This meant that it was the intermediate People's Court that would hear part of the IPR criminal cases concerning accusations of smuggling. Investigations conducted last year by the concerned bodies of the Supreme People's Court had shed some light on this issue. However, given the complexity of responsibilities within different authorities, the issue whether the hearing level of IPR criminal cases should be adjusted, required more research.

263. Turning to customs border enforcement, he said that at present, measures taken by the General Administration of Customs to protect IPR included establishing more laws and regulations on IPR protection, training more enforcers of GCA, strengthening cooperation with right holders, participating more in cooperation and communication with foreign counterparts, and employing more advanced technology to find more pirated products. All these measures had proven effective to prohibit exportation and importation of pirated goods.

264. According to old regulations, once the consigner or the consignee of the goods apply to the Customs for dissension on their goods that are suspected of piracy, the Customs could no longer conduct an investigation on whether the product was pirated or not. However, a new regulation stipulated that, in response to an application from right holders, once the Customs had found products suspected of piracy, the goods would be detained by the Customs, no matter whether the consigner or the consignee filed to the Customs for dissension. The Customs could conduct investigations on whether the goods were pirated or not. Therefore, the enforcement by the Customs was strengthened while efficiency of enforcement was improved.

265. In a passive protection mode, right holders would have to pay a deposit equivalent to the worth of the products, but in an initiative protection mode by the Customs of China, the Implementing Rules of GCA stipulated, firstly, that deposit equivalent to the worth of the goods had to be paid if the goods were worth less than 20,000 RMB; secondly, that a deposit equivalent to half of the worth of the goods had to be paid if the goods were worth between 20,000 and 200,000 RMB, with the deposit being no less than 20,000 RMB; thirdly, that a deposit of 100,000 RMB had to be paid if the goods were worth more than 200,000 RMB. In either mode, right holders could choose to pay the deposit in cash or to show the Customs the insurance letter provided by a bank or a financial organization other than a bank.

266. According to the law, only the consigner or the consignee of the imported or the exported goods were subject to Customs administration. Therefore, the Customs could not extend its jurisdiction to other companies involved in piracy. However, in real practice, Customs would provide the information on the detained goods to the right holder and concerned authorities of the administrative enforcement. The right holder and the concerned authorities of the administrative enforcement could exercise punishment on the companies involved in piracy on the basis of the information provided by the Customs. From 2001 to 2003, there had been altogether 5,000 cases where the Chinese Customs had exercised protection measures, while in 1,700 of these cases pirated products had been found. The value of the confiscated products had been 198m RMB.

267. Customs enforcement was categorized as administrative enforcement. The products had already been deemed by the Customs as pirated and the Customs would exercise administrative punishment to the violator, including confiscating goods and forfeiture. Since 1996, there had been 5,800 cases where the Customs had exercised administrative punishment to violators. Therefore, it was unnecessary for the Customs to file an administrative lawsuit in IPR cases. As for civil lawsuits, it had to be filed by the right holder to the court. In criminal lawsuits, as there had not been clear prescriptions on criminal obligations for piracy in exportation and importation, neither were there any judicial interpretations, the Customs so far had not transferred the cases for criminal obligations.

268. In recent years, cooperation in IPR enforcement between the Chinese Customs and the international community had been strengthened. Statistics showed that, since 2000, by joint enforcement with the Customs of Hong Kong, China, the Chinese Customs had dealt with more than 200 IPR cases where the information had been provided by the Asean-Pacific RILO of the WCO.

269. Regarding the cost burden for right holders for infringing products that had been stopped at the border, he said that it was in conformity with the present situation in China to let the right holder pay the storage fee and the Chinese Customs had realized that this practice was impeding IPR protection. However, it had to be admitted that it was unaffordable for the government to solve this problem. Therefore, with the right holder undertaking part of the financial burden of the counterfeiting actions, the enforcement by competent authorities was facilitated in a sense. The new regulation and its implementation stipulated clearly the investigating period and the period to deal with examining the product. According to this regulation, the pendency of customs clearance would not be long. Therefore, the storage fee for products would be reduced shortly and finally right holders would undertake the charges concerned. Pursuant to the new regulation, once the suspected goods were determined as piracy, IPR right holders could take the storage fee and concerned charges as part of the fees to stop piracy which the right holder could request the violator to compensate for. Therefore, the right holder only paid the deposit temporarily and could be compensated by way of repayment from the violator.

270. Regarding confiscated goods, he said that if these were all to be destroyed, it would cause not only waste of natural resources but also environmental pollution. Therefore, the Customs would sell such products that could be reutilized at auction to make full use them. Meanwhile, pirated indicators on a product would be erased to protect the interests of the right holder. So far, the implementation of the regulation was satisfactory so that no revision to the regulation would be made.

271. The representative of Japan thanked the Chinese delegation for its comprehensive statement. He said that, at the transitional review in 2002 and 2003, his delegation had raised questions regarding the "further improvement of enforcement in judicial procedures", "patent examination procedures", and other issues. He said that his delegation appreciated the fact that the Chinese Government had made considerable efforts to improve its intellectual property protection in response to these questions by, for example, drafting new judicial interpretation on criminal thresholds, and launching a nationwide campaign to step up its protection of intellectual property rights.

272. He said that, in spite of such efforts, it appeared that China's intellectual property protection and enforcement was still insufficient in the light of the high level of counterfeiting and piracy that continued to exist in China. In document IP/C/W/430 submitted by the Japanese delegation, the following four issues had been recognized as highly important: "active pursuit of criminal prosecutions", "strengthening of sanctions through alteration of criminal prosecution standards", "pendency of patent examinations", and "prevention of misappropriated applications", about all of which the Japanese industry had serious concerns. He said that due to time constraints, China might not be able to prepare detailed responses to all the questions immediately, but his delegation would greatly appreciate China's providing such responses through future discussion.

273. The representative of the United States expressed her appreciation of China's answers to Members' questions. China deserved recognition for the extensive IPR-related legislative changes it had made at the time of accession. The United States also appreciated China's efforts to improve its IPR enforcement and protection environment, including the growth of China's Trademark Office and Patent Office and the increasing dockets of the Chinese courts and enforcement agencies. Under the leadership of Vice Premier Wu Yi, China had committed to address a number of problems in its IPR regime and to significantly reduce IPR infringement levels. She said that China had announced various action plans in this regard, only some of which had been made publicly available to date. The United States was watching China's follow-through on these commitments closely.

274. She said that, as China's own official reports had noted, IPR infringement in China was rampant and the magnitude of IPR infringement in China was harming the interests of right holders not only in China but around the world. China's increasing exports of counterfeit and pirated goods posed dangers to consumers throughout the developed and developing world. In light of China's obligations under the TRIPS Agreement to provide adequate and effective IPR enforcement, the United States noted a number of continuing problems. Administrative enforcement was weak. Administrative enforcement processes typically afforded no meaningful relief to right holders: fines were non-deterrent; the decision-making process was not transparent; and too few administrative cases were referred to criminal prosecution. As an example of this problem, she said that while new border measures implemented earlier this year had provided for some improvements, they had significantly reduced the level of customs penalties from 300% to 30% of value. China's civil, administrative and criminal enforcement systems continued to suffer from local protectionism. She said that structural changes, such as providing an immediate right of appeal to non-local courts or agencies, requiring mandatory penalties, and instituting mandatory sentencing practices would help address these problems. Institutional challenges remained. Although China had created an expert civil IPR court, its criminal and administrative courts lacked the same level of expertise in IPR matters.

275. In addition, she said, the United States had serious concerns about certain aspects of China's IPR legal framework, although China had done much legislative work at the time of its WTO accession. In particular, China's Criminal Law raised serious TRIPS issues by requiring a showing of profits for certain types of offences; failing to address commercial-scale trafficking of infringing goods; and criminalizing counterfeiting only when the infringing mark was "identical" rather than confusingly similar. She said that the United States appreciated China's commitment to issue a judicial interpretation by the end of this year to immediately address these issues, and was looking forward to its implementation.

276. However, she said that the United States greatly regretted that China had not released a draft of the long-awaited criminal judicial interpretation for widespread public comment. Both the US Government and right holders had waited anxiously for the opportunity to comment on the draft prior to its final promulgation. Last year at the TRIPS Council, China had pledged to increase transparency by making judicial interpretations on IPR matters available for public comment. While the United States was pleased with the positive trend in this regard and noted the release during the present week of three draft civil IPR-related judicial interpretations for public comment, nevertheless the drafting of this critical criminal judicial interpretation had been opaque with the draft being disclosed only to selected entities and industry associations.

277. She said that the United States appreciated that China had committed in the near term to address some of the problems highlighted above and looked forward to real results from China's efforts. The coming months would be a critical period, particularly in the light of the issuance and implementation of the judicial interpretation and implementation of the IPR action plans. The United States looked forward to continuing efforts on issues that remained of concern to both countries as well as to other Members, with a view towards improving the overall IPR enforcement environment in China.

278. With respect to the specific answers provided by the Chinese delegation, she said that the United States appreciated very much the information provided on administrative enforcement cases. As a matter of clarification, she requested the Chinese delegation to confirm that, under Chinese law, there was no obligation requiring administrative decisions in IPR cases to be issued in writing.

279. The representative of the European Communities thanked China for updating the TRIPS Council on its efforts to improve IP protection in China. He said that his delegation was taking note with satisfaction of the progress that had been made so far and of positive on-going initiatives to tackle the problems. However, the European Communities remained concerned by the level of

counterfeiting in China and urged China to continue its efforts towards an effective IP enforcement system. In this respect, his delegation was committed to working with the Chinese authorities to improve the situation. With regard to the questions that had been submitted very recently by his delegation, he said that his delegation would appreciate it if China could respond to them as soon as possible.

280. The representative of Australia thanked China for the very comprehensive and informative responses to the many questions posed to them. He said that Australia attached particular importance to its bilateral cooperation with China in intellectual property matters and was looking forward to continuing to work closely with China to the mutual benefit of both countries on intellectual property issues.

281. The representative of Chinese Taipei thanked China for its statement and the information provided by its delegation. Although Chinese Taipei had not submitted questions in writing in advance, his delegation shared some of the views regarding intellectual property issues mentioned by other delegations. His delegation attached great importance to the transparency requirement under Article 63.1 of the TRIPS Agreement. Chinese Taipei was of the belief that transparency of administrative rulings as well as laws and regulations in the national system was of crucial importance both to local and foreign IP owners. In this light, he wished to draw attention to the issue of well-known marks. According to China's recent communication in document IP/Q/CHN/1/Add.1, dated 9 June 2004, the State Administration for Industry and Commerce (SAIC) was revising the "Rules on the Determination and Protection of Well-Know Marks". He said that his delegation would appreciate it if China could advise if there were any developments in this regard. In addition, he was interested in having a list of well-known marks currently applicable in China for reference. He asked if the Chinese delegation could advise where to locate such a list if it was publicly available on the Internet. In conclusion, he said that his delegation had noticed that China had already made good progress in several areas of intellectual property and would like to encourage China to continue in its relentless endeavour in the time ahead.

282. In response to the remarks made by other delegations, the representative of China said that, with regard to the written questions posed by the European Communities on 26 November 2004, most of these concerns had already been covered by China's initial statement. His delegation had given answers regarding the Chinese intention to join the WIPO 1996 Internet Treaties and had pointed out that China had never indicated that it would join these treaties before the end of 2005 and had said nothing about a completion of the draft for the Internet-related implementing rules before the end of 2004. With regard to the Copyright Law of China, the measures on the protection of the right of communication through information networks had already been put onto the 2005 legislative agenda of the State Council and this task was currently being carried out in a smooth and orderly way. Regarding the protection of the rights of producers of sound recordings, he said that the Chinese copyright legislation was totally consistent with the TRIPS Agreement. Regarding the rules on collecting societies, he said that these would be made available by the Chinese delegation to the European Communities and any other Members concerned once the rules had been ratified. In reaction to prevalent interests and requests from industries, local communities and other sectors, SAPO of China was engaging in a preliminary assessment of the national IP strategy. Regarding the follow-up question from the delegation of the United States, he said that his delegation would discuss with experts in the capital and would hopefully be able to come back with further information.

283. Turning to the preparation of the TRIPS Council's report to the General Council, the Chairman suggested that, given that the TRIPS Council would not have another meeting before the General Council's next meeting scheduled for 13 and 14 December 2004, the TRIPS Council agree that that he, acting on his own responsibility, prepare a brief and factual report to the General Council. The content of the cover page to the report would be similar to that submitted by the TRIPS Council in 2003, and the part of the minutes of the meeting reflecting the discussions held under this agenda item would be attached.

284. The Council took note of the statements made and agreed to proceed with the preparation of the report as suggested.

Q. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

285. The Chairman informed the Council that the Kingdom of Cambodia had become the 148th Member of the WTO on 13 October 2004.

R. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

286. The Chairman said that the list of the 16 pending requests for observer status in the TRIPS Council by other intergovernmental organizations was contained in document IP/C/W/52/Rev.10. He recalled that the Council had discussed these pending requests at its previous meetings, but had not been able to reach consensus on any of them.

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

S. ANNUAL REPORT TO THE GENERAL COUNCIL

288. The Chairman informed Members that a draft Annual Report of the Council had been circulated in document JOB(03)/177. He suggested that the Secretariat would be requested to update the draft to reflect the discussions at the present meeting. This draft would be faxed to Members, who would have two days to comment on the updated parts of the draft report once it had been circulated by the Secretariat. The Chair indicated that this short period for comments was due to the fact that the report had to be circulated in time for the General Council's meeting of 13-14 December.

289. The Council agreed to proceed as suggested by the Chairman.¹

T. OTHER BUSINESS

290. The Chairman suggested the Council agree on the following dates for the Council's meetings in 2005: 8-10 March, 14-15 June and 25-26 October 2005.

291. The representative of Egypt requested that the meetings be coordinated so as to avoid any conflict with meetings at WIPO. The Chairman informed the Council that the Secretariat had liaised with WIPO in order to avoid any foreseeable conflict in meeting dates.

292. The Council agreed on the dates for the Council's meetings in 2005 as suggested by the Chair.

¹ The Annual Report (2004) of the Council for TRIPS was subsequently circulated in document IP/C/32.