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

MINUTES OF MEETING

Held in the Centre William Rappard on 25-26 October 2006

Chairman: Ambassador C. Trevor Clarke (Barbados)

The present document contains the record of the discussion which took place during the TRIPS Council meeting held on 25-26 October 2006.

<u>Subjects discussed</u>	<u>Page nos.</u>
A. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT	2
B. REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION	2
C. TRANSITIONAL REVIEW UNDER SECTION 18 OF THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA	3
D. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)	14
E. RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY	14
F. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE	14
G. REVIEW UNDER PARAGRAPH 8 OF THE DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH	25
H. NON-VIOLATION AND SITUATION COMPLAINTS	27
I. REVIEW OF THE IMPLEMENTATION OF THE AGREEMENT UNDER ARTICLE 71.1	27
J. REVIEW OF THE APPLICATION OF THE PROVISIONS OF THE SECTION ON GEOGRAPHICAL INDICATIONS UNDER ARTICLE 24.2	27
K. FOURTH ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT	27
L. TECHNICAL COOPERATION AND CAPACITY-BUILDING	29
M. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS – COMMUNICATION FROM THE EUROPEAN COMMUNITIES	30
N. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO	44
O. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS	45
P. ANNUAL REPORT TO THE GENERAL COUNCIL	45
Q. OTHER BUSINESS	47

1. In proposing the agenda for adoption, the Chairman said that item M on "Enforcement of Intellectual Property Rights – Communication from the European Communities" had been put on the proposed agenda at the written request of the delegation of the European Communities, dated 21 September 2006. He proposed that the Council adopt the agenda as proposed.

2. The Council so agreed.

A. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

3. The Chairman informed the Council that, since its meeting in March, it had received a notification of laws and regulations from Saudi Arabia. Among the Members whose transitional periods under Article 65.2 or 65.3 had expired on 1 January 2000 or who have acceded to the WTO after that date, there still remained two who had not yet submitted any notification concerning their implementing legislation, namely Saint Kitts and Nevis; and Saint Vincent and the Grenadines.

4. He said that the Council had also received a number of supplements and updates to earlier notifications of laws and regulations notified under Article 63.2 of the Agreement. Mexico had notified a number of amendments to its Industrial Property Law as well as to its Copyright Law and Regulations; Hong Kong, China had notified amendments to its trademark rules and the Copyright Ordinance of 2001; Japan had provided an updated text of its Unfair Competition Act; Japan had also provided a complete update of its initial notification; and Australia had provided information regarding amendments to its laws and regulations made prior to 31 October 2004. These notifications were being circulated in the IP/N/1/- series of documents. In addition, Switzerland had notified statistical information on the enforcement of intellectual property rights in Switzerland for the years 2002 and 2003 (document IP/N/6/CHE/1/Add.2).

5. He urged those Members whose initial notifications remained incomplete to submit the outstanding material without delay, and reminded other Members of their obligation to notify any subsequent amendments of their laws and regulations without delay after their entry into force. In particular, he reminded those Members who had made any changes to their laws and/or regulations to implement the decision on "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" and who had not yet notified such changes to the Council to do so.

6. With regard to notifications of contact points under Article 69, he said that, since the Council's meeting in June, a notification of a new contact point had been received from Saudi Arabia. Furthermore, updates to contact points notified earlier had been received from Guatemala and Latvia. These notifications were being circulated in an addendum to document IP/N/3/Rev.9. To date, 122 Members had notified contact points under Article 69.

7. The Council took note of the information provided.

B. REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION

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

8. The Chairman said that, with regard to the reviews of national implementing legislation that had been initiated at the Council's meetings since April 2001, eight reviews still remained on the Council's agenda. These reviews concerned Cuba; Fiji; Grenada; Mauritius; Saint Kitts and Nevis; Saint Vincent and the Grenadines; Suriname; and Swaziland.

9. He added that a number of questions had also been raised with regard to the implementing legislation of certain 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. These Members were Dominica, Gabon, Ghana and Guyana.

10. He 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 these reviews.

11. The Council took note of the information provided and agreed to revert to the matter at its next meeting.

(ii) *Arrangements for the review of national implementing legislation of Saudi Arabia*

12. The Chairman recalled that, at its meeting in March, the Council had agreed that it would take up the review of TRIPS implementing legislation of Saudi Arabia, a newly acceded Member, at its first meeting in 2007. At its meeting in June, the Council had set the following target dates for the submission of questions and answers in this review: questions should be submitted to Saudi Arabia, with a copy to the Secretariat, by 27 November 2006; and responses to questions posed within that deadline should be submitted by 8 January 2007. As indicated under item A, the Council had recently received the notification of Saudi Arabia's implementing legislation. However, the Council had not yet received responses to the Checklist of Issues on Enforcement. He urged Saudi Arabia to provide its responses as soon as possible so as to facilitate the Council's review. He said that, under "Other Business", it was his intention to suggest that the Council's first meeting in 2007 be held on 13-14 February. Given that Saudi Arabia's notification was still being circulated and that there was still plenty of time before the Council's next meeting, he suggested that the Council postpone by two weeks the target dates for the submission of questions and answers in this review, namely that:

- questions should be submitted to Saudi Arabia, with a copy to the Secretariat, by 11 December 2006; and
- responses to questions posed within that deadline should be submitted by 22 January 2007.

13. The Council so agreed.

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

14. 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 pursuant to the requirement, dated 23 October 2006, had been circulated as document IP/C/W/483. Questions and comments in connection with the transitional review had been submitted by the European Communities, Japan and the United States (documents IP/C/W/481, 479 and 482, respectively).

15. The representative of China, briefing the Council on China's progress in the implementation of its TRIPS-related commitments since the last transitional review, said that as regards legislation, a number of new regulations and judicial interpretations relating to IPRs had been issued or were being drafted. Among these were the Interim Regulation concerning *Intensified Interlinking and Coordination in the Combat against Copyright Infringing Criminal Offences* which had been brought

into effect on 13 January 2006, the *Measures on Protecting the IPR of Exhibition* which had been brought into effect on 1 March 2006, and the *Regulations on the Protection of the Right of Communication through Information Network* which had entered into force on 1 July 2006. By the end of 2005, the process for obtaining public comments through the Internet for four further draft judicial interpretations had been completed. These were: one on *Civil Dispute Concerning Unfair Competition*, one on *Infringement Disputes Regarding New Plant Varieties*, one on *Conflicts of Intellectual Property Rights*, and the last one on *Dispute of MTV Copyright*. More information was contained in the document submitted pursuant to Annex 1A.

16. Regarding enforcement, he said that China had already stated previously that it regarded a good system of enforcement and transparency as essential to bring into full play its excellently constructed legal system of IPR protection. In this regard, the national working group for IPR protection that had been set up in 2005 and comprised all relevant judicial and administrative agencies had taken new important steps this year to strengthen law enforcement. At the heart of this effort was the creation of service centres all over China in order to facilitate the reception of complaints on IPR infringement. So far, the Ministry of Commerce had set up 50 such centres in large- and medium-sized cities across China and these centres were functioning well. In order to bring a complaint or to report an IPR infringement case to China's enforcement agencies, one could simply dial 12312 or log on to the website www.ipr.gov.cn and a quick response would be assured. Another important step was the issuance of the Circular on the *Transfer of Suspectable Criminal Offences by Administrative Organs for Law Enforcement* and the subsequent release of three further Circulars by the Ministry of Public Security in conjunction with other competent authorities, concerning accelerated transfer of IPR infringement cases by customs authorities from administrative to criminal enforcement.

17. With regard to transparency, he said that in March 2006 the Supreme People's Court had set up a website through which judicial decisions on IPR infringement cases were accessible to the general public free of charge. The Supreme People's Court and local high courts had begun to establish a spokesman system, through which important IPR issues were publicized regularly. Comprehensive up-to-date information on the protection of IPRs in China was also available from the website www.ipr.gov.cn. One very important development in China's protection of IPRs in the year 2006 was the adoption of the *National Action Programme on the Protection of IPR (2006-2007)*, which specified guidelines, objectives, priorities and the main measures regarding the strengthening of IPR protection in China. *China's Action Plan on IPR Protection (2006)*, which had been adopted at the same time, promoted the protection of IPRs through the improvement of legislation and enforcement, institutional development, education and training, international exchange, and cooperation. The protection of intellectual property rights was also regarded as an important strategy to transform China into a nation with strong innovative capabilities.

18. He said that it was clear that China had made tremendous efforts to promote better protection of IPRs in line with its economic development level and had made remarkable achievements, namely that five years after joining the WTO, China's IPR system was fully consistent with the TRIPS Agreement and China had fully implemented its accession commitments. When talking about IPR issues in the WTO, it had to be kept in mind that firstly, one was talking about trade-related aspects of IPRs, and secondly, that the objective of the TRIPS Agreement was to promote the development of trade and technology transfer through appropriate rules on protection and use of IPRs.

19. Before responding to the specific issues and questions raised by Members, he said his delegation would want to make a number of comments. Firstly, his delegation had made available several documents for this meeting. One was the document containing the information requested in Annex 1A, which had been circulated as document IP/C/W/483 and which provided information on the development of legislation and enforcement, as well as some detailed statistics and data on enforcement. Furthermore, the following room documents had been made available for Members: the White Paper on *China's Intellectual Property Rights Protection for 2005*, *China's Action Plan for*

the Protection of Intellectual Property Rights for 2006, and a book of approximately 200 pages on how to protect intellectual property rights in China.

20. Secondly, he said that his delegation had summarized Members' questions and divided them into six parts which would be addressed by the answers, namely Part 1 on general issues; Part 2 on copyright; Part 3 on trademarks and geographical indications; Part 4 on patents; Part 5 on enforcement; and Part 6 on other issues.

21. Thirdly, he pointed out that, although the time available to translate the questions into Chinese, obtain answers from the numerous competent authorities in China and translate the replies back into English was very short, his delegation was still making every effort to answer as many questions as possible. However, if a delegation felt that an issue had not been sufficiently addressed, this could be dealt with after the TRM meeting, but would not merit an extension of the TRM process.

22. Fourthly, he said that Members, in their questions, had requested very detailed figures concerning China's enforcement data, organized, for example, by subject-matter, by country, by different authorities or even by different local courts or local administrative agencies. The document provided pursuant to Annex 1A had basically provided this information, but further accessible sources for detailed information would be indicated in answers to specific questions. As the time in TRIPS Council meetings was very limited, no-one could expect to resolve all issues under the TRM process in just one meeting.

23. He said that the importance the Chinese Government attached to the TRM process was reflected in the size of the delegation at the present meeting, which included members from the WTO mission based in Geneva; from the Supreme People's Court; from the copyright bureaux; from the Legislative Affairs Office of the State Council, and also from the State Intellectual Property Offices and Trademark Offices, as well as representatives from the Ministry of Commerce.

24. In responding to the specific questions by Members, the representative of China turned to his delegation's answers concerning **general issues (Part 1)**. He said that with regard to the drafting of new or revised judicial interpretations, new laws, regulations or judicial interpretations relating to IPRs since the last review, his delegation had already mentioned the preparation of the four draft judicial interpretations on *Civil Disputes concerning Unfair Competition*, on *Infringement Disputes regarding New Plant Varieties*, on *Conflicts of Intellectual Property Rights*, and on *Dispute of MTV Copyright*, which were in preparation. Furthermore, the following regulations had come into effect since the last review: *Interim Regulation concerning Intensified Interlinking and Coordination in the Combat against Copyright Infringing Criminal Offences*, *Measures on Protecting the IPR of Exhibition*, and the *Regulations on the Protection of the Right of Communication through Information Network*. The document submitted pursuant to Annex 1A provided more information on these instruments.

25. Regarding the number of administrative cases in the areas of trademarks, copyright and IP-related customs matters undertaken on an ex officio basis and on the basis of right holders' complaints, he informed the Council that the industry and commerce administrative authorities had investigated and dealt with 39,107 trademark infringement cases in 2005 and 15,493 cases during the first six months of 2006. In 2005, China customs had dealt with 1,210 IPR infringement cases involving the import or export of goods. No separate statistics were available on the number of cases dealt with on the basis of right holders' complaints.

26. No data was yet available on the number and percentage of cases referred from administrative enforcement to criminal enforcement under the revised transfer mechanisms that had been developed by the Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security (MPS), and General Administration of Customs.

27. He confirmed that the treatment of trademark infringement under the current Trademark Law would also be applicable to the unauthorized use of copyright and trademarks on the Internet and the provision of counterfeit/pirated products on Internet sites in the .cn domain. Right holders could complain to the local Industry and Commerce Administrations as well as directly bring a case to the court. The *Regulations on the Protection of the Right of Communication through Information Network*, which had come into effect on 1 July 2006, would further contribute to the regulation of the spread of works on the Internet, to the enhancement of the copyright protection on the Internet, and to further development of the internet industry.

28. The representative then turned to his delegation's answers concerning **copyright (Part 2)**. With respect to the availability of statistical data on prosecutions under Article 225 of the Criminal Law on "illegal business operations" that involved copyright infringement, he said that China did not distinguish cases involving copyright infringement from illegal business operations. With regard to the results of the "Number 2 Sunshine Action to Improve the Operation of Audio and Video Markets" and the "100-day Anti-Piracy Activity" campaign, he said that no data was available yet as these actions had only been staged very recently.

29. Regarding Article 43 of the Copyright Law of China on fees charged for broadcasting of copyrighted works, a separate regulation was being drafted by competent authorities of the State Council, but there was no timetable as to when the regulation would be issued.

30. Regarding the effectiveness of enforcement in the case of infringements of multiple intellectual property rights, he said that the State Office of Intellectual Property Protection, the Ministry of Public Security and the Ministry of Supervision had jointly issued the Provisions on the Transfer of Suspectable Criminal Cases by Administrative Organs for Law Enforcement in 2006, in order to enhance the coordination and cooperation among law enforcement bodies in cracking down on IPR criminal offences.

31. The representative then turned to his delegation's answers concerning **trademarks and geographical indications (Part 3)**. With regard to the information required for a trademark application and the classification system used by the China Trademark Office, he said that if the name of a product or service was identical to the name of a product or service in the Nice Agreement on the International Classification of Goods and Services for the Purpose of Registration of Marks (8th edition), then the applicant was not required to provide additional information. Otherwise, the applicant was required to provide a description of the product or service which would then be classified according to the Nice Classification.

32. He said that the China Trademark Bureau was adopting only the Nice International Classification System, not two different systems. The groups referred to as "sub-groups" were groups of similar goods or services on the basis of the Nice Agreement. Goods included in the same similar group were regarded as similar goods. Therefore, the similar group was the reference standard for the purpose of establishing whether there was confusion between a trademark applied for and a registered trademark or a prior application. More information on this question was provided at www.ctmo.gov.cn. With regard to the specific cases of a glove and a scarf mentioned in Members' questions, he said that the glove fell under the similar group of 2510 and the scarf fell under the similar group of 2511.

33. Regarding a minimum amount of damages stipulated for trademark infringement, he said that neither the Implementing Regulations on trademark law before 2002 nor the Implementing Regulations on trademark law revised in 2002 contained any provisions on minimum amounts of damages.

34. With regard to the issue of local Administrations of Industry and Commerce (AICs) publishing their decisions, he said that local AICs published the penalties for major infringement cases and the transfer of cases to public security bodies, in order to improve transparency and deliver a strong message against counterfeiting.

35. Concerning data on the rate of affirmance or reversal of appeals from the Trademark Review and Adjudication Board (TRAB) to the Beijing High Court of final decisions regarding trademark validity, he said that, in 2005, a total of 128 appeal cases had been decided, of which 105 had been maintained and 23 had been withdrawn. No data was yet available for the first six months of 2006.

36. With regard to the grounds on which the Chinese Trademark Office could refuse protection of a geographical indication and the independent qualification documentation required in an application for GI protection, he said that the registration of a GI needed to pass the material review governed by Articles 10, 11, 12, 28 and 29 of the Trademark Law.

37. With regard to China's measures and procedures for designating so-called "famous brands" and "famous trademarks", he said that the procedures for designating both these items were basically the same. More information could also be found in his delegation's answer to that question during last year's review.

38. On the issue of counterfeiting in retail markets, he said that the Administrations of Industry and Commerce (AICs) encouraged the inclusion of anti-counterfeiting provisions in lease contracts between market operators and market sponsors. Under the provisions of the trademark law, the AICs were able to investigate and deal with action infringing exclusive rights to registered trademarks, both on an ex officio basis and in response to a complaint or report.

39. Concerning the length of the time period currently necessary for the review of trademark applications, he said that the number of applications had been increasing at an annual rate of 100,000 in recent years. The current time span from the submission of an application to the first action by the trademark administration office was approximately 24 months, or more in cases of disagreement or dispute. China was taking proactive measures to try to shorten the time length of the registration cycle.

40. On the issue of opposition without substantive reasons, he said that any opposition document had to be accompanied by clear claims and factual evidence. China would consider the issue of "vicious opposition" during the future revision of the trademark law.

41. With regard to the treatment of foreign and domestic applications for well-known trademarks, he said that there was no discrimination at all.

42. The representative then turned to his delegation's answers concerning **patents (Part 4)**. With regard to the question on the future revision of the Patent Law, he said his delegation regarded this question as being outside the scope of the transitional review mechanism.

43. Regarding the issue of linkage between patent approval and drug approval processes, he reported that the ongoing study by the State Food and Drug Administration was not yet completed.

44. Regarding approval procedures for patent or technology transfer, he said that the main provisions relating to this issue were in the Regulation on the Administration of Technology Import and Export. According to that Regulation, patent applications for transfer that involved a restricted technology were prohibited from being transferred, while technology that fell within the free category only had to go through an export approval procedure. This procedure was already quite simplified.

45. Regarding the protection of test data for pharmaceutical products, Article 35 of the Implementation Regulations of the Pharmaceutical Administration Law provided that the non-disclosure test data or other data required for an application on distribution permission using new chemical components would be protected. The Measures on Pharmaceutical Registration Administration provided further that, during the six years since the State Food and Drug Administration had approved a pharmaceutical product containing new chemical components, other applicants could not use the exclusive data and materials of the original applicant without the permission of the original applicant.

46. On the question of additional protection for products that are subject to marketing authorization, he said that Article 42 of China's Patent Law concerning the time-period for patent protection was already consistent with the TRIPS Agreement and China had no plans to grant any additional protection at present.

47. He clarified that "business talks" at exhibitions about products that exploit a design for which a patent right had been granted did not constitute a "sale" under Article 11 of China's Patent Law.

48. The representative then turned to his delegation's answers concerning **enforcement (Part 5)**. With regard to the procedures for the destruction of goods and materials used in producing counterfeit, pirated and other infringing goods, he said that according to Article 53 of the Trademark Law the objects to be detained or confiscated were the infringing products and instruments specially used for the manufacturing of infringing products and did not include products and materials not involved in infringing activities. All infringing goods that had been confiscated were being destroyed and not put up for auction. In 2005, the AICs had seized and destroyed more than 18,400 pieces of infringing goods, amounting to 7000 metric tonnes.

49. Regarding the procedures for obtaining a preliminary injunction, especially procedures to "establish" a case before the request for a preliminary injunction was considered, he said that the right holders or interested parties who required the court to place the case on the docket had to submit a written application to the court that had jurisdiction over the case. The court then had to decide within 48 hours whether the application met the relevant requirements, in which case its execution would begin immediately. The court had to inform the person against whom the application was made within five days. Parties not satisfied with the court's verdict could apply for review within ten days of issuance, but execution or implementation would not be stopped during such a review. Regarding statistical data on preliminary injunction requests and evidence preservation order requests, and the rate of their grant or denial, he said that since the inception of the three major laws until October 2005, local courts across the country had accepted 301 preliminary injunction cases and had closed 299, of which 177 had been sustained and 24 had been withdrawn.

50. Concerning the results of the 50 new IPR Service Centres established as part of the 2006 IPR Action Plan, he said that, by September 2006, the 50 centres had accepted about 15,600 reports, complaints and enquiries, among which had been 198 reports; 15,000 enquiries, and 307 complaints. Many of the 500 cases reported had gone through to judicial procedures, but no specific data was available on how many had triggered criminal proceedings.

51. He said that the combat against text book piracy on university campuses was already part of the 100-day anti-piracy activity.

52. Regarding the question of which other localities, apart from Beijing, had initiated "trademark authorization systems", he said that to his knowledge these were in Zhejiang Province and in some parts of Guangdong Province.

53. Regarding the question of legalization of powers of attorneys and documentary evidence, his delegation believed that the current procedures were normal procedures to ensure the legality of important documents.
54. He said that the question regarding the difference in criminal prosecution between individual and unit crime had already been answered during the April trade policy review process.
55. With regard to criminal thresholds for the prosecution of manufacturing and/or supply of dangerous counterfeit goods, he said that China had no plans to abolish the criminal threshold.
56. On the question of the participation by right holders in enforcement, he said that under Chinese laws, right holders were granted the right to complain to the IPR administrative agencies, provide evidence, participate in hearings, and request administrative review proceedings. They therefore enjoyed a high level of participation in IPR enforcement activities.
57. He said that statistics concerning administrative penalties in 2005 were contained in the document provided pursuant to Annex 1A.
58. Regarding the proportion of IPR infringement cases in the criminal cases, in respect of the crime of production, sale of counterfeit and inferior products and illegal business operations, he said that this data could not be singled out under the current statistical method.
59. Regarding data on trademark infringements in alcoholic beverages, he said that no separate statistics for alcoholic beverage trademark infringement were available.
60. With respect to the understanding that, in China, criminal penalties were not imposed on an infringement by "similar" trademarks, he said that this understanding was incorrect and referred Members to Article 8 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights.
61. He confirmed that administrative as well as criminal penalties were imposed on services mark infringement and said that the same law applied to goods trademarks and services marks.
62. He confirmed that, in trademark infringement, heavier administrative penalties were imposed on repeat offenders.
63. With respect to the development of clearer or up-to-date judicial interpretations regarding the calculation of illegal business operation and unit crime, stated in the "2006 Action Plan for the Protection of IPR", he said that this was subject to further study in light of results of the application of relevant judicial interpretations.
64. With regard to whether China was planning to reduce the burden of right holders in customs actions against alleged infringement, he said that the implementation measures of the Regulations of the General Customs Administration on Customs Protection of IPRs had already helped alleviate this burden in that they obliged all customs offices to conclude an investigation within 30 working days from the date of detaining the goods. This shortened case-handling time at the customs offices and consequently reduced storage time and costs. Furthermore, right holders did not bear storage costs of confiscated goods beyond three months from the date of confiscation. Regarding data on the number of customs seizures, he said that the number of cases investigated and dealt with by customs was 700 in 2003, 1,000 in 2004, and 1,100 in 2005. This data was not broken down by country.

65. With respect to measures to enhance the protection of IPRs at the local level, he said that some provinces had promulgated local administrative regulations to strengthen IPR protection, encourage innovation and counter IPR infringement activities. A regional cooperative mechanism had been established amongst some provinces and cities, for example the inter-provincial agreement for administrative protection of patents among six provinces and cities, including Beijing, Shanghai and Guangzhou. The Action Programme for IPR Protection 2006-2007 by the State Council specifically required local governments of all levels to include IPR protection as an important agenda in their work and to incorporate it in their respective overall socio-economic development programmes. The Action Programme also included a training programme for local officials and managerial personnel at the enterprise level.

66. The representative then turned to his delegation's answers concerning **other issues (Part 6)**. Regarding the issue of the protection of trade names in the revision of the "Law to Counter Unfair Competition", he said that the relevant authorities in China were looking into the issue of conflict between trade names and trademarks. As the law was still in the process of being revised, his delegation was not in a position to prejudge the results.

67. Concerning the licensing regulations contained in the Regulations on the Administration of Import and Export Technology, he said that the provision "where the exploitation of a technology given by a transferee in accordance with the terms of the contract infringes upon the legitimate right and interests of others, the transferor shall be held liable" was compulsory, not discretionary. China had no plans to revise the provision on liability of third parties' infringement.

68. The representative of Japan thanked China for its comprehensive responses. He said that question 26 of his delegation's document, regarding the statement by Prime Minister Wen on the lowering of prosecution thresholds, had not been directly addressed and he requested China to address this question. His delegation had continuously raised the issue of "further improvement of criminal enforcement" at the TRMs from 2002 to 2005. He appreciated that the Chinese Government had recognized the importance of IPR protection and had made considerable efforts to improve enforcement including, for example, the new judicial interpretation in December 2004 and "The China Action Plan on the Protection of Intellectual Property Rights" which stated that "clearer or more advanced interpretations will be presented on the problem recognized through treatment of concrete cases" based on an assessment of the situation after the new interpretation had been enacted.

69. Despite these efforts, however, a survey conducted by the Japanese Government in 2006 had illustrated Japanese industry's concerns that the actual administrative sanctions applied to IPR infringement in China were still insufficient and that enforcement by Chinese governmental authorities was not satisfactory. About 30% of Japanese companies that had used the remedial procedures in China had continued to suffer repeated infringement. Therefore, his delegation had to conclude that IPR enforcement in China was insufficient to deter further infringements, which continued to cause serious damage to the Japanese industry. He emphasized that it was important to improve the deterrent effect by strengthening administrative punishment and criminal prosecution, and improving sanctions against repeat offenders. Japan was looking forward to China enhancing IPR protection and taking further steps to provide effective enforcement against any act of infringement of IPRs, including through the lowering of the criminal thresholds for prosecuting IPR-related offences.

70. The representative of the United States said that his delegation appreciated China's efforts to improve its IPR enforcement and protection environment, and had welcomed that China's leadership at the highest levels, including President Hu, Premier Wen, and Vice Premier Wu Yi, had continued to publicly recognize the importance of IPR protection and enforcement over the past year. China also deserved credit for a number of concrete, positive developments: China had conducted several special enforcement campaigns, such as the "Mountain Eagle" campaign. It had issued a 2006 Action Plan on IPR Protection, which among other things called for "special crackdown efforts" with respect

to various IPR infringement problems. It had adopted revised rules governing transfer of administrative and customs cases to criminal authorities. Although these rules were not a complete solution and did not address the problem of thresholds, they were nonetheless a welcome step. Authorities in a few parts of China, notably Shanghai, appeared to show greater willingness to take ex officio enforcement action on behalf of US right holders. And, notably, authorities in some parts of China had started to take enforcement actions against Internet piracy.

71. Unfortunately, however, the IPR situation in China remained critical. Infringement levels remained unacceptably high and continued to affect products, brands and technologies from a wide range of industries, including films, music and sound recordings, publishing, business and entertainment software, pharmaceuticals, chemicals, information technology, apparel, athletic footwear, textile fabrics and floor coverings, consumer goods, electrical equipment, automotive parts and industrial products, among many others. China's share of infringing goods seized at the US border in 2005 had been more than ten times greater than that of any other US trading partner.

72. He said that the key problems were well known and had been repeated many times in this forum: China suffered from chronic over-reliance on toothless administrative enforcement and underutilization of criminal remedies. Its own 2004 data showed that it channelled more than 99 per cent of copyright and trademark cases into its administrative systems, rather than its criminal system. China's high thresholds for criminal liability, i.e. the minimum values or volumes required to initiate criminal prosecution, continued to be a major reason for the lack of an effective criminal deterrent. Right holders had pointed to a number of other deficiencies that highlighted the need for reform of criminal IPR laws. For instance, Article 217 of the Criminal Law provided for prosecution of the unauthorized "reproducing and distributing" of certain copyrighted works. Thus, it appeared that unauthorized reproduction was subject to prosecution only when accompanied by unauthorized distribution, and vice versa. Enforcement efforts, particularly at the local level, were hampered by poor coordination, local protectionism and corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes. In the copyright area, trade in pirated optical discs continued to thrive, and China continued to maintain market access restrictions that artificially limited the availability of foreign content and thus led consumers to the black market.

73. His delegation also remained concerned about various aspects of China's 2004 customs regulations and implementing rules. One example was that these rules established a hierarchy of requirements for the disposal of infringing goods that had been confiscated by Chinese customs authorities, following the removal of their infringing features. This hierarchy required such goods to re-enter channels of commerce unless the right owner paid for these goods.

74. He said that many Members, including the US, had worked hard to address these concerns through a constructive bilateral dialogue with China, which had often yielded positive results. One example was the bilateral discussions on the issue of software infringement in 2006 that had led to China's decision to require computers to be pre-installed with licensed operating system software. His delegation believed such bilateral discussions to be indispensable to a healthy trade relationship, and intended to continue these on a wide range of IPR issues. At the same time, the multilateral WTO forum and its tools, such as the TRM and the transparency provisions under Article 63.3 of the TRIPS Agreement, were equally indispensable to a healthy international trade environment.

75. Unfortunately, China had shown a disappointing reluctance to use these tools to clarify issues and explore possible solutions. While the United States appreciated China's responses today, it also noted that once again this year, as in the past, not all questions had been fully answered. These unanswered questions fell in three categories: The questions to which no answers had been provided at all included question 5, paragraphs (b), (c) and (d); question 19, paragraphs (b) and (c); question 22 paragraph (b); question 23; and question 28. Questions that China had regarded as

lying outside the scope of this Council included questions 24, 25 and 26 concerning the Patent Law. It was his delegation's view that, as this review was a transparency exercise, taking a broad rather than a narrow perspective would help to avoid the use of other mechanisms to resolve disputes in the future. The third category of unanswered questions included questions 2, 4, 11, 15, 16, 17 and 27, and concerned various requests for data, which China had said were not yet available. His delegation would appreciate receiving that data once they were available.

76. He noted China's response that no new or revised judicial interpretations were contemplated regarding the possibility of lowering thresholds for criminal liability. The United States and other Members had repeatedly raised serious concerns about these thresholds in the past, and would continue to explore every possible avenue for resolving this issue. He also expressed his delegation's disappointment that China had not provided substantive responses to the questions posed a year ago by the United States and other Members under the provisions of Article 63.3, and thereby had not seized the opportunity to enhance mutual understanding and work towards concrete solutions. He said that the TRM process and transparency requests under Article 63.3 were valuable tools, as they could help Members solve particular problems without resorting to other mechanisms, such as the WTO dispute settlement process, and he urged China to take fuller advantage of such opportunities in the future.

77. The problem of IPR infringement in China was multifaceted and complex and required broad engagement and cooperation. Addressing these concerns might require bilateral discussions, multilateral tools like today's TRM, or the use of other avenues, and his delegation hoped to engage fully and constructively with China in all these efforts.

78. The representative of the European Communities thanked China for its responses to the questions posed by the European Communities in document IP/C/W/481. As it was not clear whether China had addressed the issue of legalization of powers of attorneys and documentary evidence referred to in paragraphs 13 and 14 of the EC communication, he said that his delegation would appreciate it if China could explain how it intended to solve this issue. He also enquired whether the information on service centres, judicial decisions and spokesman system, provided on the numerous websites mentioned in China's presentation, was available in languages other than Chinese.

79. He said that, while his delegation noted with satisfaction China's progress so far and the ongoing initiatives to tackle the remaining problems, his delegation remained concerned by the high level of counterfeiting and piracy and urged China to actively pursue its efforts towards an effective IP enforcement system. His delegation's continuing commitment to bilateral efforts to improve the situation was illustrated by the establishment of the joint IP Working Group under the EC-China Structured Dialogue on Intellectual Property, which would hold its third meeting in November 2006 in Beijing. He expressed his hope that this Dialogue, which had the purpose of solving IP problems that European companies were facing in China, would lead to concrete and tangible results.

80. The representative of Canada thanked China for its responses to Members' questions and the documents it had provided, giving details of some of the measures and legislation that had been implemented by China. Canada and China were engaged in continuous bilateral exchanges of best practices and other experiences by their respective intellectual property agencies and IP experts. In the course of this exchange, Canada was welcoming a Chinese delegation from the Yunnan Intellectual Property Office in the same week and, as part of the Canada-China WTO Capacity Building Project, a study tour the following month of senior officials from the provincial offices of the Chinese Ministry of Commerce.

81. Canada followed China's work on its legal framework for the protection and enforcement of IPRs with great interest and, while recognizing progress in relation to trademark protection in the last couple of years, remained concerned by some of the key issues with respect to enforcement. These

concerns were confirmed in a recent survey of Canadian businesses, industry groups, right holders and other interested stakeholders, which had been conducted in order to identify the countries where stakeholders were encountering problems with enforcement and how these problems were affecting them commercially. Almost two thirds of the submissions had raised concerns with China, covering equally the infringement of patents, trademarks, copyright, and industrial designs in products ranging from building materials, circuit breakers, electrical devices and electronics to batteries, toys, apparel, luxury goods, Inuit themed gift items, and works of art. Disconcertingly, almost all of the submissions that had raised concerns with China noted that they had not initiated enforcement procedures in China, citing a variety of reasons including the difficulty of pursuing remedies, the unlikelihood of a satisfactory result, extensive bureaucracy, the absence of effective sanctions, high costs with slim chances of success, and difficulties in gaining support and action from the Chinese authorities. In addition, increasing concerns about copyright enforcement in China had been raised by a number of Canadian groups, including recording artists, film companies and video game developers.

82. In this respect, Canada was particularly interested in the indications by China's Premier that China would improve mechanisms for IPR protection and strengthen law enforcement, and shared other Members' concerns regarding the thresholds for criminal prosecution that had been established by China's Supreme People's Court in 2004. Canada was further interested to hear that one of the activities of the State Working Group on IPR Protection established in August 2004 was to conduct public awareness and education campaigns. Canada would be interested in any further examples of recent IP public awareness campaigns that China could provide. Canada also shared the interest of other Members who had raised detailed questions, and was looking forward to continuing this dialogue.

83. The representative of Switzerland thanked China for its responses and efforts in the context of the TRM. He said that Switzerland shared the concerns of other delegations that deficiencies remained in the field of intellectual property and particularly with regard to civil, administrative and criminal enforcement. His delegation was committed to continuing and intensifying the dialogue with China, not only in this multilateral forum where his delegation had last year submitted requests to China under Article 63.3, but also bilaterally, and hoped for a positive response from China in this regard.

84. In responding to Members' comments, the representative of China said that some of the unanswered questions would require detailed studies and breakdowns of data. He confirmed that the websites mentioned in his presentation were also available in English. His delegation had taken note of the other issues mentioned and would study them further in its capital. As Members had mentioned, the bilateral channel of communication was a very effective tool to deal with concerns not only of other Members but also China's concerns. Regarding the Members who had raised the issue of transparency under Article 63.3, he said that China had already clearly expressed its position that it had no obligation to provide specific information under this provision. However, China would discuss this issue with interested Members through bilateral channels.

85. The Chairman thanked China for all the information it had provided, as well as other Members for their contributions. Turning to the Council's reporting obligation to the General Council, he suggested that the Council follow the same procedure as in the past years, namely that the Chairman, acting on his own responsibility, would again prepare a factual report. The content of the cover page to the report would be similar to that of the report submitted by the Council in 2005 and the part of the minutes reflecting the discussions held under this agenda item would be attached.

86. The Council took note of the statements made 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

87. The Chairman recalled that, at its meeting in March 2006, the Council had agreed to maintain its present method of work on these matters at this stage and to keep this method under review in order to assess whether any change might prove appropriate in the light of developments. He said that, at its meeting in June 2006, the Council had received three new communications: from Japan on the patent system and genetic resources (IP/C/W/472); from Norway on amending the TRIPS Agreement to introduce an obligation to disclose the origin of genetic resources and traditional knowledge in patent applications (IP/C/W/473, WT/GC/W/566 and TN/C/W/42); and from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania on a disclosure proposal (IP/C/W/474, WT/GC/W/564/Rev.2 and TN/C/W/41/Rev.2). Since that meeting, South Africa had requested to be added to the list of co-sponsors of this document and an addendum had been issued to this effect. At that meeting, the delegation of Brazil, on behalf of the co-sponsors of the latter document, had provided responses to certain questions raised by other delegations on the disclosure proposal. Based on a written version since provided by Brazil, these responses had been circulated in document IP/C/W/475. He informed Members that the Council had just received a new communication from Peru that provided comments in relation to an earlier communication from the United States in document IP/C/W/469 (advance copy of IP/C/W/484).

88. Introducing document IP/C/W/484, the representative of Peru said that the document was intended to answer the questions raised by the United States regarding Peru's earlier submission in document IP/C/W/458. The United States questioned how the mere fact that a patent application or a patent referred to genetic resources or involved an invention that might have some relation to these resources could lead to a conclusion that the genetic resource or the knowledge at issue had been obtained illegally, irregularly or questionably. He said that document IP/C/W/458 presented an analysis of potential cases of biopiracy. There was no implication that all the cases contained in that document were, at this stage, already instances of biopiracy or that all patent applications or granted patents involving genetic resources or traditional knowledge had been obtained illegally or irregularly. Peru and other Members had provided the Council with a number of cases which raised the concerns of developing countries regarding the effectiveness of patent systems.

89. He said that, since the CBD had entered into force, it had been recognized that, in accordance with the UN Charter and international law, countries had sovereign rights over their natural resources and had the power to regulate access to their genetic resources. This legal obligation was enforceable *erga omnes* and the legal right was the resource itself. The requirement to disclose the source and/or the origin of genetic resources and traditional knowledge would make it possible to identify those cases in which genetic resources had been used outside their jurisdiction and to verify the legality of access to such resources. As there was no such disclosure obligation at the international level so far, each country had to meet its obligation under the CBD by its own means, which entailed huge expenditure, including for the setting up of competent institutions such as the National Anti-Biopiracy Commission in Peru. The disclosure requirement would also make it possible for the country of origin to review the compliance with patentability criteria, especially novelty and inventive step, and to make sure that the invention was not covered by prior art, including genetic resources or traditional knowledge, which might be unknown to patent examiners.

90. He said that Peru shared the view of the United States regarding the usefulness of databases and public information systems and had recognized the possibility of using such systems in the Memorandum of Understanding negotiated under the Free Trade Agreement between the two

countries. However, such systems would be of no value if the provenance or origin of genetic resources was not identified. He said that the disclosure requirement would make it possible for Members to check compliance with the CBD's principle of prior informed consent and fair and equitable benefit sharing in national laws. He said that, contrary to the US statement, the majority of patent applications or patents did not disclose the origin or source of genetic resources. Therefore, there was a need to have a legally binding universal rule on the disclosure requirement in the patent system. The disclosure requirement would make it possible to eliminate the doubt on the legal provenance of genetic resources and to determine whether genetic resources were obtained through legal commercial channels. He also said that Peru had difficulty in marketing and commercializing its organic and natural products, *inter alia* maca, in the European Communities because of the EC Regulation on Novel Foods (EC Regulation 258/97), which blocked the entry of a group of biological resources regarded as novel foods.

91. He said that the above-mentioned initiatives were supplemented by Peru's national regulations relating to the promotion and protection of genetic resources and traditional knowledge, which were aimed at establishing a balance between the sustainable use of such resources and the proper implementation of the patent system. They were also supplemented by the implementation of a new database system for the registration of traditional knowledge of indigenous peoples for the purpose of determining whether the traditional knowledge originated in Peru. He gave an on-line demonstration using overhead facilities of the website for the registration of traditional knowledge of indigenous peoples hosted by Peru's National Institute for the Defence of Competition and Protection of Intellectual Property, which could be found at <http://www.indecopi.gob.pe>. Despite all these efforts, he said that biopiracy still existed in Peru. Therefore, there was a need for an international binding requirement to disclose the country of origin and/or source of genetic resources in the patent system.

92. The representative of Ecuador supported Peru's submission IP/C/W/484 and asked to be added to the list of co-sponsors of document IP/C/W/474.

93. The representative of Brazil supported Peru's submission IP/C/W/484 and said that, although the Doha Round had been suspended, the issue of the relationship between the Agreement and the CBD was still of the utmost importance and should be given priority in the TRIPS Council in accordance with the mandate given by Ministers. He said that, in addition to the mandate contained in paragraph 12 of the Doha Ministerial Declaration, the Council had another mandate stemming from paragraph 19, which instructed the Council to continue its work regarding the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge and folklore, which should be guided by the objectives and principles set out in Articles 7 and 8 of the Agreement and take fully into account the development dimension. He recalled the content of Article 7 and Article 8 of the Agreement. He said that Members should move forward with the debate on the amendment of the Agreement for a disclosure requirement. The proposal for the amendment of the Agreement sought to enhance the mutual supportiveness of the Agreement and the CBD. The amendment would be the most practical and efficient means of endowing the patent system with an instrument to deal with the issues of misappropriation and biopiracy. It would also facilitate tracking illegitimate use of genetic resources or traditional knowledge in patented inventions. The patent system needed to address the issue of legitimacy and should not undermine the pursuit of the objectives of the CBD by granting patents to the invention that had been made through illegitimate access to traditional knowledge and genetic resources.

94. He recalled that his delegation, on behalf of the co-sponsors of document IP/C/W/474, had provided responses to certain questions raised by other Members on the disclosure proposal at the last TRIPS Council meeting, which had been circulated as document IP/C/W/475. This document responded to some questions raised by the United States in its submission IP/C/W/469. In order to have a concrete and useful debate on this issue, he said that the Council should focus its discussion on the amendment proposal. He noted that many of the US concerns and questions had been given an

adequate response or were self-evident. In some cases they did not specifically address the amendment proposal as such but were more theoretical in nature. Therefore, he would encourage delegations to raise more specific questions on the amendment proposal to which he would like to provide further information after coordinating with the other co-sponsors.

95. The representative of India said that Peru's national experience illustrated the concern of the co-sponsors of the disclosure proposal that the problem of biopiracy was still present in the country which had had national legislation on access and benefit sharing and database systems on traditional knowledge. He said that the mandatory disclosure requirement would facilitate tracking the illegal use of or the illegal access to traditional knowledge and biological resources. He supported the Brazilian statement regarding the importance of continuing the technical work on the issue of the relationship between the TRIPS Agreement and the CBD, and noted that the Director-General of the WTO had spoken about a "window of opportunity" between mid November 2006 and mid March 2007, so that Members would not lose time once negotiations were resumed. He further said that as the proposal for the amendment of the Agreement had been also circulated as a TRIPS Council document, there was a clear mandate to discuss it. He said that Members should address not only the issue of erroneously granted patents but also the mutual supportiveness between the TRIPS Agreement and the CBD.

96. The representative of Venezuela said that the issue of the relationship between the TRIPS Agreement and the CBD was important for developing countries, particularly those rich in biodiversity. He said that it was urgent for Members to set up norms in this regard. He supported the statements of the delegations of Brazil and India regarding the importance of work in the TRIPS Council.

97. The representative of Malaysia said that it was important to implement the TRIPS Agreement and the CBD in a mutually supportive manner, and that one possible way might be to amend the Agreement. His delegation was interested in further understanding the proposal for the amendment of the Agreement. He raised the following questions regarding the draft amendment: how would the disclosure requirement help to implement the TRIPS Agreement and the CBD in a mutually supportive manner? Did the terms "biological resources", "country providing the resource" and "country of origin" referred to in paragraph 2 of the draft amendment have the same meaning as they did in the CBD? How would the requirement for the publication of the disclosed information and the requirement for the effective enforcement procedures mentioned in paragraphs 4 and 5 of the draft amendment work in practice? Did the requirement for administrative and/or judicial procedures go beyond the requirement for the effective enforcement procedures? He said that his delegation would discuss these technical issues with the proponents of the disclosure requirement through bilateral consultations.

98. The representative of China said that, as a co-sponsor of document IP/C/W/474, his delegation attached great importance to the issue of the relationship between the TRIPS Agreement and the CBD. He said that document IP/C/W/474, which had increasing support from developing country Members, was fully compatible with the Doha mandate and should be developed as an essential outcome of the Doha Development Round. He said that many developing countries possessed plenty of genetic resources and related traditional knowledge, but due to some constraints on their technical capacities, most of them were unable to make full use of these resources and knowledge for patented innovation. The CBD had adopted the principles of national sovereignty, prior informed consent and benefit sharing, which were far from being sufficient to guarantee the interest of developing countries. Therefore, China, together with many other developing countries, believed that the work in the WTO should be intensified, aiming at including the CBD principles in the TRIPS Agreement and ensuring that the source of genetic resources and the traditional knowledge obtained from developing countries be disclosed in patent applications.

99. He said that the draft amendment of the TRIPS Agreement contained in document WT/GC/W/564/Rev.2 faithfully reflected the Doha mandate and served as a sound basis for moving to the next stage of text-based negotiations. The delegation of Brazil had already addressed the questions raised on the draft amendment. Among the outstanding implementation issues, the issue of the relationship between the CBD and the TRIPS Agreement had gathered the clearest and the broadest support of the developing countries as a whole and had matured both politically and technically. Therefore, the negotiation on this issue should be intensified upon the resumption of the Doha Development Round, and the outcome should be an integral part of the final single undertaking.

100. The representative of Norway said that his delegation was encouraged by the positive responses to its proposal contained in document IP/C/W/473 and would remain open to answering any questions raised by other Members. He said that there was a general consensus among WTO Members that the TRIPS Agreement and the CBD could and should be implemented in a mutually supportive manner. His delegation stood ready to engage in discussions on this subject, while realising that the prevailing circumstances might make it difficult for Members to engage more actively in discussions.

101. The representative of the United States appreciated the clarification made by Peru that the reference to the camu-camu case was intended as a hypothetical illustration of a potential case of biopiracy. This had reinforced his conviction that it was important for Members to remain as focused as possible on truly fact-based instances so that they could, through the exploration of specific facts, consider the best way forward to achieve what seemed to be a fair degree of shared objectives. Responding to Brazil's comment on the various attachments to different mandates regarding the agenda items, he said that his delegation would rather not, and saw no particular need to, engage in a debate on these various mandates; nor did it really see it as adding significantly to the current discussions, which in general were proceeding in a useful technical manner. He reiterated that his delegation would continue operating in that sense.

102. He said that, as one of several Members that saw no conflict between the TRIPS Agreement and the CBD, the United States considered that these agreements could and should be implemented in a mutually supportive manner and that no amendment to the TRIPS Agreement was needed or warranted. Over the course of recent meetings of the TRIPS Council, numerous written submissions had been offered for discussion. Members had generally confirmed a wide divergence of views on how to address these issues. In light of this, he said that it was premature to engage in text-based discussions. Instead, Members' work should, consistent with their mandate, continue with fact-based discussions, which could analyse actual examples that illustrate the perceived concerns. This work should include, in particular, examination of existing access and benefit-sharing regimes, as this appeared to be directly related to perceptions of what constituted misappropriation. Members' work would facilitate progress in this area and continue to clarify points of disagreement while helping to reduce differences among Members.

103. He said that it remained important to focus on intended shared objectives, which included providing for appropriate access and equitable sharing of benefits and the minimization of mistakenly granted patents. In its proposal, the United States sought to demonstrate that these objectives were achievable within the framework of nationally based laws and systems and that new patent disclosure requirements were not an appropriate or indeed effective solution to meet the concerns raised by some Members. In order to achieve the objectives of prior informed consent and equitable benefit sharing, national laws outside the patent system that directly and effectively regulated such conduct were critical. He said that there seemed to be a universal recognition in the TRIPS Council that at least a national access and benefit-sharing regime was necessary for the proper running of the benefit-sharing aspects of any such system. Indeed, the United States had long observed that concerns about misappropriation arose more broadly than in the context of products under patent protection. The more appropriate solution for any kind of misappropriation would be to strengthen national regimes

outside the patent system in order to address all instances of commercialization or misappropriated resources and/or traditional knowledge that needed to be addressed, regardless of whether these instances involved patenting or not. His delegation was convinced that additional consideration by the TRIPS Council of fact-based examples and national experience of access and benefit-sharing systems could lead to useful conclusions about the extent of alleged misappropriation and about how existing systems could be implemented most successfully. A resolution of the issues being discussed should more fully and directly address the objective sought, and should avoid the negative effects inherent in the proposed patent disclosure requirements. The most recent fact-based discussions had raised a number of issues regarding genetic resources, their trade as commodities, perceptions of illegality of access, the relationship of these goods to national access and benefit-sharing regimes in place, as well as the relationship of such goods to starting materials that might be used for research or innovative purposes, among other major questions. Analysis of these issues could bear greatly on perceptions of misappropriation and perceived solutions to the concerns raised, thereby allowing progress on these issues.

104. He said that his delegation supported further consideration of Japan's proposal of databases, including its identification of issues, such as use of languages, assessment and identification of compilation of the databases, and the notion of a "one-stop shop" characteristic for the database. He said that the proposal was important in analysing direct, pragmatic solutions for the concerns that had been raised. This was also another example where the ongoing work in intellectual property offices could continue to inform Members' discussion in the TRIPS Council. In conclusion, he said that his delegation looked forward to remaining actively and constructively engaged in discussions at the TRIPS Council.

105. The representative of Sri Lanka said that his delegation attached great importance to this agenda item. The presentation made by Peru indicated that the more research Members undertook in this area, the more empirical evidence they found regarding the illegal use of traditional knowledge and genetic resources. Such illegal use should be addressed within the patent system. The disclosure requirement would be a useful tool not only for monitoring and tracking the use of biological resources but also for preventing the misappropriation of biological resources and traditional knowledge. National regimes would not be sufficient to address a problem which had an international dimension. Therefore, his delegation supported the proposal for amendment of the TRIPS Agreement, which had been submitted to both the General Council and the TRIPS Council by a group of developing countries.

106. The representative of Thailand said that, although national contract-based access and benefit-sharing systems were important, they would not ensure effective and mandatory international enforcement because of their voluntary nature and unequal bargaining power of the parties involved. This was why although some developing countries, including Thailand, had implemented national access and benefit-sharing systems, bio-piracy still continued. Thus, national access and benefit-sharing systems would be an important and necessary complement to, but not a substitute for, the proposed disclosure requirement. The proposal of amendment of the TRIPS Agreement to include the disclosure requirement would adequately and effectively respond to existing limitations or loopholes in the international system. Accordingly, he supported moving to text-based negotiations on this issue.

107. The representative of Japan said that the discussion of the relationship between the TRIPS Agreement and the CBD involved two issues: avoiding erroneously granted patents and securing compliance with the CBD provisions concerning prior informed consent and benefit sharing. He said that the first issue could be addressed through improved database systems of genetic resources and traditional knowledge, information provision systems and invalidation trials as indicated in Section III.C of document IP/C/W/472. He said that the discussion of biopiracy cases had shown that some factors, such as languages or lack of other facilities, constrained patent examiners' capacities to

access prior art. Therefore, his delegation had made a proposal of one-stop database systems, which would allow patent examiners to access prior art easily and to effectively prevent erroneously granted patents. Japan had also put forward this proposal in the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) for discussion. Responding to some Members' concern that the database system might make it easier for the third party to access genetic resources and associated traditional knowledge and therefore to facilitate misappropriation, he said that access to such databases could be restricted to patent examiners. He further said that tracking patent applications was aimed at securing compliance with the CBD rather than preventing erroneously granted patents. Patent applications could be tracked by contractually requiring the user of genetic resource to report information such as subsequent research and development or by retrieving the name of genetic resources or the name of patent applications through existing patent databases, such as WIPO's international patent application search system and each country's patent application databases. He noted the concern of some Members that knowledge of genetic resources and traditional knowledge was dispersed and that some of the traditional knowledge existed in oral form, and therefore the establishment or improvement of such database would be costly and time consuming. He encouraged Members to take full advantage of the discussion in the WIPO IGC in order to establish and improve such database systems. He also said that it would be difficult to effectively prevent erroneously granted patents without improving patent examiners' access to the information on genetic resources and associated traditional knowledge.

108. Regarding the disclosure proposal, he said that although the problem of erroneously granted patents was within the patent system, information on the providing country or the country of origin of genetic resources was not directly relevant to novelty and inventive step. Therefore the provision of such information to patent examiners would not help to prevent erroneously granted patents. He indicated that as some fundamental concepts in the disclosure proposal, such as "genetic resources", "biological resources" and "derivative of genetic resources", were still not clear to Members, the introduction of such requirements in the patent system would place an unreasonable burden on the user of the patent system.

109. Regarding the issue of securing the compliance with the CBD provisions of prior informed consent and benefit sharing, he said that this issue should be addressed in a broader perspective and should not be associated with the patent system. He said that the use of genetic resources should not be limited to research and development, but should include direct consumption, sale, and cultivation. He indicated that not all the research would result in patent applications being filed. Some results of the research could be kept as trade secrets or never be commercially exploited even if patented.

110. In conclusion, he said that the introduction of the disclosure proposal would not effectively and sufficiently secure the compliance with the CBD. As there had been insufficient fact-based discussions, it was necessary for Members to further analyse their national experiences and identify problems in their national regimes.

111. The representative of the European Communities clarified some terminologies used in the EC Directive on the legal protection of biotechnological inventions (Directive 98/44/EC) referred to in document IP/C/W/475. He said that Article 2(1)(a) of the EC Directive used and defined the term "biological material" instead of "biological resource". Under the EC Directive, the invention should concern a product consisting of or containing biological material or a process by means of which biological material was produced, processed or used. The term "biological resource" used in the developing countries' proposal of the amendment of the TRIPS Agreement was broader than the term "biological material" as biological materials with different technical characteristics could be obtained from one biological resource. He said that the EC Directive was not relevant to the debate on the relationship between the TRIPS Agreement and the CBD as the Directive applied to a different context. WTO Members should adhere to the mandate given and confirmed by the Doha and Hong Kong Ministerial Conferences.

112. Regarding Japan's proposal of database systems contained in document IP/C/W/472, he noted that the discussion on the paper had taken place and would continue in WIPO, which should be taken into account appropriately by the TRIPS Council in order to avoid duplication of efforts. As suggested by Japan, such database systems could be used by patent examiners in all countries on a one-stop-research basis. It would help patent examiners determine prior art and therefore reduce the risk of erroneously granted patents.

113. He said that the CBD and the patent system, in particular the TRIPS Agreement, did not conflict with each other and were mutually supportive. In many cases, the flexibility of the TRIPS Agreement and the availability of other international instruments, such as the CBD, allowed Members to address the biodiversity issue in a satisfactory manner. Nevertheless, when necessary, his delegation was prepared to look into other appropriate solutions to ensure a more effective interplay between the TRIPS Agreement and the CBD. He then recalled several key points of the EC disclosure proposal contained in document WIPO/GRTKF/IC/8/11: a mandatory requirement should be introduced to disclose the country of origin or source of genetic resources in patent applications; the disclosure requirement should apply to all international, regional and national patent applications at the earliest stage possible; the patent applicant should declare the country of origin or, if unknown, the source of the specific genetic resource to which the inventor had had physical access and which was still known to him; the invention had to be directly based on the specific genetic resource; there could be a requirement for the patent applicant to declare the specific source of traditional knowledge which was associated with genetic resources if he was aware that the invention was directly based on such traditional knowledge; in this context, a further in-depth discussion of the concept of "traditional knowledge" was necessary; if the patent applicant failed or refused to declare the required information despite being given the opportunity to remedy that omission, the patent application should not be further processed; if the information provided was incorrect or incomplete, effective, proportionate and dissuasive sanctions should be envisaged outside the field of patent law; a simple notification procedure to be followed by patent offices every time they received declarations should be introduced; and it would be adequate to identify in particular the Clearing House Mechanism of the CBD as the central body to which the patent office should send available information. He said that the EC disclosure proposal was intended to formulate a way forward which would ensure an effective, balanced and realistic disclosure system at the global level.

114. The representative of Korea said that his delegation was still of the view that there was little possibility of a conflict between the TRIPS Agreement and the CBD, and that the two instruments could be implemented in a mutually supportive manner. While recognizing the importance of avoiding biopiracy and misappropriation of genetic resources, he said that the disclosure requirement was not an appropriate solution. He encouraged Members to continue fact-based discussions on this issue in order to enhance their understanding of others' concerns and to find a way to address those concerns.

115. The representative of Switzerland said that, considering the suspension of the Doha Round, his delegation would approach the discussion on these three agenda items in a purely technical manner. He said that Switzerland had been actively participating in the discussion on the disclosure requirement in the TRIPS Council by submitting a number of written communications. These communications described Switzerland's disclosure proposals submitted to the WIPO Working Group on Reform of the Patent Co-operation Treaty (PCT), which would explicitly enable national legislators to require patent applicants to disclose source of genetic resources and traditional knowledge in patent applications. He said that the TRIPS Agreement was adequately flexible with regard to the disclosure requirement and therefore did not need to be amended. For legal and practical reasons, Switzerland opposed the requirement which obliged patent applicants to provide the evidence of prior informed consent and benefit sharing in their patent applications. Solutions to these issues needed to be found outside the patent system, such as in the CBD. Accordingly, his delegation could

not support Norway's proposal of the introduction of a disclosure requirement provision immediately following Article 29 of the TRIPS Agreement.

116. Nevertheless, he agreed with several points made in Norway's proposal. First, the sanction of invalidating a patent should not be applied to any new disclosure requirement as the invalidation would create unnecessary uncertainty in the patent system and would be detrimental to fair and equitable benefit sharing. Second, any invention that did not satisfy the substantive patentability criteria should be revoked. Third, a simple notification system should be established. He recalled that, in 2003, his delegation had proposed to establish a list of government agencies competent to receive information about patent applications containing the declaration of source. When patent offices received such patent applications, they could inform the competent government agency that the respective State was declared as source. This information could be provided in a standardized letter sent to the competent government agency. For easy reference, this list could be made accessible on the Internet. The list and the provided information would prevent States from having to monitor all patent applications submitted worldwide to find out whether they were declared as source.

117. He posed several questions to Norway regarding its disclosure proposal. First, given that Norway proposed to apply the disclosure requirement to all patent applications, i.e. international, regional and national patent applications, he was interested in additional information on how Norway foresaw that the proposed amendment of the TRIPS Agreement could also apply to international and regional patent applications. Second, noting that Norway proposed to require the disclosure of the supplier country of genetic resources, he asked how the concept of "the supplier country" as used in Norway's proposal was different from "the country providing genetic resources" used by Article 15 of the CBD. Third, noting that Norway proposed to require the disclosure of the supplier country and the country of origin of traditional knowledge, he asked how the "supplier country" and the "country of origin" of traditional knowledge would be determined, concepts that were not foreseen in the CBD. What would be the role of the holders of traditional knowledge, that is indigenous and local communities? If a patent applicant received genetic resources from gene banks and the supplier country was unknown to him, what should be disclosed? Would it not be preferable to use the concept "source"? Fourth, noting that Norway proposed that "[i]f the applicant is unable or refuses to give information despite having had an opportunity to do so, the application should not be allowed to proceed", he asked whether this sanction would also apply if the patent applicant was unable to provide the required information for reasons beyond his control. Last, noting that footnote 1 of document IP/C/W/473 stated that "[t]he specific provision of the disclosure obligation should be fully compatible with the International Treaty on Plant Genetic Resources for Food and Agriculture and the Multilateral System established under it", he asked how this compatibility could be achieved if the patent applicant would be required to disclose the "supplier country" and the "country of origin", two concepts unknown to the ITPGRFA.

118. The representative of Australia said that the proposal of amendment of the TRIPS Agreement to implement the disclosure requirement was premature. She recalled that, at the Council's meeting in June 2006, Members had had fact-based discussions on the relationship between the TRIPS Agreement and the CBD, on alleged cases of biopiracy, and on the role of the patent system in this context. However, despite the amount of information presented and the useful exchange, it was clear that Members came to different conclusions both in relation to the existence and extent of the problem or conflict and the role, if any, of the patent system and in particular the TRIPS Agreement, in addressing the problem. She noted that Peru's latest submission acknowledged that the camu-camu case was not necessarily a proven case of biopiracy but a potential case, which at least resolved one factual disagreement, although others remained, such as the turmeric case. As Members had reached different conclusions, the disclosure proposals did not attract consensus.

119. She said that Brazil's submission IP/C/W/475 was useful in revealing the complexity of the issue and the fundamental differences in approach even between those who were willing to consider

mandatory disclosure requirements. If Members started with the position that the TRIPS Agreement must be changed and papered over the very significant disagreements by moving to text-based discussions, they would not be able to get very far in this regard. Therefore, her delegation disagreed with the proposal of Brazil and others to start text-based discussions. She said that there was a need for a more thorough consideration of Members' access and benefit-sharing regimes. In light of this, her delegation had provided the Council with information about Australia's own regime set up under the Environment Protection and Biodiversity Conservation Act 1999, which had entered into force in December 2005.

120. Finally, she referred to the letter addressed to Members of the TRIPS Council from the representatives of biotechnology industries in the United States, Europe and Canada, which, *inter alia*, acknowledged the concerns over the effectiveness of contract-based systems and the value of looking more closely at these systems. She said that the letter might guide Members in their future work.

121. The representative of New Zealand said that it was necessary for the Council to focus on a close examination of the problem at hand, namely whether there was a need to amend the current TRIPS disclosure requirements for the patenting of genetic resources, traditional knowledge and folklore. The answer to this fundamental question lay in focusing on national systems, in particular access and benefit-sharing regimes. Before Members contemplated amending the TRIPS Agreement, there were two questions to be answered. Firstly, at the national level, was there a problem with erroneously granted patents or compliance with access and benefit-sharing regimes? Secondly, if so, what would the appropriate solution be? Was an amendment to the TRIPS Agreement necessary, or would better implementation at national level be more effective? He recalled that, at the Council's meeting in June 2006, his delegation had outlined its national system governing access to genetic resources and informed the Council that New Zealand was still in the process of developing a bio-prospecting regime. Given the domestic context, it was too soon for his delegation to conclude whether or not the patent disclosure requirement was necessary. Since there was still uncertainty about whether the patent disclosure requirement was the best solution to the problem relating to use of genetic resources, traditional knowledge and folklore, he encouraged Members to share their experience on how their national access and benefit-sharing regimes worked. Once Members had a collective sense of the problem, they could begin to develop appropriate solutions.

122. The representative of the Dominican Republic said that her delegation attached great importance to this agenda item. As a co-sponsor of several documents submitted by a group of developing countries, her delegation was in favour of the proposal of amendment to the TRIPS Agreement. She said that the draft amendment would resolve the problems of misappropriation and biopiracy which many developing countries faced to some degree, which could not be solved by their national regimes. Therefore, she supported moving to text-based discussions in order to comply with the Doha mandate and to make the TRIPS Agreement compatible with the CBD.

123. The representative of Kenya said that although some Members had established national laws on access and benefit sharing, they were faced with the problem of enforcement. While the CBD required Members to facilitate the acquisition of genetic materials on mutually agreed terms through prior informed consent, the patent system had no provision for prior informed consent. Based on the cases of biopiracy and misappropriation as presented by Peru and other Members and the problem of erroneously granted patents, he said that there was a case for improving the existing patent system. In order to make the TRIPS Agreement and the CBD co-exist in a mutually supportive manner, Members needed to discuss this issue with a view to introducing the disclosure requirement as a substantive formality requirement in patent applications. Finally, he said that his delegation remained open and ready to engage in further discussions on this issue.

124. The representative of Canada said that her delegation shared the concerns of developed and developing countries about misappropriation of genetic resources and traditional knowledge, of

finding appropriate ways to strengthen the method of preventing erroneously granted patents and achieving appropriate and equitable access and benefit-sharing agreements. She said that Canada had been, and would remain, engaged in the discussion in the TRIPS Council and in other international forums, which had established expertise and capacity. She stressed that any work done in the TRIPS Council should build upon rather than duplicate the work in other forums.

125. She said that a fact-based discussion was a meaningful way to advance the technical work as it was a necessary step in allowing for a full scoping of the issue before proceeding further. The nature and operation of Members' national access and benefit-sharing regimes - with particular focus on those who either had best practices to share or who had experienced problems - were of particular interest to Members as were database systems meant to improve prior art searches such as those presented by Japan. She reiterated that her delegation had not yet seen evidence on a need for amending the TRIPS Agreement and continued to be of the mind that the Agreement and the CBD could and should be implemented in a mutually supportive manner. The proposal regarding a new disclosure requirement was not an appropriate solution to the concerns and objectives that had been raised thus far and the lack of consensus on many elements of this discussion made it clear that it would be premature to move to text-based discussions at this time.

126. Responding to Switzerland's question about the term "the supplier country", the representative of Norway clarified that "the supplier country" corresponded to "the country of source", which was the country which, according to Article 15.5 of the CBD, gave its prior informed consent before granting access to genetic resources. Under Article 15.3 of the CBD, the country providing the resource might not necessarily be the country of origin, that is, the country possessing the genetic resource *in situ* conditions. Where the country supplying the genetic resource was different from the country of origin, both countries should be disclosed under Norway's proposal.

127. The representative of Brazil said that while a number of developing countries supported the proposal of amendment of the TRIPS Agreement in order to make it supportive of the CBD objectives, many Members, especially the developed country Members, were not open to discussing the proposal. While referring to the shared objectives of the CBD, these developed countries insisted on describing the debate as a reflection of a wide divergence of views. He said that Members should not describe the debate this way if the objectives of the CBD were truly shared by them, and if they all agreed that misappropriation and biopiracy should be dealt with in a way that was consistent with the CBD objectives. He said that, while his delegation was not against fact-based discussions on national laws, it believed that it was not within the purview of the TRIPS Council. Members should concentrate their discussion on the TRIPS Agreement as such and on the issue that was within their mandate. Members' mandate was to discuss the relationship between the TRIPS Agreement and the CBD, which should not be narrowed down to fact-based discussions or prejudge the outcome of the discussion. He further said that the disclosure requirement would reduce the opportunity for illegality of access to genetic resources and traditional knowledge, which were now condoned or rewarded by the granting of patents in some cases. The patent system needed to respond to the moral issue of the illegality of access, which raised more concerns in developing countries than in developed countries as developing countries were usually the victims of misappropriation and biopiracy. He said that the international dimension of this issue required an international solution in the TRIPS Agreement, and that national measures did not fall within the purview of the Council, which would not be able to deal with this issue adequately by itself.

128. He asked Switzerland and the European Communities whether they intended to request the TRIPS Council to circulate their disclosure proposals submitted to WIPO as formal documents for Members' discussions. He also asked whether the European Communities had the flexibility to discuss the disclosure requirement based on the parameters contained in its WIPO proposal in the TRIPS Council. He said that his delegation would be interested in debating proposals by the European Communities and Switzerland in the TRIPS Council as the discussion on the amendment of

the TRIPS Agreement should be carried out in the TRIPS Council. He noted that while the EC Directive used the term "biological material", the European Communities referred to the term "genetic resources" in its disclosure proposal to WIPO.

129. Regarding Japan's proposal on database systems, he said that a centralized database system was not an adequate solution to misappropriation as patent examiners might simply ignore whether there had been an illegal access to genetic resources and associated traditional knowledge. Meanwhile, the database system would place traditional knowledge at the disposal of patent examiners without ensuring local communities that the international community would provide the disclosure requirement to discourage misappropriation and biopiracy. He said that the proposal to amend the TRIPS Agreement was not necessarily in contradiction with the database system and could be discussed on its own merit and separately.

130. The representative of Switzerland said that the Swiss proposal to WIPO addressed the requirement of disclosure of source at the international level. In his view, the proposal was more feasible and open to consensus than the disclosure proposal put forward by a group of developing countries in the TRIPS Council. As his delegation's proposal was relevant to the discussion in the TRIPS Council, it had been submitted to the TRIPS Council as annexes to documents IP/C/W/400/Rev.1 in June 2003, IP/C/W/423 in June 2004, and IP/C/W/433 in November 2004.

131. The representative of the European Communities clarified that the EC proposal to WIPO had not been submitted to the TRIPS Council. He recalled that, at the June meeting, some delegations had asked for information about the EC member States' implementation of the disclosure requirement. He informed the Council that the provisions on the disclosure of origin which existed in some EC member States were based on Recital 27 of the EC Directive, which was not binding. None of these States had introduced the requirement of disclosure of evidence of prior informed consent or of fair and equitable benefit sharing. The disclosure requirement only related to the origin or source of the genetic resource used in the invention. Among these States, some, such as Germany and Sweden, had introduced it as a voluntary requirement, while others, such as Denmark and Belgium, had introduced it as a mandatory requirement. He noted that none of these States provided for the invalidation of the patent in case of non-compliance and that all sanctions lay outside the sphere of the patent law. None of the patent offices had kept a record of the patent applications involving the disclosure requirement, but it was estimated that the number of such applications was low. Therefore, the disclosure requirement seemed to have little impact either on patent applicants or on patent offices in the European Communities.

132. The representative of Peru shared the view of Brazil regarding Members' mandate on the issue of the relationship between the TRIPS Agreement and the CBD. He said that the analysis of potential cases of biopiracy showed the difficulty faced by Members in examining all the cases of biopiracy. He could not share the conclusions of a group of biotechnology industries in their letter to the TRIPS Council regarding the disclosure requirement as it would not result in high cost to the industry. He further said that the database system was an insufficient solution to the problem of biopiracy. Regarding the discussion of the disclosure requirement in WIPO, he said that WIPO members had no clear mandate to negotiate an international instrument on the issue of protection of genetic resources and traditional knowledge. The WIPO IGC had not made any progress in its discussion, and the WIPO Working Group on Reform of the PCT had suspended its discussion on the disclosure proposal. Therefore, it was his view that the WTO was the only international forum where the issue of the disclosure requirement could be discussed.

133. The representative of Switzerland said that the disclosure proposal made by Switzerland had been discussed substantively in the WIPO Working Group on Reform of the PCT, where members had a mandate. Unfortunately, at the last meeting of WIPO Working Group on Reform of the PCT, one of the key *demandeurs* in the TRIPS Council had tried to undo the mandate.

134. The Council took note of the statements made under these three agenda items and agreed to revert to them at its next meeting.

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

135. 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.

136. He said that the Secretariat had prepared a draft cover note to the Council's report modelled on that of last year's report, which had been circulated as JOB(06)/244. The draft cover page contained factual information on the implementation and 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 proposed that the part of the minutes of the meeting reflecting the discussions held under this agenda item be attached to the cover note. This format would follow the way that the Council prepared its report last year.

137. As regards the status of acceptances of the Protocol Amending the TRIPS Agreement that was done at Geneva on 6 December 2005, he said that Switzerland and El Salvador had notified, respectively, their acceptance of the Protocol on 13 and 19 September 2006 (documents WT/Let/547 and 548). He also recalled that the United States had notified its acceptance on 17 December 2005. Therefore, to date, three Members had accepted the Protocol, which would enter into force for these Members upon acceptance of the Protocol by two thirds of the Members.

138. The Chairman recalled that the Protocol was open for acceptance by Members until 1 December 2007 or such later date as may be decided by the Ministerial Conference. As this date was only a little over a year away, he encouraged Members to ensure that necessary measures were being taken in capitals to allow the consideration of the acceptance in a timely fashion. With a view to regularly updating the Council on the state of play in regard to acceptances, he suggested that the Secretariat be requested to prepare a note setting out the status of acceptances, which would be updated for each meeting of the Council.

139. The representative of El Salvador considered that the Protocol represented a triumph in the WTO negotiations on public health, which was unprecedented and highly beneficial for developing countries and least-developed countries. The Decision adopted in December 2005 would establish additional flexibilities under the TRIPS Agreement as it related to public health. Countries with no or insufficient domestic manufacturing capacities would have the right to import patented medicines produced abroad by making use of compulsory licences under the paragraph 6 system. This already formed an integral part of her country's intellectual property legislation. The system would make it possible for a country with manufacturing and export capacities to authorize the use of a compulsory licence to permit the production of medicines for export to countries in need of such medicines which have no or insufficient supply capacity.

140. The representative of Canada updated Members on the Canadian Access to Medicine Regime, which had come into effect on 14 May 2005. Her delegation was committed to ensuring that the regime was effective, responsive, transparent and accessible to countries that had an interest in using it in their efforts to combat HIV/AIDS, tuberculosis, malaria and other epidemics. In August 2006, Canada's Minister of Health had announced an immediate and comprehensive review of the Access to Medicine Regime in consultation with stakeholders. The review had been built into the legislation

because Canada was one of the first WTO Members to implement the August 2003 Decision and had had to address many key legal and policy issues for the first time. The review would provide an opportunity to identify ways in which a regime could better meet its humanitarian objectives without derogating from international trade obligations and to compare the Canadian legislation with that of other WTO Members which had now implemented the Decision.

141. She recalled that, under the Access to Medicine Regime, Canada had started with an initial list of drugs recognized by the WHO as being essential to the health needs of citizens around the world. The list would minimize the discretion of Canada's Commissioner of Patents in deciding whether to issue a compulsory licence and could be amended to reflect the evolving public health needs of developing and least-developed countries. It had already been amended twice. The first amendment was in response to a request from a non-governmental organization and a Canadian drug manufacturer to add a fixed-dose combination HIV/AIDS therapy. It had passed Health Canada's regulatory review and was now listed on the WHO's prequalification list. Also at the request of a local manufacturer and a non-governmental organization, the second amendment had added Osteltamivir, an antiretroviral drug for the prevention and treatment of the influenza virus. The system was in place and the fixed-dose combination HIV/AIDS therapy was available. All that would remain was for an eligible importing country to request it.

142. To provide information on the regime, her government had developed a CD-Rom that explained the system, the procedures and the documentation. The same information was also available at a special website created for the Access to Medicines Regime (www.camr.gc.ca). Canada's experts stood to provide further information. If potential users did not find the regime to be a feasible option, or did not consider it to be the right choice, her delegation would welcome their feedback. Her delegation would keep Members informed of the results of the domestic review, which was due to be completed by May 2007.

143. The representative of Benin, speaking on behalf of the African Group, said that the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health was of vital importance for the African Group, and particularly for the least developed countries belonging to that group. The process under way for the amendment of the Agreement would enable countries having insufficient or no capacities for the production of medicines to benefit from flexibilities in the form of licences to be granted by WTO Members possessing infrastructure for the production of medicines for export to countries lacking such capacities. African countries would work with their trading partners to implement the Decision.

144. The representative of Switzerland agreed with the Chairman that Members should be encouraged to proceed swiftly to the acceptance of the Protocol Amending the TRIPS Agreement.

145. The representative of Kenya said that his delegation was in the process of depositing its instrument of acceptance of the Protocol. His delegation was seeking assistance from the Commonwealth Secretariat to implement the Decision.

146. The representative of the European Communities informed the Council that his delegation was in the process of accepting the Protocol.

147. The Council agreed on the draft cover note to the report and that the record of the discussion be attached to it, and that the Secretariat be requested to prepare a note on the status of acceptances of the Protocol Amending the TRIPS Agreement, which would be updated for each meeting of the Council.

H. NON-VIOLATION AND SITUATION COMPLAINTS

148. The Chairman recalled that paragraph 45 of the Hong Kong Ministerial Declaration directed the TRIPS Council to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the next session of the Ministerial Conference. It was agreed that, in the meantime, Members would not initiate such complaints under the TRIPS Agreement.

149. He further recalled that, at its meeting in March 2006, the Council had agreed to keep this item on the agenda as a regular item so as to allow Members who had new thinking to share it, and also enable the Council to consider improved ways of organizing its work on this matter.

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

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

151. No statements were made under this agenda item.

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

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

153. The Chairman recalled that Article 24.2 provides that the Council should keep under review the application of the provisions of the GI Section of the Agreement. He informed the Council that he had held consultations on how the Council should organize its future work on this review. These consultations had shown that delegations' views were still divided, although there had been some indications of common thinking. Questions had been raised as regards the purpose of the review. In the light of these consultations, it seemed that Members still needed more time to reflect on the matter. He therefore suggested that he hold further consultations on the matter before the Council's next meeting.

154. He urged those delegations that had not yet provided responses to the Checklist of Questions (document IP/C/13 and Add.1) to do so. He also said that those Members that had already provided responses could provide updates to the extent to which there had been any significant changes to the way they provided protection to geographical indications.

155. The Council agreed to proceed as suggested by the Chair.

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

156. 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 shall 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. The Council had taken up its first annual review of developed country Members' reports on their implementation of Article 66.2 at its meeting in November 2003. At its meeting in June 2006, the Council had agreed to request developed country Members to submit new detailed reports on actions they had taken or planned in pursuance of their commitments for the present meeting.

On 29 August, the Secretariat had issued airgram WTO/AIR/2881 to remind developed country Members of this request.

157. The Council had received new detailed reports from the following developed country Members: Japan; New Zealand; Australia; Switzerland; Norway; the European Communities and individual member States (namely Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, the Slovak Republic, Spain, Sweden and the United Kingdom); the United States; and Canada (being circulated in document IP/C/W/480 and addenda).

158. As regards the purpose and conduct of the review of this information, he recalled that paragraph 2 of the Decision 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.

159. The representative of Bangladesh, speaking on behalf of the LDC Group in the WTO said that his Group was yet to review the reports and requested that the item be retained on the agenda of the Council's next meeting. It would be appreciated if those developed country Members that had submitted reports could clarify how the technical assistance they had provided had led to transfer of technology, as required under Article 66.2. Specific examples of this would be immensely valuable to LDCs, who had great difficulties in acquiring technology. It might be possible to replicate successful examples from one country in another country, if circumstances were right. He said that this subject was most important for LDCs and urged developed country Members to bring out this practical element clearly.

160. The representative of Brazil said that his delegation attached great importance to transfer of technology and that it intended to comment on the reports at the next session. He supported Bangladesh with regard to the need to assess to what extent developed country Members were transferring technology and to what extent they were providing technical assistance, stressing the need to differentiate between these two concepts.

161. The representative of China, associating himself with the statement made by Bangladesh, said that it was important for developed country Members to provide incentives to promote technology transfer to LDC Members in order to enable them to create a sound and viable technological base. He called upon developed country Members to implement more measures to enable their enterprises to engage in effective technology transfer.

162. The representative of India, supporting the statements made by earlier speakers, said that the reports appeared to be very general in nature and that he failed to see how the listed measures were different from those provided as technical assistance. Details should be provided on specific cases from the last year in which technology had been transferred to a least-developed country, including how the technology had been transferred and what incentives the Member concerned had provided to its enterprises. Training programmes for LDCs on how to implement the TRIPS Agreement did not amount to transfer of technology.

163. The Chairman urged those developed country Members that had not yet provided reports to do so, and said that they might wish to take into consideration some of the comments made at the present meeting. As requested by Bangladesh, it was his intention to provide delegations with an opportunity at the Council's next meeting to make further comments on the information submitted for the present meeting that they might not yet have been able to study.

164. The Council took note of the statements made.

L. TECHNICAL COOPERATION AND CAPACITY-BUILDING

165. The Chairman recalled that the Council had agreed, at its meeting in June 2006, to hold its annual review of technical cooperation at the present meeting. In preparation for this annual review, developed country Members had been requested to update information on their technical and financial cooperation activities relevant to the implementation of the TRIPS Agreement. Other Members who had also made available technical cooperation were encouraged to share information on these activities if they so wished. On 29 August 2006, the Secretariat had issued airgram WTO/AIR/2880 reminding Members of this request. Intergovernmental organization observers to the Council as well as the WTO Secretariat had also been invited to provide information.

166. The Council had received information from the following developed country Members: Switzerland; Japan; New Zealand; Norway; Australia; the European Communities and individual member States and agencies (namely Austria, the Czech Republic, Denmark, Finland, France, Germany, Lithuania, Poland, Portugal, Spain, Sweden, the United Kingdom and the Office for Harmonization in the Internal Market); the United States; and Canada (being circulated in documents IP/C/W/476 and addenda). Updated information had been obtained from the following intergovernmental organizations: the OECD, UPOV, UNCTAD, WIPO and WHO (being circulated in document IP/C/W/478 and addenda). In addition, the IMF had informed the Chairman, by means of a letter dated 13 September 2006, that it did not carry out any TRIPS-related technical assistance and, hence, did not have any useful information to provide to the Council. Updated information on the WTO Secretariat's technical cooperation activities in the TRIPS area could be found in document IP/C/W/477.

167. The representative of Bangladesh, speaking on behalf of the LDC Group in the WTO, welcomed the Council's Decision of 29 November 2005 (IP/C/40) extending LDCs' transition period until 1 July 2013, or until such a date on which they ceased to be an LDC. Given that the economic, financial and administrative constraints faced by LDCs had not changed to date, the need for flexibility to create a viable technological base was even more necessary than previously.

168. He said that LDCs were committed to the multilateral trading system and the TRIPS Agreement. It was hoped that, during this extended transition period, LDCs would be able to build up capacity to implement the Agreement. Built into this process was technical assistance and capacity building that was to be offered to LDCs. Without such assistance, the transition period could not be utilized effectively. This relationship between the extended transition period and the building up of implementation capacity was very important. Given that the expected targeted technical and financial assistance had not been delivered in the past, his delegation requested that a clear plan be drawn up detailing the nature and type of technical and financial assistance to be provided to LDCs. To facilitate targeted technical and financial cooperation programmes, paragraph 2 of the Decision called on LDCs to provide as much information as possible on their individual priority needs for technical and financial cooperation, preferably by 1 January 2008. In some cases, LDCs might require technical assistance to identify and prioritize such needs. Arrangements had to be made accordingly in the WTO for LDCs to be able to undertake such needs assessments.

169. The LDCs were still reviewing the information submitted to the Council on technical cooperation activities related to the TRIPS Agreement. The implementation of the Agreement had development implications. The provision of technical assistance and capacity building should not be conditional on compliance with the Agreement. The Agreement contained both rights and obligations with built-in flexibilities to allow countries, especially LDCs, to promote their social policies, development goals and interests.

170. The representative of Brazil recalled the position of developing country Members in the TRIPS Council and also in WIPO according to which technical assistance should not only focus on teaching developing countries how to implement obligations. While recognizing that this was an important component, he said that technical assistance should not be reduced to it. This was why his delegation had presented a development agenda at WIPO, which clearly stated the broader nature of technical assistance, also encompassing how to make full use of the flexibilities and the provisions related to transfer of technology. The IP system was based on a balance between rights and obligations. Technical assistance should fully respect this balance and enable developing countries to not only respect the obligations, but also to make use of and to benefit from the rights.

171. The Chairman urged those Members that had not yet provided updated information to do so. Given that some of the information had been received only recently, and most of it was still only available in its original language, he said that it was his intention to provide Members with an opportunity, at the Council's next meeting, to make further comments on the information submitted for the present meeting that they might not yet have been able to study.

172. The Council took note of the statements made.

M. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS – COMMUNICATION FROM THE EUROPEAN COMMUNITIES

173. The Chairman said that this item had been put on the Council's proposed agenda at the request of the delegation of the European Communities, dated 21 September 2006. He recalled that the Council had discussed this topic at its last three meetings on the basis of three communications from the European Communities, circulated in documents IP/C/W/448, 468 and 471. Furthermore, the Council had just received a new communication from the European Communities, Japan, Switzerland and the United States on "Enforcement of Intellectual Property Rights" (advance copy of IP/C/W/485).

174. The representative of the European Communities said that, in the year 2005, his delegation had initiated a debate in the Council about the worrying status of IPR enforcement worldwide and the negative consequences of counterfeiting and piracy, in particular for the health and safety of EC citizens and the economic viability of legitimate companies and right holders from the European Communities. His delegation had been supported by several Members who had expressed similar concerns and the willingness to continue discussing in the Council the nature of the problem and appropriate solutions to address it. The Joint Communication in document IP/C/W/485 followed on from this debate.

175. He believed that it would be important that Members engage in a constructive discussion on two issues: firstly, on how to implement the enforcement provisions of the TRIPS Agreement in a more effective manner; and secondly, on the accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement efforts, such as promoting interagency co-operation, fostering higher public awareness, and reinforcing institutional frameworks. Additionally, technical assistance had an important role to play in ensuring effective IP enforcement. In this respect, the European Communities was ready, in co-operation with recipients of technical assistance and with relevant international organizations, to better focus its technical assistance in favour of developing countries in order to facilitate the implementation of enforcement provisions.

176. In the past, Members had already provided a valuable contribution on IP enforcement in the form of their replies to the Checklist of Issues on Enforcement (IP/C/5). He reiterated his earlier suggestion that the Secretariat be requested to prepare a synopsis of Members' contributions to the Checklist that could serve as a basis for the above-mentioned discussion. Such a summary would constitute a useful reference for future discussions.

177. He emphasized, firstly, that the intention was not to dispute the freedom of Members to determine the appropriate method of implementing enforcement provisions as provided for in the TRIPS Agreement and, secondly, that the objective of this exercise did not consist of finger-pointing but, on the contrary, of a constructive discussion based on an exchange of best practices that had produced concrete results.

178. The representative of the United States said that his delegation supported a dialogue in the Council on the implementation of the enforcement obligations under the Agreement and the identification of solutions to deficiencies in this area. It was pleased to advance this concept through document IP/C/W/485, which it had co-sponsored with the European Communities, Japan and Switzerland. The paper reflected the growing preoccupation on the part of the United States and other co-sponsors with regard to the increasing scale of global counterfeiting and piracy activity, which had caused profound negative commercial and developmental consequences, not just for the co-sponsors, but for all Members. Addressing these problems effectively would require a multifaceted approach at the national level and through international cooperation. Additional fact- and experience-based discussions of enforcement within the Council could be a useful part of such efforts. Focusing on best practices might be a particularly useful approach. The Council's discussions should focus on the enforcement aspects of the Agreement itself and not extend beyond the scope of the TRIPS rights and obligations. His delegation looked forward to continuing to remain engaged in discussions on this issue, including through a reflection of its experience in the enforcement area.

179. The representative of Argentina said that, in her view, the Council was still at an early stage regarding this issue, given that her delegation and others had requested, since it had first been introduced, that it not be a regular item on the agenda. She asked whether the European Communities had again requested that the item be put on the agenda of the present meeting.

180. As a preliminary reaction to the new Joint Communication in document IP/C/W/485, she said that the focus, proposals and objectives that were being sought through the successive proposals were outside the functions of the Council and the mandate under the TRIPS Agreement. In paragraph 7 of the document, it was suggested that Members engage in a discussion of how to implement the enforcement provisions of the Agreement in a more effective manner. This was not the responsibility of the Council, since there was no mandate under the Agreement to undertake such an examination or to revise its provisions to make them more effective. The Agreement remained as negotiated. If any delegation had questions or concerns about how specific Members had implemented it, appropriate mechanisms were already available, such as reviews of implementing legislation under Article 63 or the dispute settlement system.

181. The second indent of paragraph 7 invited Members to engage in a discussion of, *inter alia*, measures which could enhance the effectiveness of national implementing legislation and cooperation with other institutions. She said that such work was already being undertaken by other organizations, such as the World Customs Organizations (WCO), WIPO and Interpol, which had the mandates to do this.

182. She said that her delegation did not agree with the request for the Secretariat to prepare a synopsis of Members' contributions to the Checklist of Issues on Enforcement. The Checklist had been prepared for and was pertinent merely in regard to the notification exercise as agreed by Members. While other checklists such as the ones on geographical indications or the CBD, were voluntary, this Checklist was a mandatory part of notification of implementing legislation under Article 63.2 of the Agreement. It was not acceptable that the responses given within the scope of this mandatory exercise would be utilized for other purposes.

183. She regretted that the focus of the last indent of paragraph 7 was on developing countries as if they were the only countries in which piracy occurred and that the technical cooperation aspect of the paper was reduced to this preoccupation.

184. Paragraph 5 of the paper read that "such implementation must ensure adequate achievement of the objective of the TRIPS Agreement". She said that she had believed that this language referred to Article 7 of the Agreement, according to which enforcement should be undertaken to increase social benefits and development of developing countries. She would have hoped that the paper would have included something to that effect. However, she had realized that this language was in fact referring to technical cooperation and developing countries as if they were the only source of piracy. The only preoccupation was to facilitate the implementation of "enforcement provisions" and there was nothing referring to the objectives of Article 7 of the Agreement. The Council should not spend time on this issue even in the context of technical cooperation, because enforcement was being addressed by other organizations at the international level. For example, as indicated in paragraph 63 of document IP/C/W/478/Add.3 containing information on its technical cooperation activities, WIPO had undertaken, alone or in cooperation with other intergovernmental organizations and governments, many activities related to enforcement.

185. She felt that it was not the right time to continue discussing this topic. There were other topics of greater importance to developing and least-developed countries, such as the issue of technology transfer under Article 66.2, on which she suggested the Council should focus. Enforcement should not continue to be put on the agenda, because there was no consensus to debate it on the bases on which the proposals had been presented.

186. Responding to the question posed by the representative of Argentina, the Chairman said that, as he had indicated in introducing this agenda item, this item had been put on the Council's proposed agenda at the request of the delegation of the European Communities, dated 21 September 2006.

187. The representative of Japan, associating himself with the statements made by the European Communities and the United States, said that counterfeiting and piracy were growing globally. This was shown in a report by the World Customs Organization and Interpol, according to which the value of counterfeit goods traded annually worldwide had already reached 500 billion Euros. Taking into account the adverse effects of counterfeiting and piracy, such as the impediments to legitimate economic activities and the threat to consumers' safety, all WTO Members should cooperate to solve this global problem. For this purpose it was important to appropriately and effectively enforce IPRs. Therefore, Japan, as one of the co-sponsors of the Joint Communication, was in favour of the Council addressing this issue, with all Members engaging in a constructive discussion on how to more effectively and cooperatively implement the TRIPS enforcement provisions with a view to combating counterfeiting and piracy.

188. The representative of Switzerland said that the fact that his delegation had co-sponsored the Joint Communication reflected the importance it attached to having this subject discussed in the Council. This was the appropriate body to examine the subject and to assist Members in the implementation of the enforcement provisions of the Agreement, as contained in its Part III. In fact, it was the only appropriate forum to do so, since one of the Council's key responsibilities was to monitor the operation of the Agreement. Considering that the TRIPS Agreement was the first international IP agreement to contain a chapter on enforcement, the Council should dedicate particular attention to the workability of its provisions on this matter.

189. The discussion proposed by the Joint Communication was not about amending the relevant provisions of the Agreement. Neither was it about finger-pointing, nor about systematically reviewing the relevant legislation of individual Members, as had been done in the context of the overall review of Members' implementing legislation at the time they were obliged to start to apply its

provisions. Furthermore, the objective of the proposed discussion should not be to enforce the TRIPS provision in WTO Members, nor to duplicate the work that had been done in other forums.

190. Considering the devastating impact of counterfeiting and piracy on national and international economies as well as on the well-being of consumers and public health globally, he believed that the Council had the duty to deal with this matter within the limits of its responsibilities, i.e. the provisions of Part III of the Agreement. By doing that, the Council would ensure that IPR protection and enforcement, in accordance with the Agreement, could make a contribution to the social and economic welfare of Members.

191. Members should consider the difficulties they were having in effectively implementing the enforcement provisions at the national level, and discuss measures and mechanisms through which these difficulties could be addressed so as to allow the Council to assist them in fulfilling their obligations under the Agreement. He also invited Members to share their experiences – whether positive or negative – with the Council, as well as their efforts in this area during the last ten years, so that other Members might benefit from them and learn about new ways and means to address the problems they were facing. That could allow joint work towards solutions to enhance the effectiveness of Members' efforts to address IP enforcement and to combat counterfeiting and piracy - problems that had become prevalent and negatively impacted on all Members.

192. The representative of China reiterated his delegation's view that the issue of enforcement should never become a regular item of the Council's agenda. As the minutes of previous meetings showed, this item was opposed by many developing countries. He therefore expressed concern about the new Joint Communication. Article 1.1 of the Agreement provided that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". Accordingly, enforcement measures should be adopted mainly at the national level. Most developing country Members had devoted enormous administrative and judicial resources to IPR enforcement with significant progress in this field; and such efforts were continuing. The proposals on enforcement went beyond the provisions of the Agreement.

193. With its mandate for the exchange of information, awareness raising and coordination of technical assistance programmes, WIPO's Advisory Committee on Enforcement was well equipped to address and discuss the issue of enforcement. There was no reason for the Council to duplicate the work done by other international organizations. The inclusion of this item on the Council's agenda and any substantial discussion arising from the Joint Communication would not only repeat the work that had been carried out in other relevant international organizations such as WIPO but would also waste the resources of the WTO and divert Members' attention away from the work they should be focusing on. As a consequence, this would further expand the imbalance of interests between developed and developing Members already present under the Agreement.

194. His delegation maintained its view that this issue should not appear on the agenda of the Council's next meeting. Furthermore, it did not agree with the request made by the co-sponsors of the Joint Communication that the Secretariat prepare a synopsis of Members' contributions to the Checklist of Issues on Enforcement. He was concerned that the co-sponsors would attempt to judge and examine the status of the implementation of IPRs in other Members and make conclusions on a non-factual basis. He saw no reason for Members to consider any substantial initiatives in such proposals. He said that, therefore, China would not participate in any detailed technical discussions and asked for the deletion of the item from the Council's agenda.

195. The representative of Canada said that her delegation saw counterfeiting and piracy as an increasing global problem with implications for all WTO Members that would go well beyond economic effects. Canada was concerned about the increasing role played by organized crime in this matter and with its effects on safety and public health. Canada had found counterfeited electrical

devices, automobile parts and pharmaceuticals in its market. This was one of the reasons why it was currently examining its approach to the enforcement of IPRs at the borders, an important element in the fight against piracy and counterfeiting.

196. Counterfeiting and piracy was a phenomenon that could not be ignored and one in regard to which the WTO had a role to play. Therefore, it was both appropriate and timely to discuss IP enforcement issues in the TRIPS Council. Canada looked forward to the debate on the issues raised in communication IP/C/W/485 and thanked its co-sponsors for raising them. Canada saw many positive elements in this paper, such as its call for inter-agency cooperation, higher public awareness and a better focus on technical assistance. IP enforcement had indeed been addressed in a variety of contexts, including in WIPO, APEC and the OECD. This indicated the need to coordinate these approaches and work together. Canada therefore urged all WTO Members to take a constructive approach to this matter. For example, it would be very helpful if they could share best practices and experiences, as many of the most troublesome challenges were issues that were common to many, if not most, Members. A discussion in the TRIPS Council would not represent the whole solution to this problem, but it would certainly be an important contribution to this work.

197. The representative of Chile said that the topic of enforcement was of fundamental importance, which his country took very seriously. Chile believed that intellectual property was a useful tool for development if utilized in a way that was balanced and did not unnecessarily hamper trade. Chile had high standards of intellectual property and a good rating regarding enforcement. Nevertheless, the proposal by the European Communities, now accompanied by other Members, presented some uncertainties.

198. Apart from the duplication of activities with other international organizations, the imprecise language used in the various documents tabled on this matter also raised other concerns. They referred principally to counterfeit and pirated goods that, under the Agreement, related to trademarks and copyrights. The documents then referred to fraudulent goods and later on to infringing goods. Furthermore, some of the documents set out a methodology which was imprecise. For instance, as to the references to the goods that had been suspended at the border, it was not clear whether they were infringing or grey-market goods. It was not clear whether the perceived problem was insufficient TRIPS norms, inadequate implementation, or ineffective enforcement. He said that he would appreciate a clarification from the Swiss delegation on whether the intention was to modify the Agreement. Some of the documents tabled by the European Communities implied that the Council should modify the Agreement.

199. The Checklist on Enforcement served a particular purpose and, if it were to be used in the way proposed by the European Communities, it could give the impression that certain questions in it reflected obligations that went beyond the TRIPS requirements. Noting that the last indent of paragraph 7 of the Joint Communication limited technical cooperation to enforcement, he said that technical cooperation should be undertaken in all areas of the Agreement.

200. The representative of Australia said that effective enforcement of IPRs was becoming an increasingly important issue. In Australia, a coherent national strategy on enforcement of IPRs had become a national priority. She saw value in fostering a dialogue in the Council on national experiences in combating piracy and counterfeiting. The experience that Members would share could assist other Members' own considerations of the issues. Such a dialogue could also be a useful complement to the work being undertaken elsewhere. The Council needed to keep in mind that this was a sensitive issue in considering how to ensure that its discussions would be constructive. A dialogue, as proposed by the European Communities, the United States, Japan and Switzerland, would not necessarily exclude the consideration of approaches and concerns of all Members.

201. The representative of Brazil said that his delegation was increasingly concerned with the proposals from developed countries in the Council that would in practice lead to a partial and unbalanced implementation of the Agreement to the detriment of developing countries. Members' rights and obligations under the Agreement could not be fulfilled or considered on a piecemeal or selective basis. The TRIPS obligations on enforcement already imposed a relatively higher burden and challenges for developing countries *vis-à-vis* developed ones. National enforcement measures taken by developing countries had resulted in high costs, both economic and social.

202. The new paper tabled by the European Communities with the support of Japan, Switzerland and the United States purported to examine the implementation of the TRIPS provisions, understand the difficulties regarding their implementation, and make recommendations by laying down benchmarks and best practices on enforcement. In his view, it was incompatible with Article 1.1 of the Agreement, which stated clearly that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." The proposal seemed to be intended to identify the appropriate mechanisms to deal with the difficulties of implementing the Agreement. However, the evaluation of what these appropriate mechanisms should be was a subject left entirely to the discretion of national governments according to the provisions of Article 1.1. Therefore, the proposal ran counter to the Agreement by eroding Members' rights under Article 1.1.

203. The exchange of information on national laws and measures concerning the enforcement of IPRs were issues that were currently under discussion in other forums, such as WIPO's Advisory Committee on Enforcement, and in the WCO. This work should not be duplicated in the Council, which already faced more important tasks. Many countries had their own national strategies for combating piracy or implementing the enforcement provisions of the Agreement, as indicated by Canada, Australia and others. Brazil also had its own programme, which was very effective and had been the object of priority action through the national committee for combating piracy. Brazil, as well as other developing countries, had been active in WIPO's Advisory Committee on Enforcement in exchanging information on their national activities in this field. This Committee was the appropriate forum for this discussion and Brazil supported the continuation of its activities, including the exchange of information on national initiatives.

204. Despite the pause in the Doha Round, it was Brazil's strong belief that outstanding implementation issues, which were referred to under a mandate within those negotiations, remained an issue of utmost importance for the TRIPS Council. This issue still required the full attention of the Council, which should not be detracted from it because of work with other issues that were not within its mandate. He said that the original idea of the implementation issues agenda derived from the perception of many Members that the agreements negotiated during the Uruguay Round were not being adequately implemented, or were not being implemented in a balanced way that would fully respect the rights and obligations of developing country Members. He saw the present agenda item as an initiative that would only enhance that unbalanced approach to the implementation of those agreements. This was precisely what developing countries were questioning when they put forward the idea of having an implementation agenda.

205. For the above reasons, he said that the recommendations that were contained in the new paper were detrimental to the delicate balance of rights and obligations established in the Agreement. Brazil did not agree to hold in-depth discussions on enforcement of IPRs. Specific difficulties in implementing the so-called relevant TRIPS provisions should be addressed on a case-by-case basis by those Members seeking technical cooperation individually or in the DSB. An examination of appropriate mechanisms to address these difficulties should not become a permanent item of the Council's agenda. He agreed with those Members, in particular Argentina, who had argued that the new proposal seemed to place developing countries as the focus of enforcement concerns. This was unacceptable, as developing countries were not necessarily the ones that were most responsible for

counterfeiting and piracy, neither in global nor in quantitative terms. As these were global issues, he saw no reason for working under the premise that developing countries were a major object of concern regarding enforcement.

206. He drew Members' attention to the development agenda presented by a group of developing countries at WIPO, which contained a large section on technical assistance. In this context, his delegation had emphasized that technical assistance provided by WIPO on TRIPS implementation should be balanced. It should not only focus on certain or selective commitments of Members, but assist them towards a full and complete implementation of both obligations and rights under the Agreement. Such rights included the flexibility under Article 1.1 of the Agreement. Other examples of flexibility were issues related to the transfer of technology, promotion of economic and social development and many others that were spread throughout the Agreement. He wished that the Agreement be read by all Members in its entirety and not on a selective, piecemeal basis.

207. The representative of Venezuela associated himself with the statements by Argentina, Brazil, China and Chile concerning the imprecision of the proposals in IP/C/W/485. At this time, the Council did not need this new topic or the reformulation of its mandate. The inclusion of technical cooperation would overburden developing country Members with a responsibility in the area of enforcement at a time when efforts at the national level were already being made. Venezuela's own programme against infringing goods was quite successful and improving continuously. Efforts and initiatives were needed on topics of greater importance for developing countries, such as the protection of traditional knowledge and folklore, and the relationship between the TRIPS Agreement and the CBD.

208. The representative of India said that he was uncomfortable with the idea of singling out just one section of the TRIPS Agreement for discussion in the manner that had been proposed. The Agreement represented a delicate balance of rights and obligations and had to be seen in its entirety. The focus, therefore, could not be only on its obligations.

209. Article 1.1 of the Agreement provided Members with the freedom to determine the appropriate method of implementing its provisions within their own legal system and practice. He was afraid that, once Members started discussing appropriate methods of implementing the enforcement provisions, they would consider the adequate achievement of the objectives of the Agreement only from the point of view of its obligations. This would tread on the policy space and national flexibility provided under that Article. Therefore, he could not support the proposal that the Council search for a coordinated response to enforcement, including the promotion of best practices.

210. The WIPO Advisory Committee on Enforcement, which had been discussing this issue at great length, was the appropriate forum to take up the discussion. In addition, Members that wished to raise any specific issue related to enforcement could do so under the existing review mechanism in the TRIPS Agreement, or could use the WTO dispute settlement mechanism. As to the proposal on technical cooperation in the new communication, he said that such activities were not needed only in terms of discharging the obligations but also for ensuring that the rights that had accrued to Members really flowed to them. In this regard, he called Members' attention to a proposal on technical cooperation at WIPO, which had been tabled by developing countries and should be taken forward. He said that his delegation did not feel that the item should be kept as a permanent item on the Council's agenda or that it should be discussed in the Council in its present form at all.

211. The representative of the European Communities said that he wished to address some of the comments made on the Joint Communication in document IP/C/W/485. He thanked Australia for having noted that the Joint Proposal was sensitive to the criticisms raised by some Members. It pointed towards a positive approach to a debate that should be constructive and not based on finger-pointing or accusations *vis-à-vis* other Members. He also thanked Members for reminding the

Council that there existed other mechanisms to deal with the issue such as the dispute settlement system which, however, was not the approach that his delegation would wish to take.

212. He said that, on one hand, several Members had mentioned that enforcement imposed a burden on their legal systems and that they were making efforts to tackle this issue. On the other hand, they had also said that they would refuse to discuss this issue or even share their best practices with other Members, despite references to successful programmes in some countries. He would certainly appreciate seeing examples of the ways in which Members had promoted enforcement in their territories within the freedom granted by Article 1.1 of the Agreement.

213. He noted that some Members had stated that the Council should look at the implementation of the Agreement in a balanced manner. He said that his delegation had participated in and made contributions to the Council's debates on issues like biodiversity, technical assistance and transfer of technology. However, when it came to enforcement, some Members simply refused to have it discussed and proposed that the Council spend its time on something else. He, therefore, failed to see where the balance mentioned by these Members was.

214. He noted that some Members had mentioned that piracy and counterfeiting were a global problem, as had also been acknowledged in the first paragraph of the Joint Communication. It was precisely for this reason that the Council would be the best forum to discuss it. He failed to understand how Members could say, on one hand, that this was a global problem and, on the other hand, accuse the new paper of pointing the finger at developing countries. In fact, the only reference to developing countries was at the end of the paper, where the co-sponsors expressed their readiness to look, together with recipient countries of technical assistance, at how best to address this problem. The reason for this reference was that the recipients of technical cooperation were usually developing countries.

215. Responding to the criticism that the Joint Communication did not refer to Article 7 of the Agreement, he said that this Article was reflected throughout the proposal. To say the contrary might imply that some would consider that piracy, counterfeiting or trafficking in dangerous products related to development. Tackling IPR infringements that were often undertaken by organized crime and presented risks to health and safety would promote development, innovation and progress. As to the comments on duplication of work, he referred to the responses by Switzerland.

216. He recalled that, at the Council's meeting in March 2006, his delegation had introduced a Communication (IP/C/W/471) aiming at initiating a debate on the use of customs measures as a means to fight the global traffic in IPR infringing goods. Customs' prime role in stopping the international movement of fake goods was shown by the fact that they were responsible for approximately 70% of all seizures of counterfeits made globally. At the present meeting, his delegation wished to continue this process on EC best practices. A colleague from the department in charge of the Internal Market within the Commission would present the main features of the EC Directive on the enforcement of IPRs within the EU Single Market.

217. The representative of Argentina asked, as a procedural question, whether the European Communities had notified the Directive in question to the Council as national implementing legislation.

218. The representative of the European Communities responded that he would have to verify whether or not the Directive had been notified.

219. The representative of Argentina said that there was a specific item on the Council's agenda concerning notifications of national laws and regulations, under which the said regulations were examined. There was no agreement to discuss this topic under the present agenda item. Neither was

there agreement on any of the specific proposals in the various documents presented, including on presentations of national experiences and best practices. Although her delegation was open to listening to the EC presentation under agenda item B, it was not willing to do so under the current agenda item due to this lack of agreement.

220. The representatives of China, Brazil and Venezuela associated themselves with the statement made by Argentina.

221. The representative of the European Communities, referring to its introduction of its communication IP/C/W/471 at the Council's meeting in March 2006, said that it was his delegation's intention to continue this process on its best practices and present the main features of the EC Directive on the enforcement of IPRs within the EU single market. He said that, with the Chair's permission, his colleague would like to take the floor.

222. The Chairman said that, in his experience in the WTO, Members had always been able to compromise on matters like these. The delegation of the European Communities had made a written request that the item to be put on the agenda. It had also indicated to the Secretariat and to him that it would like to make a presentation as part of addressing the issue. He recalled that, at an earlier Council meeting, an EC representative from its customs administration had made a presentation on this subject. It did not seem to him that a presentation outlining the EC experience would cause any injury to those Members who were not inclined to go along with a discussion on the issue. He added that Members still had the facility whereby the European Communities would have to make a written request for this item to be pursued at a future meeting. However, in his view, once such a request had been made at the appropriate time and the agenda had been adopted on the basis of that request, it was not unreasonable for the European Communities to be heard. He therefore asked whether Members could agree to hear the presentation.

223. The representative of Brazil said that the inclusion of this item on the agenda had not given Members a forewarning that there would be a PowerPoint presentation on this subject by the European Communities. The problem was that he did not wish that the presentation would imply that Brazil was accepting that enforcement should be discussed as an item of the Council. The appropriate agenda item to put forward this kind of presentation was "Reviews of National Implementing Legislation", but not the present item, since Members had not agreed to in-depth discussions under it, be it through national experience, best practices, or the like. There were many Members who disagreed with the idea of holding these kinds of discussions. He believed that this was a substantive rather than only a procedural matter. The position of some Members that the Council did not have a mandate for this kind of discussion also had to be respected. He wondered whether a compromise could lie in the nature of the agenda item under which this presentation would be made.

224. The representative of China, associating himself with the statement made by Brazil, said that the EC request had not been communicated to Members and that the presentation of EC best practices had not been reflected in the agenda item, which merely referred to a "Communication from the European Communities". Neither had he seen any advance copy of the presentation. Therefore, there was no reason for the Council to waste time listening to the presentation.

225. The representative of Venezuela said that there was an imbalance regarding the amount of time dedicated to different topics. The previous day, only little time had been spent on agenda items D, E and F, which were of greater importance to developing countries.

226. Responding to the comments made by Venezuela, the Chairman clarified that the amount of time that an agenda item took depended on how much time Members wished to spend on it. The items in question had not been closed until there were no more requests for the floor.

227. The representative of Venezuela said that he was not questioning the Chair's actions, but was merely pointing out how much time was spent on certain discussions that had recently appeared on the agenda, while there were other pending issues on the agenda.

228. The representative of the United States said, as a point of order, that the adopted agenda clearly indicated that the European Communities was the requester of the item under discussion. Certain deference should be shown to a requesting Member with respect to an item that they had requested and that such a Member should be allowed to make whatever presentations it deemed appropriate under that agenda item. Members would expect the same deference to apply in many other circumstances.

229. The Chairman said that there seemed to be two options, namely to hear the EC presentation under item M or to reopen item B. These two options would respect the WTO practice under which Members were willing to respectfully hear each other out, whether they agreed or not. He therefore asked whether there was any objection to hearing the EC presentation under agenda item M or whether there was any objection to reopening agenda item B, as suggested by some Members.

230. The representative of the United States, as a point of order, said that he objected to reopening the previous agenda item. Members were dealing with a subject-matter on the basis of a request from a Member. It was extremely important, as a systemic matter for this body and for other bodies of the WTO, that Members who had requested discussion would be free to present whatever material they deemed appropriate under that item. His delegation would certainly expect to follow that practice with respect to any similar request from any other WTO Member.

231. The representative of the European Communities, associating himself with the US statement, said that the purpose of the presentation, as had been indicated in the earlier EC communications, was to provide information on how it was tackling the issue of enforcement, as one possible way to address this problem. This had nothing to do with review of legislation. The Directive provided guidelines for EC member States, which were to implement it in their own national legislations. The purpose was not to discuss it under any another agenda item. The presentation fell entirely under the agenda item that his delegation had requested.

232. The Chairman said that, as Brazil had mentioned, this was an issue of both substance and procedure. Procedurally, the Council was dealing with it at the EC's request. The custom was that Members respectfully hear each other, whether they disagree or not. At the end of the day, all still had to work together for the rest of the session and in future sessions. As a compromise, he suggested that the European Communities make a brief presentation summarizing the issues on the basis of its experience, and submit in writing any additional detail contained in the presentation to be circulated to Members.

233. The representative of Argentina said that her delegation had made a compromise and showed flexibility in accepting the item on the agenda. The focus of her concerns about the proposals was the exchange of national experiences and best practices, precisely what the European Communities wished to do under this agenda item. This was perhaps the fourth session in which the European Communities and other delegations had had the opportunity to present the issue. Her delegation had respectfully listened to these presentations, even though it did not agree with the EC point of view. For that reason the compromise should be mutual. A possible compromise might be that the European Communities give its presentation on the Directive at the Council's next meeting, once it had notified it as implementing legislation. If it were to be agreed that, under the present item, Members would exchange information on their national experiences or best practices, then all Members should have an opportunity to do so. At present, there was no such agreement, which would be neither timely nor appropriate.

234. The Chairman said that he understood the concerns about the substance, which would always remain in the hands of Members. As far as the procedure was concerned, he maintained that the item was on the agenda, and that he was still not satisfied that there was a valid argument against hearing the presentation. The compromise he had suggested was in response to those Members who had concerns about the subject-matter.

235. The representative of Brazil said that, while this item posed a great deal of problems for Brazil and other Members, his delegation had tried to deal with it constructively by avoiding the use of words such as "objecting". He wished to find a solution that was adequate and respectful, not only of the position of the Member who wished to make the presentation, but also of the position of the many Members who believed that making the presentation would substantively harm their positions regarding this subject. This was not a procedural issue on which a ruling could be made. It was an issue of substance and part of the agenda item that his and other delegations, in good faith, had accepted to discuss.

236. He said that, if this was the way that meetings on this issue would be carried out, his delegation would object to a proposed agenda for the Council's next meeting that would contain this item. While he believed that all Members should be heard, he also believed that they should have an understanding of the positions of others. This was not a Council just for one Member to put forth its own national experience in a manner that could prejudice the position of other Members regarding whether this was an adequate place to discuss its particular national experience or not. This was a very delicate subject, and if it appeared in the report that the European Communities had made a presentation on its Directive under an item on enforcement of IPRs, next time this could become the precedent and prejudice the position of others who believed that this should not have occurred and that the Council was not the appropriate forum for making these presentations. This was therefore a substantive rather than procedural issue. There should be respect also for those who had already listened to the European Communities on four occasions and had even responded at length to its proposals. Nowhere in this agenda item had there been any forewarning as to the European Communities wanting to make a detailed PowerPoint presentation on its Directive, and nowhere had Members been forewarned that the EC Directive would be the substantive issue to be debated as enforcement or as best practices of intellectual property. The Council should be more balanced in its decisions and more respectful of the position of all Members, and not only of a few Members.

237. The representative of the United States said that the Council did not need to decide at the present meeting on the methodology for considering enforcement. There were a number of items on extremely significant issues that were regularly discussed in this Council, including possibilities for amending the Agreement. Members had carefully listened to each other and exchanged questions and answers in a constructive manner as a means of moving forward the discussion. He saw no reason why Members could not follow a similar procedure in the discussion under this agenda item. He reiterated that the agenda had been adopted with this item, which was being dealt with as an item under which the European Communities had put forward a proposal. If Members were to be concerned with the creation of precedents, then they should be concerned about the precedent in which once an agenda had been adopted, one saw possibilities for blocking the freedom of expression of Members of the Council to bring forward proposals.

238. The representative of China, associating himself with the statements by Brazil and Argentina, said that, although the agenda had been adopted with this item, there had been no advance indication that there would be a presentation on this item, which therefore had been a total surprise to all Members. This was a very important substantive issue, rather than a procedural issue, and the Council should avoid setting a bad precedent. His delegation had already shown respect to the European Communities in respect of this item, but the European Communities should not go too far on this item in the absence of agreement on the important substantive issues.

239. The representative of Costa Rica said that, while a Member had the right to bring a topic on the agenda and the right to be heard, the other Members had the right to know in advance what was the content of the topic on the agenda. Some Members had been surprised that there would be a presentation on the EC legislation. There was no consensus to discuss the substance. He said that a possible way for moving forward might be that the European Communities make its presentation under "Other Business" with the understanding that it would notify the Directive as implementing legislation for the Council's next meeting.

240. The representative of the European Communities said that the item had been put on the proposed agenda at its request, and the Council had adopted the agenda. It was his understanding that several Members were interested in discussing enforcement and hearing the EC presentation on its best practices. It was important for the Council to have this discussion and the presentation on the EC Directive on Enforcement. Members were free, once an agenda item had been accepted, to say what they wanted within the available time.

241. The Chairman suspended the meeting so as to allow him to consult with those delegations who had spoken on the matter.

242. Resuming the meeting, the Chairman said that, as he had indicated when he had suspended the meeting, he had consulted on how to proceed with those delegations who had spoken on this matter and, as a result of the consultations, he would offer the floor to the delegation of the European Communities.

243. The representative of the European Communities said that the EC had taken initiatives in its fight against counterfeiting and piracy at three levels: within the internal market of the European Union; in the field of its customs regime, which had been modernized in 2004; and in terms of a policy *vis-à-vis* the respect of IPRs in third countries. The initiatives within the internal market included two pieces of legislation. Directive 2004/48/EC on the enforcement of intellectual property rights ("Enforcement Directive") contained measures, procedures and remedies that courts in the EC member States should apply to IPR infringement cases. Another initiative, still under discussion within the EU, dealt with criminal sanctions to combat intellectual property offences.

244. In general, a directive defined obligations for the EC member States but left it to each individual member State to choose the means to transpose these obligations into its national law. Directives were adopted to harmonize the laws of the 25, or soon 27, member States. The Enforcement Directive had been adopted on 29 April 2004, and member States had had until 29 April 2006 to transpose it into their national law. The Directive had been proposed by the European Commission and had been formally adopted by the Council of the European Union, in which the member States were represented, as well as by the European Parliament.

245. The Enforcement Directive was intended to complement substantive IP provisions, and did not create new, substantive IP laws or modify or extend existing ones. It dealt exclusively with the enforcement of these IPRs. All EC member States and the European Communities itself were Members of the WTO, and the TRIPS Agreement was the basis of the Directive. It also built on the best practices of EC member States. It took the best practices that were already being applied effectively in one or more member States, and then harmonized them throughout the European Union. The Directive contained only minimum standards, which meant that any member State could introduce measures that gave more protection to right holders. In that respect, the approach in the Directive was similar to that used in the TRIPS Agreement.

246. He stressed that enforcement issues were now subject to the review by the European Court of Justice (ECJ). As a consequence, any court in the European Union that had doubts about the proper interpretation of the Directive could ask the ECJ's opinion. Therefore, member States would not only

have the same legal text but also a uniform interpretation of the wording of the Directive. It was important that the ECJ had the final say in all these matters in the context of infringement procedures. This meant that any member State that was not respecting the obligations of the Directive because, for example, it had not transposed it in time or had done so incorrectly, or did not apply it in the proper way, could be subjected to an action brought by the Commission before the ECJ. In order to assist member States to implement the Directive, the European Commission had convened some meetings to discuss practical matters of transposition and to exchange experiences, respecting the fact that finally every single member State could transpose it in a way that best fitted it.

247. Regarding the scope of the Directive, he said that the Directive applied to infringements of all IPRs. This was a horizontal approach, which could also be found in the TRIPS Agreement. More specifically, the Directive applied to the infringement of IPRs "as provided for by Community law and/or by the law of the member States concerned". The European Commission had published a list of IPRs that it believed were governed by this language of the Directive in order to enhance legal certainty and give some interpretative guidance to member States. The Directive covered, for example, copyright, trademarks and industrial designs, but also geographical indications, plant variety rights and even trade names, insofar as protected as an exclusive IPR in the member State concerned. Those member States that provided protection for utility models should also apply the Directive to infringements of utility models.

248. Turning to the substantive provisions of the Directive, he said that its general obligations reflected those of Article 41 of the TRIPS Agreement. Paragraphs 1 and 2 of Article 41 stated that measures, procedures and remedies shall be fair and equitable, not unnecessarily complicated or costly, and applied in such a manner as to avoid barriers to legitimate trade and to provide for safeguards against their abuse. This kind of terminology was also found in the Directive. There were also some other general obligations that were typical of EC legislation, for instance, the fact that remedies and the procedures should be effective, proportionate and dissuasive.

249. The issue of evidence was very important. Normally in IPR infringement cases evidence was mainly in the hands of the infringer himself. For this reason, the Directive reflected the language of Article 43 of the TRIPS Agreement by providing that the right holder submit reasonably available evidence. Then the court could order the production of that evidence if that was in the control of the opposing party, for example, by means of sampling. In addition to this TRIPS language, the Directive contained the possibility for a court to oblige the infringer to communicate banking, financial or commercial documents that were under the control of the opposing party, provided that alleged infringements took place on a commercial scale. The Directive foresaw, under provisional measures, the need to preserve relevant evidence, particularly when there was a likelihood of irreparable harm or the destruction of evidence. Obviously, if that were the case, some safeguards should be included and, in fact, the Directive contained several safeguards for the parties affected by such a measure. For example, for provisional measures *inaudita altera parte*, i.e. without prior hearing of the other party, there was a list of safeguards for the opposing party.

250. The Directive contained a provision on the right of information. This was a familiar concept from Article 47 of the TRIPS Agreement, under which the right was optional. However, under the Directive, the right of information was made compulsory in order to trace the origin and the distribution networks of the counterfeited products. A court could order the submission of the names, addresses and the quantities in question and the prices of the counterfeited products. The measure could be addressed not only to the infringer, as under Article 47 of the TRIPS Agreement, but also to any other person who had been involved in the distribution or manufacturing of the counterfeited products. It foresaw the possibility of including measures taken *vis-à-vis* intermediaries, like Internet service providers. Obviously, the right of information, as set out in the Directive, was a strong measure, and the Directive also contained many related safeguards, for instance, on rules on the use of

the information in civil and criminal proceedings, rules on self incrimination, and very importantly, also rules on the protection of confidential information or personal data.

251. The provisional measures mirrored the provisions of Article 50 of the TRIPS Agreement. But, also in this regard, the Directive went somewhat further. For example, provisional measures could also be taken against intermediaries whose services were being used by third parties to infringe a right.

252. Regarding corrective measures, which partly reflected Article 46 of the TRIPS Agreement, he explained they were measures taken on the merits of a case. They could take the following forms: recall from the channels of commerce; and definitive removal from the channels of commerce or the destruction, not only of the infringed goods, but also of the materials and the implements which were principally used in the creation or the manufacture of these goods.

253. Another set of provisions of the Directive related to damages and legal costs. Damages, which were also provided for in Article 45 of the TRIPS Agreement, guaranteed adequate damages to compensate for the injury to the right holder. The Directive, however, was much more detailed than the TRIPS Agreement. First, it provided that the right holder had the right to damages appropriate to the actual prejudice suffered by him as a result of the infringement, which was more or less equivalent to the language of Article 45 of the TRIPS Agreement. However, the Directive went further to also include some guidelines for the courts on how to calculate these damages. The EC member States' courts had two possibilities: one option was to calculate the damages on the basis of all appropriate aspects, such as the negative economic consequences for the right holder (e.g. lost profits and unfair profits made by the infringer) and other than economic factors (e.g. moral prejudice). In other words, this option would be to calculate on the basis of the real damages. Another option was to impose a lump sum, to be paid on the basis of elements such as "at least" the amount of royalties or fees, which would have been due if the infringer had requested authorization to use the intellectual property right in question. However, it had not been the intention to introduce punitive damages. That did not mean that punitive damages were not possible within the European Union and its member States, but only that this was a choice left to each individual member State to decide. There was no obligation to do so, but member States could, if they so wished, impose punitive damages for IPR infringement.

254. As to legal costs, which were also reflected in the second paragraph of Article 45 of the TRIPS Agreement, he said that the Directive took a "the-loser-bears-it-all approach" rather than a "the-winner-takes-it-all approach". This meant that anyone who was successful in a litigation could claim all legal costs and other expenses, provided they were reasonable and proportionate. Similarly, another provision which would lead to a change in practices in several EC member States was to publish decisions to serve as a "name-and-shame" sanction. This was a compulsory regime that would have to be implemented by those members which did not already have it. It basically meant that courts could order appropriate measures for the dissemination of the information concerning the decision through the publication of the decision in whole or in part in certain specified magazines or on the Internet. The publication of decisions was at the request of the right holder and at the expense of the infringer.

255. There was an optional provision on access to courts, which determined persons who were entitled to go to court and apply for these measures, procedures and remedies. This was an optional system and the Commission hoped that this would be an incentive for member States to e.g. provide access to right management bodies. There was another provision on the presumption of authorship or ownership, which echoed the second paragraph of Article 15 of the Berne Convention. There was also a provision that required member States to promote the conclusion of codes of conduct by private businesses, e.g. SID codes. A further provision created a correspondence network between member States and the Commission. After three years there would be an evaluation on the application of the Directive.

256. He concluded by saying that the European Communities took the fight against counterfeiting and piracy seriously. It was a joint responsibility shared by the Communities and its member States. It was also the responsibility of the civil society. He believed that the Enforcement Directive provided an appropriate balance between all the interests involved, the right holders, alleged infringers and intermediaries, and consumers.

257. The representative of the European Communities reiterated that his delegation saw this exercise in a very constructive spirit of sharing experiences and looking for balanced solutions to very important problems like infringements. As he had indicated before, the presentation had not contained any finger pointing or naming of countries. He said he would be ready to answer any questions or comments in the Council's next meeting and encouraged Members who also had enforcement experiences, whether good or bad, to share them with the membership.

258. The representative of Brazil said that the rules of Directive 2004/48/EC might not necessarily represent the best solution in the area of enforcement for the whole international community. He failed to understand the compatibility of the EC proposals with the Council's mandate as contained in Article 68 of the TRIPS Agreement, according to which the Council should monitor the operation of the Agreement, and in particular, Members' compliance with their obligations under it, and should afford Members the opportunity of consulting on matters relating to the trade-related aspects of IPRs. The powers to interpret and recommend actions, as proposed in the EC documents, could also involve a conflict of mandate between the Council and the Dispute Settlement Body, which was responsible, according to the TRIPS Agreement, for judging allegations of non-compliance with the rules on enforcement of IPRs.

259. He said that other delegations had raised the point of whether the EC Directive had been notified to the TRIPS Council. This was an extremely important issue because Article 41 of the Agreement clearly stated that enforcement measures, in themselves, should not create barriers to legitimate trade and should provide safeguards against their abuse. Although the EC representative had said that there was no finger pointing or mentioning of Member countries, such acts had happened within the context of the European Communities' broader actions related to intellectual property rights. Finger pointing on a unilateral basis, outside the framework of the Agreement, could be equated with creating barriers to legitimate trade, in particular of developing countries. This was a point that should be adequately considered under the appropriate agenda item of the Council, the item on notifications, reviews of national implementing legislation, and not under the current one.

260. The Council took note of the statements made.

N. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

261. The Chairman said that, at its meeting of 12 October 2006, the General Council had agreed to the recommendations and understandings contained in paragraph 6 of a report from the Dedicated Session of the Committee on Trade and Development (WT/COMTD/SE/5) under which small economies would be allowed to use regional bodies to assist them in the implementation of their obligations under the TRIPS Agreement, as well as under SPS and TBT Agreements, and Members and the WTO – when providing technical and financial assistance to support small, vulnerable economies in fulfilling their rights and obligations under these agreements – would consider the advantages of providing that assistance to a regional body where one existed.

262. The Council took note of the information provided.

O. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

263. The Chairman said that the list of the 17 pending requests for observer status in the TRIPS Council by other intergovernmental organizations was contained in document IP/C/W/52/Rev.11. 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. He suggested that the Council take note of this information and agree to revert to this matter at its next meeting.

264. The Council so agreed.

P. ANNUAL REPORT TO THE GENERAL COUNCIL

265. The Chairman said that the draft Annual Report of the Council had been circulated in document JOB(06)/246. It still needed to be updated so as to reflect the discussions at the present meeting.

266. The representative of Argentina said that her delegation did not have any problems with the draft Annual Report, except for with the way section XIV, consisting of paragraph 17, was presented. In her view, section XIV incorrectly gave the impression that the topic was, like the other topics, a regular item of the agenda. She wondered whether the heading of section XIV could be changed into "Other Business", under which this topic of enforcement of intellectual property rights would be inserted. Furthermore, she did not believe that paragraph 17 gave a factual presentation of the status of the discussions on this topic. It should reflect the fact that there was no agreement as to whether the topic should be a permanent item of the agenda, as well as the views expressed by the two sides on this matter.

267. The representative of the European Communities said that, in his view, paragraph 17 reflected the situation in a clear, precise and careful manner. While he was aware of the differences relating to the matter, it was factual that the Council had taken up the item. Given that the paragraph was purely factual, no conclusions should be drawn from it.

268. The representative of Brazil, associating himself with the statement by Argentina, said that this item was not part of the regular agenda of the Council and had been the object of several statements during the course of the present and earlier meetings. These statements had to be duly reflected in this report to the General Council. He therefore strongly supported the idea of moving the item into a different section to make it clear that it had a different standing. The proposal by Argentina to put it under "Other Business" would serve that purpose. Additionally, it would be necessary for an effectual reflection of what actually occurred under this item to indicate the absence of agreement by Members regarding the continuation of discussions on it as a TRIPS Council agenda item. This disagreement needed to be reflected in the report to the General Council in the same way that had happened with other non-consensual elements that had also been reported to the General Council. It was important to state that there were divergences of views regarding the continuation of discussion of this item in the TRIPS Council.

269. The representative of India, associating himself with the statements by Argentina and Brazil, said that it was clear that this topic was not a regular agenda item of the Council. Therefore, it should be mentioned separately under "Other Business". Given the discussions that Members had had on it not only in the present but also in previous meetings, any factual representation should make it clear that there was no consensus on keeping the item on the agenda in the future.

270. The representative of China, associating himself with the statements by Argentina, Brazil and India, said that enforcement issues should not enjoy the same standing as other issues, because the

topic was not a regular item on the agenda. Paragraph 17 should therefore reflect the objection to the inclusion of this topic as a regular item on the Council's agenda.

271. The representative of Switzerland said that, in his view, paragraph 17 was factual. As to the concern that the topic had not been a standing item on the Council's agenda, he said that the first sentence of the paragraph made this clear by stating that this item has been put on the agenda at the request of the European Communities. He therefore believed that its current wording should be acceptable to Members, considering that the report should remain purely factual. He would be very hesitant to recommend the inclusion under this item of Members' substantive positions, since this would require that Members' positions be reflected also under other items covered by the report.

272. The Chairman suggested that the Secretariat, when updating the draft, take into consideration the points raised in the discussions at the present meeting. The revised draft would be faxed to Members, who would have one week to comment on the revised and updated parts.

273. The representative of the European Communities said that he understood that all Members agreed that the function of the Annual Report was to look at what had been done in the past and not what should be done, or what Members wished to be done, in the future. He asked how any possible disagreements concerning the updated report would be solved.

274. The representative of the Philippines said that his delegation's views on the topic covered by paragraph 17 were well borne out by the records. He was sympathetic towards the comments made by Argentina, Brazil and India. The Secretariat and the Chairman should draft the Annual Report, bearing in mind the compromise language suggested by some delegations and the concerns expressed by the European Communities. In addition, he suggested that the revised draft report reflect clearly that, at each meeting, this item had been taken up by the Council at the request of the European Communities. In his view, the current language did not sufficiently clearly reflect this fact.

275. The Chairman said that the revised draft would take into consideration the views expressed. If there were conflicting views, the challenge was to find appropriate compromise language. If such language would not meet with the satisfaction of both sides, then he would need to consult on the matter.

276. The representative of Argentina said that, since this was an annual report, Members were faced with the challenge of making it as factual as possible. She agreed with the procedure proposed by the Chair that the Secretariat send a revised version of the draft report, and give Members a time-limit for comments, otherwise the report would be considered as approved.

277. She suggested adding, after the first sentence of paragraph 17, that "some delegations had mentioned that there were different opinions regarding whether this issue should be a standing item on the agenda". The second sentence should be made factual, since the language "continued its discussion" gave the impression that the only thing under discussion was the EC contribution. The same applied to the language in the last sentence "had further exchanges". In fact, there were different opinions regarding whether or not the topic should be included on the agenda. The paragraph should indicate that there was no agreement on the substance of the EC communications. The fact that other communications were also submitted should be reflected.

278. The representative of the European Communities said that the paragraph consisted of four short factual sentences. The first stated that this item had been taken up by the TRIPS Council at the request of the European Communities. He did not believe that any delegation could disagree with this or the other sentences. The second stated that, at its meeting in March 2006, the Council had continued its discussion of the EC communication. This did not mean that Members should continue such discussion. The third indicated that, at that meeting, the Council had had before it two additional

communications, with a reference to the relevant documents. This did not imply that his delegation should put forward more communications or that other Members should agree with them. The last sentence merely indicated that Members had had further exchanges in June 2006 and at the present meeting.

279. The representative of Brazil said that, in fact, Members could disagree with all four sentences. Members could not consider sentences agreed to by all the other Members merely because they liked them. The wording "taken up" seemed to indicate a decision by the Council that this item had become an integral part of the Council's agenda and work programme. He asked the Secretariat to provide a more factual wording to reflect the fact that the item was included on the Council's agenda at meetings in question and, at each case, this had occurred at the request of the EC delegation. No decision had ever been taken to "take up" the issue. Similarly, the language "continued its discussions of earlier communications from the European Communities", did not reflect the full picture of what had actually happened. In fact, there had been lengthy discussions on whether this subject should constitute an issue for the Council on its own right. This matter had taken most of the debate and his delegation had made lengthy interventions on it. He said that it would be useful if the Secretariat could read the minutes of the meeting, and the interventions made, not only by those who had proposed the issue, but also by those who had opposed discussing this issue in the Council. Referring to the wording "the Council had further exchanges", he said that it was important not to mislead the General Council, which might get the impression that all Members were in agreement, there was no opposition, the issue was "taken up", and all Members agreed that it should become a permanent part of the TRIPS Council's debate, since that would not be factual.

280. The representative of South Africa, associating himself with the statements by Brazil, India and Argentina, agreed with the European Communities that paragraph 17 consisted of four simple sentences. But taking them together amounted to a total misrepresentation of the factual situation. If a clear reflection of the factual situation required adding more sentences and changing wordings, then it should be done.

281. The representative of Kenya said that, while it was true that paragraph 17 consisted of four short and clear statements, it would be useful to add four or five further sentences in order to make the report more factual. He agreed with the procedure proposed by the Chair on how to proceed with the approval of the Annual Report.

282. The Chairman reiterated his suggestion that that the Secretariat revise the draft Annual Report, taking into account the comments made at the present meeting. If there were further differences, he would consult with Members with the view of having them resolved so that the report could be circulated in time for the next General Council meeting.

283. The Council so agreed.¹

Q. OTHER BUSINESS

284. The Chairman suggested that the Council agree on the following dates for the Council's meetings in 2007: 13-14 February; 5-6 June; and 23-24 October.

285. The Council so agreed.

¹ The Annual Report (2006) of the Council for TRIPS was subsequently circulated in document IP/C/44.