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Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING

Held in the Centre William Rappard on 28 October 2008

Chairman: Ambassador Dennis Francis (Trinidad & Tobago)

The present document contains the record of the discussion which took place during the TRIPS Council meeting on 28 October 2008.

Subjects discussed — Page nos.

A. ELECTION OF CHAIRPERSON

1. The representative of the Secretariat recalled that, as the Council had been informed at its meeting in June, the former Chair of the Council had relinquished her post because of her return to her capital to take up new responsibilities. At its meeting of 31 July, the General Council had taken note of the consensus on the appointment of Ambassador Dennis Francis from Trinidad and Tobago as Chairman of the TRIPS Council. On the basis of the understanding reached, he proposed that the Council for TRIPS elect Ambassador Dennis Francis as its Chairman for the remainder of the current term by acclamation.

2. The Council so agreed.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

3. The Chairman said that, since the Council's meeting in June, Ukraine had made its initial notification of its laws and regulations, circulated in document IP/N/1/UKR/1 and related law series documents. Its responses to the Checklist of Issues on Enforcement had been circulated in document IP/N/6/UKR/1. It had also made a number of notifications relating to Articles 1.3 and 3.1 and certain other provisions, which were being circulated in documents IP/N/2/UKR/1 and IP/N/5/UKR/1. In addition, the Council had received a number of supplements and updates to earlier notifications of laws and regulations notified under Article 63.2 of the Agreement. Hong Kong, China had notified two notices announcing the commencement of some of the remaining provisions of the Copyright (Amendment) Ordinances 2007; Switzerland had notified a consolidated version of its amended patent law; Japan had notified a consolidated version of its amended Unfair Competition Act; Viet Nam had notified amendments to an Ordinance on Handling of Administrative Violations and a Joint Circular Guiding the Application of a Number of Legal Provision to the Settlement of Disputes over Intellectual Property Rights at People's Courts; and Canada had notified an amendment to the Patented Medicines (Notice of Compliance) Regulations. These notifications were being circulated in the IP/N/1/- series of documents.

4. 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 TRIPS and Public Health and who had not yet notified such changes to the Council to do so.

5. As regards notifications of contact points under Article 69, since the Council's meeting in June, Myanmar had notified its contact point. In addition, updates to contact points notified earlier had been received from the Czech Republic, Colombia, El Salvador and Guatemala. These notifications were being circulated in addenda to document IP/N/3/Rev.10.

6. The Council took note of the information provided.

C. REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION

(i) Follow-up to the review of legislation of Viet Nam

7. The Chairman recalled that, at its meeting in March, the Council had initiated the review of the TRIPS implementing legislation of Viet Nam. This review had been continued at the Council's meeting in June. Since then, Viet Nam's responses to the questions posed by the European Communities, Japan, Switzerland, Chinese Taipei and the United States had been circulated in

document IP/C/W/514. Its responses to the questions from Canada and to the follow-up questions from the United States had been circulated in Addendum 1 to that document.

8. The representative of Viet Nam recalled that, at the Council's meeting in June, his delegation had presented a summary of changes to Viet Nam's IP legislation and summarized its responses to questions from the United States, the European Communities, Chinese Taipei, Japan and Switzerland. In preparation for the present meeting, Viet Nam had submitted its responses to the questions from Canada and the follow-up questions from the United States. Summarizing these responses, he said that, with regard to copyright and related rights, Viet Nam considered that moral rights should be protected under IP law and have perpetual term of protection. Regarding industrial property rights, a utility solution patent was similar to a petty patent or utility model patent under the laws of some other countries. In terms of the protected object, the provisions on the utility solution patent system satisfied the requirements for protection of utility model under the Paris Convention as referred to by Article 2 of the TRIPS Agreement. In its responses to the questions from Canada, Viet Nam had explained several provisions of its IP law and relevant documents guiding its implementation, such as the conditions for applying the right to self-protection, the conditions for using folklore and folk art works, the limited exceptions to the exclusive rights of patent owners, the requirements of national defence, security and other urgent social needs, the criteria for protection of business secrets, relevant remedies for sanctioning violation of intellectual property rights, the role of enterprises in handling of IPR infringing acts, and the application of administrative and criminal remedies. Responding to the questions from the United States, he said that Viet Nam had provided relevant information on the process of amending certain provisions of the criminal code on IP in order to codify existing provisions, thus complying with the requirements under Article 61 of the TRIPS Agreement.

9. The representative of the United States said that he was following with great interest Viet Nam's work on amending its criminal code to include remedies for wilful trademark counterfeiting and copyright piracy on a commercial scale. If this amendment were to meet the requirements set out in Article 61, Viet Nam would have completed its TRIPS obligations in this respect, currently being fulfilled by the criminal circular as a temporary measure. On the issue of protection of undisclosed information, the United States continued to have certain questions regarding Viet Nam's regime as provided for in its regulations. He understood that Viet Nam was exploring a possible amendment of these regulations and he looked forward to having the opportunity to review those revisions at such time as they were produced.

10. The representative of Canada said that his delegation would review carefully Viet Nam's responses received these past months and would advise Viet Nam if it had any follow-up to the responses provided.

11. The representative of the European Communities said that he appreciated the great efforts made by Viet Nam in bringing its legislation into compliance with the TRIPS Agreement and that a proper intellectual property system was instrumental in attracting foreign investment and for economic development. The European Communities and Viet Nam had developed a solid cooperation on IPRs over the last years and his delegation would continue to provide technical assistance in order to help Viet Nam to ensure effective protection and enforcement of property rights.

12. The representatives of Chinese Taipei and Switzerland thanked the delegation of Viet Nam and said that they had no further questions.

13. The Chairman said that Viet Nam's responses to all of the questions posed to it had been circulated prior to the meeting. He suggested that the regular review of the legislation of Viet Nam be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from this review at any time.

14. The Council took note of the statements made and so agreed.

(ii) Follow-up to reviews already undertaken

15. The Chairman said that, as regards the reviews of national implementing legislation that had been initiated at the Council's meetings since April 2001, there were six reviews that still remained on the Council's agenda. These reviews concerned Cuba, Fiji, Grenada, Saint Kitts and Nevis, Saint Vincent and the Grenadines and Suriname.

16. Furthermore, a number of questions had been raised with regard to the implementing legislation of certain other 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 reviews at any time. These Members were Dominica, Gabon, Ghana and Guyana.

17. He urged the delegations concerned to provide the outstanding material as soon as possible, so as to allow the Council to complete these reviews.

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

(iii) Arrangements for the reviews of national implementing legislation of Tonga and Ukraine

19. The Chairman recalled that, at its meeting in June, the Council had agreed that it would take up the review of the TRIPS implementing legislation of Tonga and Ukraine, two newly acceded Members, at its first meeting in 2009. The Council had set the following target dates for the submission of questions and answers for this review: questions were to have been submitted to Tonga and Ukraine, with a copy to the Secretariat, by 1 December; and responses to questions posed within that deadline were to be submitted by 12 January 2009. Ukraine had already notified its laws and regulations, and provided its responses to the Checklist of Issues on Enforcement. This material was intended to serve as the basis for the upcoming review. He said that it would be appreciated if any questions to Ukraine could be submitted within the target dates the Council agreed at its meeting in June. As regards Tonga, the Council had not yet received Tonga's notification of its TRIPS implementing laws and regulations.

20. The representative of Tonga said that his delegation would attempt to provide its notification by the end of November and requested that the review of its TRIPS implementing laws and regulations be postponed until the Council's second meeting in 2009.

21. In the light of the request by the delegation of Tonga, the Chairman proposed that the Council postpone the review of Tonga until its second meeting in 2009 and set the target dates for the submission of questions and responses for that review at its first meeting in 2009.

22. The Council so agreed.

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

23. The Chairman recalled that section 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 section 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 21 October 2008, had been

circulated as document IP/C/W/525. Questions and comments in connection with the transitional review had been submitted by Japan, the United States, the European Communities and Canada (documents IP/C/W/518, 520, 521 and 524, respectively).

24. The representative of the United States said that his delegation believed that the transitional review mechanism continued to be a useful mechanism that helped to provide needed additional transparency for China's trade regime and allowed Members to better understand and assess China's progress in implementing and complying with its WTO obligations. Turning to his delegation's submission before the Council, he noted that the United States appreciated the importance China attached to the protection of intellectual property rights and the active steps that it had taken to improve IPR enforcement and protection. It was his understanding that China had developed and released a detailed national IPR strategy reflecting a commitment to address IPR-related issues at the highest levels of China's Government.

25. At the same time, the United States remained concerned about several aspects of China's regime for the protection and enforcement of intellectual property rights. It was critically important that China and other WTO Members maintained regimes that respected all intellectual property rights regardless of national origin. While he understood the importance that China placed on promoting its domestic industries through indigenous innovation polices, his delegation encouraged China to ensure that these polices did not undermine the rights of non-Chinese owners of intellectual property rights or otherwise ran afoul of WTO rules. The United States also continued to see evidence of unacceptable levels of IPR infringement, particularly in the numbers of Chinese goods seized at US borders. Mid-year statistics for 2008 showed that China remained the source of the vast majority of infringing goods seized at US borders, accounting for 85 per cent of seizures by value, and it was troubling that the seizure of Chinese goods had been increasing, not decreasing, each year since China had joined the WTO in 2001.

26. Exports of counterfeit and pirated goods, however, were only part of the problem. United States industries continued to report high rates of infringement within China. More work was needed to address growing challenges involving internet counterfeiting and piracy in China, such as offering infringing products for sale to businesses and consumers or deep linking to infringing files. At the same time, the problem of physical counterfeiting and piracy in China continued and was widespread as illustrated by the continuing operation of large wholesale and retail markets for counterfeit and pirated goods in a number of jurisdictions in China. The range of industry sectors affected by infringement within China was quite broad, including, among many others, pharmaceuticals, electronics, batteries, auto parts, industrial equipment and toys. The United States was further concerned because many of the counterfeit products made in China continued to pose a direct threat to the health and safety of consumers not only in China, but in the United States and elsewhere around the world. For reasons similar to those indicated in its questions, the United States also remained concerned by Chinese rules that appeared to exempt so-called Chinese famous brand products from quality inspection. His delegation wished to learn more about the scope of this exemption and about the trademark-based criteria that made products eligible for this exemption.

27. In conclusion, his delegation looked forward to receiving China's responses to its questions, and to continuing to engage bilaterally with China on a wide range of IPR issues. The United States appreciated the cooperative spirit in which the two countries had intensified IPR discussions under the Joint Commission on Commerce and Trade and other bilateral mechanisms, and continued to believe that deeper multilateral and bilateral dialogue and cooperation would provide an important path to progress.

28. The representative of the European Communities said that his delegation took note with satisfaction of the progress that had been made so far in China on IPRs and of positive ongoing initiatives such as the action plan for IPR protection for 2008, the National Intellectual Property

Strategy, the ongoing revision of patent law, the ongoing revision of trademark law and the announced revision of copyright law. However, despite these developments and China's efforts to address problems in its IP system, his delegation remained concerned at the high level of counterfeiting and piracy in China. Although the customs seizures of counterfeit products coming from China at the EU border had decreased in 2007, China remained the main source of infringing goods with over 60 per cent of all articles seized at the border coming from there.

29. European companies continued to face serious IPR problems in China, in particular, the lack of proper access to the legal system and of effective IPR enforcement. Criminal prosecution remained ineffective, sanctions against IPR infringement were insufficient to deter infringers, administrative enforcement procedures were still subject to discretion in many areas, and administrative infringing activities remained difficult to obtain, expensive and in comparison to domestic cases, more time consuming.

30. His delegation encouraged China to actively pursue its efforts towards an effective IPR enforcement system and was committed to continue working bilaterally with Chinese authorities to improve the situation, in particular through the joint technical cooperation programme IPR 2. The European Communities had also established a structured dialogue on intellectual property and had set up a joint EC/China IP Working Group in the framework of this dialogue, in order to exchange information and address IPR issues. The fifth session of this IP Working Group had taken place in Beijing on 23 September 2008. He expressed his hope that this cooperative approach with China on IPR issues would be instrumental in improving the IPR situation in this country and lead to concrete and tangible results.

31. He said that his delegation had submitted 43 questions covering a wide range of issues including patents, technology transfer, protection of confidential data, trademarks, copyright, and plant variety protection. With regard to enforcement, the questions included issues such as customs measures, civil enforcement, criminal prosecution and on-line piracy, and his delegation was looking forward to receiving responses from China.

32. The representative of Canada said that his delegation was appreciative of China's continued engagement in a dialogue on IP issues at the WTO and in other international fora such as the Heiligendamm Process. Canada also appreciated the opportunities to share best practices and other experiences through the two countries' respective intellectual property agencies and IP experts. For example, the Commissioner of the Canadian Intellectual Property Office would travel to China next month for an annual meeting with her counterpart and to speak at the 6th Shanghai International Intellectual Property Forum.

33. Canada had recently submitted document IP/C/W/524 in relation to the China TRM, containing questions related to China's action plan on IPR protection and recent revisions to China's Patent Law. His delegation would understand if China required additional time to study the questions before providing responses, and would therefore be happy to accept China's written responses in due course.

34. Canada had also included a few specific inquiries, including one question relating to China's Olympic experience. Specifically, in view of the fact that the 2010 Winter Olympics would be held in the Canadian province of British Columbia, Canada would be grateful to learn about China's experiences with respect to the registration and use of the Beijing Olympic trademarks.

35. The representative of Japan said that his delegation appreciated the recent Chinese efforts to strengthen the protection of intellectual property rights. It was his understanding that the Chinese Government had enhanced the civil as well as the criminal measures to protect intellectual property rights and Japan welcomed this improvement of IPR legislation in China.

36. Having said that, his delegation wished to point out three issues: first, Japan still had serious concerns about infringement in China. The types of infringement were getting more and more complicated, the number of infringements using the Internet was increasing and serious problems remained with regard to enforcement of IPR issues in local Chinese government. His delegation expected that the Chinese Government would take appropriate measures with regard to these issues in due course.

37. Second, his delegation wished to raise a new issue regarding compulsory certification in China, which was also mentioned in paragraph 10 of the EC document. Private enterprises were requested to provide highly confidential information to get technical regulatory approval in the Chinese territory. It was his understanding that from May 2009, 13 types of information security products would be required to pass a certification. His delegation had serious concerns on this matter from the point of view of IT protection. His delegation expected the Chinese Government to review these measures which were exceptional in the international community.

38. Third, his delegation welcomed the Chinese action plan on IPR 2008, which had been announced in June 2008. In this action plan, the Chinese Government had committed to protect IPRs at a higher standard by 2020, reducing IPR infringement. His delegation expected further efforts by the Chinese Government based on such action plans.

39. Lastly, his delegation was looking forward to China's responses and hoped for further dialogue and cooperation with the Chinese Government in the TRIPS Council, as well as in bilateral cooperation.

40. The representative of China said that his delegation wished to pursue a dialogue in a constructive and transparent way with all Members. China had received over 80 questions from several Members and, while he did not agree with all of these questions, his delegation appreciated the continued interest in the Chinese IPR mechanisms and listened very carefully to the comments made by these Members.

41. With regard to the questions received he said that his delegation had had enough time to prepare responses to the questions from the European Communities and Japan as they had been received by e-mail at the same time that they had been transmitted to the WTO Secretariat. The questions from the United States, however, had only been received by China one week before the meeting. Although, after reporting back, this had left his delegation only three days to prepare responses, it had done its best to respond to as many of these questions as possible. Nevertheless, there was one question that could not be answered at this stage and his delegation remained available to follow up with the United States through bilateral channels. With respect to the questions from Canada, he regretted that his delegation had only been informed about them at the present meeting. For future transitional reviews, he encouraged Members to follow past practice and transmit their questions or communications to China at the same time that they sent them to the Secretariat.

42. Briefing the Council on China's implementation of the TRIPS Agreement and relevant commitments since the last review, another representative of China said that China had always attached great importance to the protection of intellectual property rights, and fulfilled its international commitments in a serious and positive manner. In recent years, China had further intensified the protection of IPRs. Since 2004, a nationwide campaign for IPR protection had been carried out each year to end trademark, patent and copyright infringements, particularly in imports and exports, wholesale markets, trade fairs, original-equipment manufacturers, printing and reproduction. Very recently, China had unveiled the Outline of National Intellectual Property Rights, a new strategy to tackle the many issues surrounding IPRs in a broader, deeper and more forceful manner which would further improve IPR protection in China.

43. Turning to questions from Members, she said that, including the Canadian submission received on that day, China had received over 90 questions. Her delegation thanked Members for their appreciation of China's achievements in IPR protection, such as Japan's comment in its communication that the implementation of China's IP commitments had evolved to a cruising phase. This was quite objective. However, other Members' communications contained comments that were not based on facts and statistics that were not credible. She hoped Members would adopt a more serious, practical and realistic attitude towards the TRM.

44. With respect to the questions from Canada, she said that most of the information regarding China's action plans regarding IPR protection could be found online on the State Intellectual Property Office's (SIPO) website (www.sipo.gov.cn) and on the website of the central government. The rest of the Canadian questions were very similar to questions raised by the United States, the European Communities and Japan.

45. She said that some of the questions, including those on internet piracy (EC questions 40-43, US questions 21-23), on customs enforcement in relation to the outbound flow of goods (EC question 31, US question 19) and some other questions, including those from Japan regarding general government policies and research, went beyond the scope of the TRM. As this was not the appropriate forum for these questions, her delegation suggested that they be discussed on other appropriate occasions such as in World Intellectual Property Organization (WIPO), the World Customs Organization (WCO) or through bilateral channels. She said that some questions were closely related to the ongoing US-China WTO dispute (DS362) in which the United States was the complainant, and the European Communities and Japan had both joined as third parties. Such questions included Japan's questions 12 and 19(d), EC questions 18, 20, 23-25, 36 and 37, and US questions 13-18, 20, and 24-26. The parties involved could discuss the relevant issues in the context of this case. Furthermore, regarding the laws and revisions mentioned in Japan's questions 1, 2 and 18(a), EC questions 5-9 and 17, and US question 27, she said that the laws including the *Trademark Law*, the *Copyright Law*, the *Law Against Unfair Competition*, *the Rules for Implementation of Patent Law* and *the Rules for Implementation of the Regulations on Customs IPR Protection*, were currently under revision or review, and no specific schedules were available at this time. Members should refer to Annex 1A for progress.

46. For convenience, her delegation had grouped the responses to questions from Members into five major subjects. The first subject related to **copyright,** and specifically the royalty distribution issue which included responses to Japan's question 3, and EC question 26. In this regard, the *Regulation on Royalty Distribution for Broadcasting and Television Organizations* was one of the key legislative programmes of the State Council this year. The Legislative Affairs Office had submitted a draft to the State Council for review. According to Article 43 of the *Copyright Law*, the Regulation (Draft) provided on radio and TV stations' royalty distribution for right holders for broadcasting published audio recordings without the latter's consent.

47. The second subject related to **trademarks and geographical indications** issues, including responses to Japan's questions 4-5, and EC questions 21-22. The current duration of the examination period for trademarks was about 28 months. In recent years, China had witnessed an annual increase in trademark registration applications and had ranked first in the world for six years until this year in terms of application volume. In 2007, the figure had risen to 708,000, which constituted a big challenge for China. The competent authorities worked hard and attached great importance to achieving an expedited examination of trademarks. A series of measures had been implemented, including setting up additional divisions, increasing staff, strengthening operation security for the automatic system, stepping up management and enhancing efficiency at every stage of the trademark registration process. These measures had yielded initial results. In 2007, 405,000 applications had been examined, which constituted a year-on-year increase of 29.3 per cent. An examiner's average workload per year was much more than in other countries. The Trademark Review and Adjudication

Board had ruled on 12,799 cases, a year-on-year increase of 200 per cent. In 2008, the Chinese Trademark Office (CTMO) had recruited 300 trademark examination auxiliary staff and 100 trademark adjudication auxiliary staff who had begun work on 1 September. With the joint forces of new staff and the comprehensive implementation of the above measures, the registration duration was expected to be further shortened in the coming years.

48. With regard to the examination guidelines of trademarks mentioned in Japan's questions 6 and 7, according to Article 10(2) of the *Trademark Law*, if a trademark consisted of or contained foreign geographical names known to the public, it would be regarded as identical to foreign geographical names and the CTMO would reject the application. However, this did not apply to trademarks composed of foreign geographical names and other words, if the combination acquired a new meaning and did not lead to confusion of the public when applied to designated commodities. "LONDON FOG" (for briefcases) was one example in this regard.

49. According to Article 9 of the *Trademark Law*, a trademark should have distinctive characteristics easy to identify, and may not conflict with legal rights acquired by others in priority. The prior rights included the names designated to new varieties of plants by the *Regulations on the Protection of New Varieties of Plants*. Accordingly, trademark applications using the names of plants should be rejected. The parties involved could also assert their legitimate rights and interests through trademark oppositions and dispute procedures. Regarding Japan's question 8, if the trademark's word formation was different from a foreign geographical name known by the public but its look and pronunciation were nevertheless likely to cause confusion with regard to that geographical name and the origin of the product, that trademark would be rejected according to Article 10(1) of the *Trademark Law*. If such a trademark was registered, an application for cancellation could be filed to the CTMO.

50. Japan's question 9 related to a complicated technical issue. For detailed information, Members should refer to the *Trademark Examination and Adjudication Standard* (2005) and the *Regulations on the Protection of New Varieties of Plants.* According to Article 11(2) of the *Trademark Law*, the following aspects should be considered with regard to marks obtaining distinctive characteristics through usage: first, public recognition of the mark; and second, the application of the mark to designated commodities and services in terms of duration, the method and the industry. With regard to the Guidelines for the Fair Use Thereof by Another Person raised in Japan's question 10, references could be found in Article 26 and Article 27 of the *Answers of the High People's Court of Beijing on Some Issues Concerning the Handling of Trademark Dispute Cases* issued by the High People's Courts of Beijing in March 2006.

51. With regard to EC question 19, she said that Chinese authorities had always been working hard to protect the exclusive right to use registered trademarks and had cracked down on fake goods, both during the Olympic Games and on average working days. At the same time, it should also be recognized that strengthening the protection of exclusive trademark rights and clamping down on trademark right violations was a difficult long-term task that could not be achieved overnight.

52. With regard to GIs, she said that the Chinese Government attached great importance to GI protection and firmly believed that GI protection would effectively promote economic development, especially the development of agriculture and the rural areas. The TRIPS Agreement established specific rules in this area and Members had set up their respective GI protection regimes under this framework. China had also established its own GI protection system based on its national conditions and was constantly improving its effectiveness. Competent authorities were actively advancing the work in this area within their respective competencies. Her delegation was willing to share experiences and actively cooperate with Members in this regard.

53. With regard to the trademark-related issues raised in US questions 1-4, she said that the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce* had expired and such a list no longer existed. Also, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) had abolished the *Measures for Administration of Exempting Products from Quality Supervision and Examination* on 18 September 2008. Therefore, famous brand products were no longer exempted. With regard to well-known trademarks, the CTMO and the Trademark Review and Adjudication Board identified and protected well-known trademarks in the procedures of trademark oppositions, administration and disputes according to the *Trademark Law*, the *Rules for the Implementation of Trademark Law*, the *Provisions for Identification and Protection of Well-Known Trademarks*. In the identification procedure of well-known trademarks, domestic and overseas trademark holders were treated equally without discrimination.

54. With regard to well-known trademarks at sub-national levels, provisions should be developed by provincial government according to local conditions. Provincial industry and commerce authorities were responsible for identifying well-known trademarks according to local regulations, rules and normative documents. Provincial local regulations, rules and normative documents should be referred to when deciding whether "foreign" trademarks of foreign companies or users could be identified as "well-known trademarks". Regarding US question 5, China's Table of Classification of Similar Commodities and Services had been formulated on the basis of WIPO's International Classification of Goods and Services for the Purposes of the Registration of Marks and according to China's practical experience over the years in classifying similar commodities and services. It was referred to by the CTMO and the Trademark Review and Adjudication Board in their reviews and examination of trademarks. However, due to constant upgrading and developing of commodities and services and fluctuation in market trading, the assessment of similar commodities and services could change in certain cases, and it was therefore still necessary to make judgments in terms of similar commodities and services when examining such cases.

55. The third subject related to **patents, technology transfer and confidential information protection** and responded to EC questions 10-11 and 12-14, and US question 12. In this regard, Chinese laws strictly prohibited the infringement of trade secrets and the information required for that purpose in the applications was necessary and within the scope of reasonable disclosure. With regard to the trial data protection, the *Drug Registration Regulation* provided for this issue, including provisions that literary and data shall not be used without the owner's consent and that on-the-spot verification must be carried out for the authenticity of each document. These measures ensured that all the application documents were authentic, reliable and had been independently acquired by the applicant himself/herself, so that applications could not be based on information submitted in earlier applications. She said that data used without the owner's consent were considered invalid and the corresponding application would be rejected.

56. The State Food and Drug Administration, when deciding whether to give marketing approval or not, could only rely on clinical trial data independently acquired by the applicant. Published data could only serve as a reference. According to Article 35 of the *Implementing Regulation for the Drug Administration Law*, the *Drug Registration Regulation* provided that, within six years from the date a drug manufacturer or seller had obtained approval to produce or market a drug containing new chemical entities, if any other applicant used the aforementioned data to apply for approval for production or marketing of the drug in question without permission by the original applicant who had obtained the approval, no approval may be given to any other applicant by the drug regulatory department. In this regard, domestic and overseas companies were given equal treatment.

57. The fourth subject related to **IPR enforcement.** By virtue of his exclusive right to use a trademark, the right holder could demand a hearing in trademark administrative enforcement procedures according to the *Administrative Punishment Law*. With regard to rulings on trademark violations, the relevant right holder could inquire with industry and commerce administrative agencies

at all levels and follow the development and result of the case. China was still studying how the right holder could take part in the trademark administrative enforcement procedure and what rights he should enjoy in the process.

58. Under the Copyright Law, copyright infringement was divided into two categories. One category included 11 torts described in Article 46 of the Copyright Law, which could only be resolved by civil litigation procedures. With regard to these torts the victim could file civil lawsuits directly with the People's Courts after collecting relevant evidence. The other category consisted of eight torts described in Article 47 of the Copyright Law, which could be addressed through civil litigation, administrative punishment and criminal litigation according to different degrees of injury. In other words, the victim could file lawsuits directly with the People's Courts after collecting relevant evidence, apply for administrative protection from copyright authorities or trigger criminal procedures in case of a crime. In brief, with regard to any tort, the copyright holder could take part in launching civil, administrative or criminal procedures and attain sufficient information in the proceedings.

59. In case of violations of copyright and exclusive trademark rights, be it infringement via Internet or traditional means, the Copyright Law and the Trademark Law applied**.** Apart from active investigations conducted by competent authorities according to their duties, the right holder could also complain to local competent authorities or file lawsuits with local courts. China had cracked down on IPR violations, and relevant individuals and units were held criminally responsible according to law. Regarding detailed information on enforcement at different levels requested by Japan and others she referred Members to Annex 1A submitted prior to the meeting.

60. The fifth subject related to **Other Issues** that had been raised in Japan's questions 13 and 14 and EC question 29. In this regard, there were currently no criteria for intellectual property rights abuse under the framework of the *Antimonopoly Law* and formulation of guidelines for that law was still under way. With regard to the conflict between trade names and trademarks raised in Japan's question 15, the Supreme People's Court had issued a judicial interpretation in February 2008 regarding the *Regulations on the Trial of the conflicts between Registered Trademark Enterprise Name and the Prior Right*, which provided fully for that issue.

61. With regard to licensing regulations raised in Japan's questions 16 and 17, she said that the provision in Article 25 that "the licensor must ensure that the technology provided is complete, correct and effective and may fulfil the agreed technological goal" only referred to the technology *per se*. In other words, under agreed implementation conditions, the technology provided by the licensor should meet the agreed technological objective. However, if the agreed technological objective was not achieved due to reasons on the licensee's part, such as substandard environmental and technical conditions, improper operation, etc., the licensor should not be held responsible.

62. Regarding EC questions 27-28, since China's accession to the 1978 International Union for Protection of Varieties (UPOV) in 1999, a legal system for protecting new varieties of plants had been established. It had played an active role in protecting the legitimate rights and interests of breeders, encouraging innovation in breeding technology, promoting reasonable allocation of breeding resources and establishing a fair competition order in the seed market that was in line with China's national conditions. The Chinese Government had issued and implemented seven batches of catalogues for the protection of new plant varieties in agriculture and four batches of catalogues for the protection of new plant varieties in forestry including 152 species and genera of plants, which far exceeded the minimum requirements of UPOV 1978. At present, the Chinese Government was still actively expanding the catalogues to protect as many plants as possible. Since 2004, China had been ranking fourth among UPOV Members. By 30 September 2008, the Ministry of Agriculture had accepted 5,192 applications for plant variety rights. After examination and testing, 1,844 applications had been approved.

63. In conclusion, the representative reaffirmed that China continued to attach great importance to IPR protection which had already been elevated to a national strategy of China. She also pointed out that IPR protection was not merely a means to fulfil China's accession commitments or to attract foreign investment and technology, but also responded to China's own intrinsic need to promote scientific and technical innovation, and to speed up its economic development. China spared no effort to establish a strong and effective IPR protection system which was in the interest of both China and other Members. However, as a developing Member, China had only started building its IPR protection system less than 30 years ago and would need continued efforts before its IPR protection system could be as sophisticated and mature as that of some developed country Members which had been developed for over 100 years. In order to catch up, China needed time, understanding and support. She hoped that Members, especially developed country Members, would be able to view the IPR situation of China from a historical and developmental perspective, recognize the efforts China had made, and continue the support and cooperation in this area.

64. The representative of the United States said that, with regard to China's comment about their late receipt of the US submission, his delegation had submitted the document to the Secretariat on 9 October and had transmitted it to the Chinese Mission via e-mail on the same day. The Secretariat had then circulated the submission on 14 October which was still two weeks ahead of the meeting.

65. He thanked the Chinese delegation for its responses and said that his delegation had a few follow-up questions and comments. With regard to US question 3, China had indicated that the 2005/2006 list of leading export brands nurtured and developed by the Ministry of Commerce had expired. His follow-up question, which was also contained in the US submission, was whether there had been any updates or subsequent lists issued for 2006/2007 and 2007/2008.

66. With regard to US question 4 on more information about sub-national measures relating to famous trademarks, China had simply indicated that sub-national measures were handled by sub-national governments, but it had not provided any responses to the question. Among other things, the United States was looking for a list of those sub-national measures. He noted that, as had been seen in the area of subsidies where sub-national governments were very active, measures issued by sub-national governments were particularly important under China's system and he expressed his hope that China would respond to that question.

67. Turning to US questions 6-11 on geographical indications, China's response had simply been that China had established a geographical indications system within its government. This had been known to the United States and had been the premise of the several detailed questions it had posed about various aspects of China's regime. None of these questions had been answered and his delegation requested China to respond to those questions.

68. With regard to several questions that had been posed about enforcement, China had referred to the ongoing WTO case, and concluded that it would not be appropriate to answer any of these questions. He said that these questions dealt with the role of private investigators in China, with legislative proposals that might enhance the power of Chinese judges to enforce judicial orders and with specific enforcement initiatives relating to health and safety threats and other matters. None of these issues was part of the WTO case and his delegation therefore requested China to respond to those questions.

69. Finally, in response to the comment that China was a developing country Member and needed more time to implement and adhere to its TRIPS obligations, he said that China, in its Protocol of Accession, had committed to adhere to the TRIPS Agreement immediately upon accession. There were no transition periods for adherence to those disciplines.

70. The representative of the European Communities thanked China for its comprehensive statement on its efforts to improve the protection and enforcement of intellectual property rights and for its detailed answers to questions.

71. While trying to follow the answers given by China, it was his impression that some of his delegation's questions had not been answered. For example, EC questions 32, 33 and 34 on the legalization and notarization requirements for power of attorney and evidence from abroad covered a very important issue for his delegation, and he would be grateful if China could answer those questions. He encouraged China to intensify its efforts to combat counterfeiting and piracy and improve the enforcement system in China, which was a priority for the European Communities.

72. The representative of Japan thanked the Chinese delegation for its very informative explanation covering all 80 questions, considering that it was certainly difficult to give out good signals while cruising on the sea. His delegation wanted to raise two points regarding its questions. First, regarding geographical names used as trademarks mentioned in Japan's question 5, China's delegation had indicated that Chinese trademark law prohibited the use of well-known geographical names from foreign countries, such as Tokyo and Osaka. However, it was his delegation's understanding that there were certain cases in which Chinese private enterprises used Japanese geographical names. This was a question related to the enforcement of Chinese national law and his delegation would expect the Chinese Government to make further efforts to strengthen the enforcement of their proper Chinese trademark law in this regard.

73. Second, in its explanation concerning the issue of protection of confidential information, the Chinese delegation had mentioned a medical law and other related laws. Japan's specific concern was whether China was going to extend these compulsory measures to oblige private companies to disclose or provide highly confidential information, as a lot of information security products would be included in such an extension. His delegation reiterated its expectation that the Chinese Government would review this exceptional system in due course.

74. The representative of China said that, with regard to the US comments, her delegation had explained that the 2005/2006 list by the Ministry of Commerce had expired and there was no longer such a list. This meant that there was no such list for 2007/2008 or 2008/2009 and that this was the end of such a list.

75. With regard to famous trademarks at sub-national level, she invited the United States to check the website of each province as China had very transparent websites in this respect, which would answer some of its concerns and questions. While she was not in a position to provide a full list of these measures at this point, she said that the measures at the sub-national level should comply with the basic principles at the national level.

76. Regarding EC questions 32-34, these were questions already received last year which implied a certain presumption by the European Communities. While welcoming the suggestions, China did not agree with the presumptions raised by the European Communities but was prepared to discuss any specific cases through other channels.

77. As regards the comments from Japan, her delegation would report these back to its capital if Japan could provide more detailed information.

78. Another representative of China said that regarding the US comment on the receipt of their submission, e-mails concerning this issue should be addressed to the desk officer responsible for TRIPS issues. This would give the delegation more time to respond to such queries.

79. Furthermore, in its intervention, the United States had misquoted the statement made by China by saying that "China needs more time to implement the TRIPS Agreement". In fact, his delegation had said that "we need to catch up yet we need time, understanding and support". With regard to the implementation of the TRIPS Agreement, China had honoured its commitments from day one of its accession to the WTO. China had revised thousands of laws and regulations. It had intensified its efforts to protect intellectual property rights. The comment regarding the need for more time related to the fact that China needed more time to correct the imperfection of the enforcement measures. It needed more time because China was a developing country and because, as China had always believed, IP protection was an issue very much related to development.

80. Before explaining why IP protection was development-related, he wanted to share with the Council one story. In recent days, a famous Chinese film star named LU Yi, which is pronounced like "Louis", had had a daughter and his fans had begun to discuss how to name this pretty girl on a website. Some suggested LU Tiantian or other pretty Chinese names for girls. One suggestion which attracted his attention was pronounced very much like the Chinese translation of "Louis Vuitton". He said that he had immediately written on the website: "Mr. LU, please refrain from considering this suggestion to name your girl 'Louis Vuitton' because it could entail a misunderstanding by EU officials and cause potential trouble for you in Europe. If you travel next time to Paris airport of Charles de Gaulle, you might face two options: either to change the name of your girl immediately or to have her confiscated by French Customs."

81. The purpose of sharing the above story was to tell Members how sensitive personnel like him, dealing with IP-related affairs in China, were to any issue that could give rise to potential problems. However, he would be ready to admit that, although a lot had been done on education, some people in China, like some living in the countryside, might not be aware of such problems. The reason was simple: IP was not a concept in a vacuum. It was a concept related to development. It was a concept related to particular development stages. It was a concept related to per capita GDP.

82. Just on the previous day, the Chinese National Bureau of Statistics had proudly declared that China's per capita GDP had now reached US$2,360. That was a great achievement and he felt very much encouraged. However, US$2,360 was less than 6 per cent of the per capita GDP of the United States, less than 7 per cent of Japan, less than 3 per cent of Luxembourg, which enjoyed the highest level of per capita GDP among the EC Members, and less than 70 per cent of Bulgaria, which had the lowest per capita GDP in the European Communities. He therefore urged the delegations who had taken the floor to compare the situation of IP protection in their countries when their per capita GDP had been US$2,360, with that in China now. He urged them to compare what they had been doing at that time on IP protection with what China was doing now, and more importantly, what China had done. Then, he said, they would have a better understanding of the situation China faced with regard to IP protection.

83. Having said that IP protection was development-related, he pointed out that piracy was not a problem existing only in developing countries including China. Piracy was a sin in human nature and common to all countries, both developed and developing. He referred Members to the International Herald Tribune report of 3 June 2008, in which Sir Hugh Laddie, a leading lawyer and former High Court judge of the United Kingdom, had said that China had become a "scapegoat" for the intellectual property problems in western countries. What he had meant by using the word "scapegoat" was that China was not "the largest source of pirated goods", as declared by some Members, but some other countries were, including some Members who had just made their comments. This involved some industries just mentioned by those Members, like computer software and films. For that, he would also refer Members to the survey by the Motion Picture Association of America (MPAA) just a few years ago, which demonstrated that their films were most seriously pirated not in countries of Asia, but in another country.

84. He said that he did not like the word "scapegoat" because his delegation knew better than anyone that China did have certain problems. He knew that China needed to do more to improve the situation, although it had already done a lot. So if Members asked whether China admitted that there were problems, yes it did. If Members asked whether China had done something to resolve those problems, yes it had. If Members asked whether China needed to do more to improve the situation, yes it did. However, if Members asked whether China could build Rome in one day, he would have to say "sorry we can't".

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 2007 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.

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

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

G. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

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, and to keep this method under review to assess whether any change might prove appropriate in the light of developments. Accordingly, he suggested that the Council continue its past practice of discussing these three agenda items together on the basis of the contributions by Members. He informed the Council that, since its meeting in June 2008, Sri Lanka had been added to the list of co-sponsors of the disclosure proposal circulated as document IP/C/W/474 (issued with the joint symbols WT/GC/W/564/Rev.2 and TN/C/W/41/Rev.2). Addendum 9 to that document had been issued to this effect.

88. The representative of Côte d'Ivoire, speaking on behalf of the "Disclosure Group"[1], expressed his disappointment at the lack of progress in the negotiations on the issue of the relationship between the TRIPS Agreement and the CBD, even though it continued to rank high among the implementation-related issues and concerns identified and set out in the Doha Development Agenda. The Disclosure Group was also disappointed at the lack of commitment and the rigid positions that certain WTO Members continued to maintain, insisting that there was not enough discussion on the issue to draft a text that could serve as a basis for negotiations. He said that, over these past nine years, Members had had technical discussions on this subject in a spirit of constructive commitment both in the TRIPS Council, in meetings organized by the Director-General, and in bilateral meetings. During that period, Members had come up with several submissions, all of which aimed to clarify these issues in order to help establish an effective and suitable framework in which WTO Members could meet their obligations under both the TRIPS Agreement and the CBD. The key proposal was to amend the TRIPS Agreement so that Members would require patent applicants to disclose the source and country of origin of biological resources and associated traditional knowledge used in the inventions in question. The applicant would also have to provide proof of prior consent and of fair and equitable benefit sharing under relevant national regimes. He said that the members of the Disclosure Group tended to fall victim to frequent biopiracy, involving the misappropriation of

[1] Co-sponsors of document IP/C/W/474.

traditional knowledge and genetic material in their countries through the patent system, and that it was difficult and extremely costly for the poor populations in these countries to defend and protect their rights. He said that the results of the Doha Development Round must guarantee these objectives if the development dimension was to be truly reflected. He reiterated that arguments for text-based negotiations, as pointed out in document IP/C/W/474, which had the support of more than 80 WTO Members, had been sufficiently substantiated. Finally, he said that the Disclosure Group remained committed to pursuing the negotiations on the TRIPS Agreement and related issues in a constructive manner.

89. The representative of Mauritius, speaking on behalf of the ACP Group, subscribed to the statement made by Côte d'Ivoire on behalf of the Disclosure Group. She said that, in the General Council, the ACP Group had called for the speedy advancement of the TRIPS/CBD issue, building on the momentum of July. In parallel with modalities on other negotiating areas, in particular agriculture and NAMA, the modalities on the TRIPS/CBD issue should form part of the overall package of the Round within the Single Undertaking. She indicated that the stalemate at the recent session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) had added urgency to the TRIPS Council's work in this area.

90. The representative of India associated his delegation with the statement made by Côte d'Ivoire and fully shared the sense of disappointment at the lack of progress on this issue despite overwhelming support and technical work of the past nine years. He said that the inadequacy in the TRIPS Agreement to combat biopiracy and misappropriation of genetic resources and traditional knowledge was one of the factors leading to an imbalance in the TRIPS Agreement. Referring to its Article 16.5, he said that the CBD, which predated the TRIPS Agreement, contained several intellectual property rights-related provisions and obliged countries to cooperate to ensure that patents and other intellectual property rights did not run counter to the objectives of the CBD. This contradiction, which obstructed the proper implementation of the CBD, needed to be addressed with priority and urgency. He said that, after a great deal of technical work, the disclosure proposal had been submitted in document IP/C/W/474 in 2006. The objectives of the proposal were shared by all Members and support for the proposal had been increasing.

91. He said that recent months had witnessed a significant change in dynamics as reflected in the Director-General's report (document WT/GC/W/591 and TN/C/W/50). Subsequently, document TN/C/W/52 had been submitted on 19 July 2008, which contained key parameters the proponents would like to see reflected in a Ministerial decision on the three TRIPS issues, that is TRIPS/CBD, GI register and GI extension. The document was a distillate of constructive engagement, flexibilities and accommodation of interests of about 110 Members which included developed and developing countries, and several LDCs and represented close to three fourths of the WTO membership. The submission, that said that the three TRIPS issues must be dealt with in tandem based on the key parameters mentioned therein, provided for a sound basis for the way ahead on these issues. His delegation strongly supported such an approach on procedure and also supported the substantive elements of the issues of GI extension and GI register as mentioned in document TN/C/W/52. He said that although numerical support could not be the sole determinant in a consensus-driven organization like the WTO, the geographical spread and the socio-economic profile of the co-sponsors were a barometer of the importance and urgency attached to the issues. The consultative process on the issues of the TRIPS/CBD and GI extension must be intensified as decided by Ministers in Hong Kong in December 2005. He recalled that paragraph 39 of the Hong Kong Ministerial Declaration had called for intensification of consultations by the Director-General "by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations". He said that Members' experience in July with the Director-General and with Minister Støre had been instructive that a common Chair for the three TRIPS issues would be useful. In conclusion, he said that the Doha Round was a development round and its results would not be complete if it fell short of correcting the imbalance in the TRIPS Agreement. The issue of TRIPS/CBD was a critical implementation issue for

developing countries. For his delegation, an outcome on this issue was an essential element of any development package that would emerge from the Round.

92. The representative of Brazil said that his delegation's position on the three agenda items was well-known. It believed that the best way to achieve the objective of mutual supportiveness between the TRIPS Agreement and the CBD was to introduce a disclosure requirement into the TRIPS Agreement. A multilateral, mandatory disclosure requirement would be the most efficient way to address the international problem of misappropriation of genetic resources and traditional knowledge as it would allow mega-biodiverse developing countries to track down the supplying country by requiring patent applicants to disclose the supplying country as well as evidence of compliance with prior informed consent and benefit sharing. He said that over 80 WTO Members were in favour of the amendment to the TRIPS Agreement to introduce a mandatory disclosure requirement, as proposed in document IP/C/W/474. Norway had put forward a positive and constructive contribution to the debate in the Council contained in document IP/C/W/473. In the context of the Doha Round, the disclosure proposal was gaining momentum. One hundred and ten Members, over two thirds of the WTO membership, had defended a parallel, simultaneous and joint treatment of the three TRIPS issues in the horizontal modalities process as indicated in the joint submission (document TN/C/W/52). He said that it reflected a firm willingness of these Members to move towards negotiations on these three issues as part of the Single Undertaking of the Doha Round. He said that the TRIPS/CBD issue was a development-related issue and that an amendment to the TRIPS Agreement to introduce the disclosure requirement would be a major development outcome of the Doha Round and of great significance for developing countries.

93. The representative of Ecuador supported the statement made by Côte d'Ivoire on behalf of the Disclosure Group. He said that, as a mega-diverse and multicultural country with a high concentration of biological resources and indigenous peoples as well as Afro-Ecuadorian and local communities that had developed and continued to use these resources and associated traditional knowledge, Ecuador had an interest in establishing adequate, expeditious and effective protection for biodiversity and traditional knowledge. He informed the Council that, on 28 September 2008, Ecuador had made a significant step forward in approving a new Constitution which used the elements of the various relevant international agreements as a basis. The Constitution reflected important achievements in the field of the protection of traditional knowledge and biodiversity. The Constitution established and guaranteed the State recognition of the collective right of indigenous peoples and local communities to maintain, protect and develop collective knowledge, their ancestral sciences, technology and knowledge; the genetic resources of biological diversity and agro-diversity; and their medicines and traditional medicinal practices; and to recover, promote and protect rituals and sacred sites as well as the plants, animals, minerals and ecosystems within their territories. It also established and guaranteed the recognition of fauna and flora resources and properties.

94. He expressed his concern over the lack of positive signs regarding the initiation of negotiations to establish clear and specific negotiating modalities for the amendment of the TRIPS Agreement according to the principles set forth in document IP/C/W/474, which had been supported by a critical mass of around 80 WTO Members. Such an amendment should incorporate, in a stand-alone provision, the principles already recognized in Article 8(j) of the CBD, namely prior informed consent, equitable benefit sharing, and the disclosure of origin of biological resources and associated traditional knowledge used in an invention. He said that negotiations to amend the TRIPS Agreement along the above lines were an integral part of the Doha Round's development dimension and of the Single Undertaking, and that a parallel approach should guide these negotiations.

95. The representative of Sri Lanka said that his delegation co-sponsored the Disclosure Group's proposal in view of the critical importance of protection of genetic resources and traditional knowledge, and of preventing misappropriation. He said that a major deficiency in the TRIPS Agreement was that it did not contain provisions to safeguard the genetic resources and traditional

knowledge accumulated and fostered by traditional societies and handed down from generation to generation over thousands of years. As a developing country, Sri Lanka considered that this deficiency had created a huge imbalance, which tended to undermine progress towards sustainable development. In contrast to the market-oriented ownership of patent rights, traditional knowledge remained largely sacred community wisdom. Therefore it was the common responsibility of the international community to recognize the existence of such knowledge and natural wealth and to take appropriate measures to protect them. He said that the Doha mandate had called for concrete action to review the implementation of the TRIPS Agreement and to examine the relationship between the TRIPS Agreement and the CBD and other relevant new development issues raised by Members. He said that it was essential for Members to recognize the value of traditional knowledge and its inextricable link to genetic resources and to incorporate that into a legal text so that the TRIPS Agreement would become a complete and sound instrument to ensure intergenerational and interterritorial equity and with this the Doha Round would be a real development round. He further said that his delegation supported the proposal contained in document TN/C/W/52 that the three TRIPS-related issues be taken together as part of the horizontal process to finalize modalities.

96. The representative of Indonesia said that his delegation attached great importance to the TRIPS/CBD issue, and believed that mutual supportiveness between the two agreements was necessary. He shared the disappointment expressed by Côte d'Ivoire on behalf of the Disclosure Group. He said that the problem of misappropriation and biopiracy facing developing countries hindered their quest to fully reap the benefits of their own genetic resources and traditional knowledge in order to foster development. Therefore, the longer the TRIPS/CBD issue was unresolved, the greater their losses would be in terms of resources and development. He reiterated that a swift response to the TRIPS/CBD issue was needed, and that an amendment to the TRIPS Agreement to include the disclosure requirement could be one important step to address the issue of misappropriation and biopiracy. He said that a fair and balanced solution to the TRIPS/CBD issue should be one of the benchmarks to decide whether the development dimension of the Doha Round has been fulfilled.

97. The representative of Lesotho, speaking on behalf of the LDC Group, said that the mandatory disclosure of source and origin of biological resources and proof of prior informed consent, which would address the problems of misappropriation and erroneously granted patents, was achievable, and therefore should be vigorously pursued. The LDC Group welcomed the consultations that had been conducted in this area and remained ready to engage constructively with all other Members to achieve success. He also supported the statements made by Côte d'Ivoire and Mauritius on behalf of the Disclosure Group and the ACP Group, respectively.

98. The representative of Jamaica added his support to the statements made by the ACP Group, the African Group and other delegations. He expressed his delegation's firm commitment to the successful completion of the Doha Round, which should include an acceptable and negotiated resolution of the TRIPS issues as a key pillar of the Single Undertaking. He urged the Council and the WTO Secretariat to work towards maintaining the momentum, which had been forged around the three TRIPS issues in July, for the commencement of text-based negotiations based on document TN/C/W/52.

99. The representative of Bolivia informed the Council that, on 21 October 2008, the Bolivian Parliament had approved a draft of the new constitution, which would be ratified at the beginning of 2009. She said that, according to Article 255 II/7 of the draft constitution, "negotiations, subscriptions and ratifications of international treaties should be governed by the principles of harmony with nature, defence of biodiversity and the banning of private appropriation of plants, animals, micro-organisms and any living matter for exclusive use and exploitation". She said that Article 27.3(b) of the TRIPS Agreement should be revised according to paragraphs 19 and 12 of the Doha Ministerial Declaration, the objectives and principles set out in Articles 7 and 8 of the TRIPS

Agreement, as well as several proposals in which the regional groups and Bolivia had requested that Article 27.3(b) be amended or clarified to prohibit the patentability of all living forms, including patents on plants, animals, micro-organisms and all other living organisms and their parts, as well as to prohibit patenting of all natural processes, including essentially biological and microbiological processes for the production of plants, animals and other living organisms.

100. She said that firstly, the patenting of living forms was contrary to a large number of countries' morality and culture, and it was absolutely unacceptable for these countries to grant private rights over basic elements of life itself, such as genetic resources, plants, etc. The patenting of life forms signified the privatization of life and associated traditional knowledge, while life was considered as collective by the large majority of cultures in the world. Secondly, current international regimes, including the TRIPS Agreement, granted monopoly rights to private parties, but did not recognize the collective rights of indigenous peoples to their traditional knowledge and genetic resources. Thirdly, the TRIPS Agreement did not protect genetic resources and traditional knowledge of indigenous peoples, and did not recognize or protect their contribution in the upstream part of the innovation value chain. Fourthly, the TRIPS Agreement was inconsistent with the latest international developments in FAO, CBD and UNESCO, and in particular with the Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly through resolution 61/295 of September 2007. Fifthly, life forms and processes that existed in nature could not be subject to patents because they were not inventions, and there was no scientific or technical rationale for the distinction made under Article 27.3(b) between life forms and processes that were patentable and those that were not. Sixthly, the patentability of plants allowed by Article 27.3(b) had rendered possible misappropriation and concentration of genetic resources belonging to developing countries in the hands of transnational companies of developed countries. In conclusion, she urged the Council to amend Article 27.3(b) so as to prohibit the patentability of life forms and associated knowledge.

101. The representative of Peru said that, since 2003, his delegation had submitted 11 working papers jointly with other delegations and four papers by itself, including a concrete case study of biopiracy and legal and practical arguments on the need to include the disclosure requirements in the patent system. Although Members had not achieved any concrete outcome on this utmost important issue, his delegation had obtained the support of the majority of the membership. He said that only when Members, local communities and indigenous peoples' rights over their genetic resources and knowledge were recognized, would they have more opportunities to develop and transform potential wealth into real wealth. He reiterated that this issue was important and that a proper legal solution was needed. Only by taking action against biopiracy, would Members establish a balanced patent system and intellectual property systems in general. He said that intellectual property systems were based on the promotion of innovation, and Members should resolve to improve the systems. In addition, as this was his last TRIPS Council meeting as a Peruvian delegate, he expressed his appreciation to both the Secretariat and other TRIPS delegates for the excellent relations over the past five years.

102. The representative of Colombia said that his delegation shared the disappointment expressed by the Disclosure Group. He said that the relationship between the TRIPS Agreement and the CBD was not a new issue in the WTO, and discussions on this subject dated back to 1997. He recalled that, during the preparations for the Seattle Ministerial Conference in 1999, there had been proposals to incorporate in the TRIPS Agreement provisions on the obligation to disclose biological materials and their country of origin, which would allow countries to raise objections, examine applications and ensure timely submission of their complaints. He also recalled the acknowledgment by the Conference of the Parties and the CBD Secretariat of the need to protect the knowledge, innovations and practices of indigenous and local communities that used genetic resources by implementing intellectual property right systems. He said that the TRIPS/CBD issue had become one of the key issues among the outstanding implementation-related issues that the Doha Ministerial Conference had

instructed should be addressed as a matter of priority and of which the Trade Negotiations Committee (TNC) should be informed so that appropriate action could be taken.

103. He said that, in the seven years during which Members had discussed this issue under the Doha Work Programme, developing countries had sponsored the disclosure proposal and now the co-sponsors made up more than half of the membership. They had set out the reasons why they considered it necessary to introduce this requirement to ensure adequate protection of indigenous communities' rights, which were of the utmost importance because of the wealth that the mega-diverse countries possessed. During this time, developing countries had come up against a lack of flexibility and understanding on the part of a small group of mostly developed country Members, which had been most reluctant to negotiate on the basis of the disclosure proposal, because it would involve amending the TRIPS Agreement. He recalled that when the ministerial-level discussions had taken place in July 2008, Members had been hopeful of reaching an outcome with the Director-General acting as facilitator of the discussions. He said that, although the outcome had not been achieved, it was important to note that there had been renewed recognition of an important benchmark for pursuing constructive discussions on the matter and finding a solution. That benchmark, to which the Director-General's June report also referred, was that there had been considerable common ground in terms of the underlying objectives of the proposal. In other words, the work being done by the membership followed a common course. He said that the task of the Chairman would be to help Members agree on the way in which to achieve those objectives. He reminded the Council that time and patience were running out, and hope was dwindling.

104. The representative of Pakistan supported the statements made by Côte d'Ivoire on behalf of the Disclosure Group and the other proponents of the disclosure proposal, and also supported the proposal that the three TRIPS issues should be taken together as part of the horizontal process to finalize the modalities.

105. The representative of Switzerland recalled that, as indicated in document TN/C/W/52, 110 WTO Members had proposed specific modalities language for the three TRIPS issues. He reaffirmed the importance his delegation attached to the three TRIPS issues and their parallel treatment, in view of a modalities decision and the need for text-based negotiations on the three issues on the basis of the parameters established in document TN/C/W/52. In order to succeed in the challenge of forging a broad consensus for a modalities decision, he said that Members should strive for a balanced package, of which the three TRIPS issues were part. He said that the three TRIPS issues had been put on the agenda by more than two thirds of the WTO membership, and therefore WTO Members should undertake urgent work on these issues. Although he noted that this work was not for the regular session of the TRIPS Council, he reiterated that the three TRIPS issues concerned the subject-matter of the TRIPS Agreement, for which the TRIPS Council was responsible.

106. The representative of China welcomed the discussion on the item of the relationship between the TRIPS Agreement and the CBD in the Council. He said that this issue was a critical implementation-related issue for developing countries, and therefore it should be an integral part of the Doha Development Round. He said that most of the Members shared the objectives of preventing biopiracy and erroneously granted patents, and the divergence was on how to realize these objectives. Some Members believed that the objectives could be achieved through national access and benefit-sharing systems and database systems while other Members thought that these systems were not efficient enough. Most Members, including China, firmly believed that the disclosure requirement in patent applications would substantially contribute to fully implementing the three main principles of the CBD. Accordingly, the effective approach was to introduce the principles of the CBD into the TRIPS Agreement, which would provide an international legal framework and ensure the mutual supportiveness between the TRIPS Agreement and the CBD. He recalled that the Director-General's report of 9 June 2008 had clearly indicated that there was important common ground among Members on the underlying objectives, notably the importance of the TRIPS Agreement and the CBD being

implemented in a mutually supportive way, avoidance of erroneously granted patents and securing compliance with national access and benefit-sharing regimes. He said that there had been wide acceptance of the need for patent offices to have accessibility to the information in order to make proper decisions and to avoid undermining the role of the patent system in providing incentives for innovation. He said that over two thirds of the WTO membership had co-sponsored the draft modality text as indicated in document TN/C/W/52, which requested the inclusion of the three TRIPS issues as part of the horizontal process. This convergence proved that the three TRIPS issues were mature politically and technically so that they merited substantive text-based negotiations in the horizontal process together with other issues, such as agriculture and NAMA. He requested that text-based negotiations on these issues be undertaken in Special Sessions of the TRIPS Council as an integral part of the Single Undertaking of the Doha Developed Agenda with the view of amending the TRIPS Agreement to implement the above-mentioned objectives as soon as possible.

107. The representative of Thailand said that Members had spent more than nine years negotiating the disclosure requirement with the hope that the outcome of the Doha Development Round would have long-lasting systemic benefits for the global trading system and tangible commercial and developmental benefits for all WTO Members. His delegation was disappointed by the delay of the negotiations and failure of the July meeting. He said that during the last nine years Members had had opportunities to share their problems and experiences in the area of misappropriation of genetic resources and traditional knowledge, in parallel with the issues of GI register and GI extension. Although some difference still remained between some Members, his delegation had the impression that many difficult elements had been resolved and the remaining differences were minimal. He said that, at the end of July 2008, more than 110 Members, from the North and South, big and small, advanced and developing, had shared the same conclusion that it was time to start text-based negotiations on the three TRIPS issues. The joint submission pressed for substantive negotiations on the three issues and highlighted the expectation of the vast majority of the WTO membership to make these negotiations an integral part of the Single Undertaking. It provided a sound basis for further work on these issues. He said that it would be a shame if Members would not be able to preserve the advance made and move forward on these negotiations.

108. The representative of the Philippines said that his country had faced the problem of unfair and inequitable exploitation of biological and genetic resources or traditional knowledge. Therefore, he fully supported the disclosure proposal as a solid and reasonable basis for genuine collective engagement which provided a multilateral and effective solution to the problem of biopiracy, especially with respect to the legal effects of non-compliance. He said that this issue had a vital linkage to the development dimension of the Doha Round. The discussion in the Council had touched on the imbalance in the TRIPS Agreement and the unfair exploitation and misappropriation of genetic resources and traditional knowledge. Its far-reaching implications for developing countries were demonstrated by the support of the many developing Members, including the African Group, the LDC Group, and the ACP Group. While fully supporting the disclosure proposal as a basis for finding an agreement acceptable to all Members, he reiterated his delegation's concern over the parallelism between the TRIPS/CBD issue and the other two TRIPS issues.

109. The representative of Turkey said that the TRIPS Agreement should include a mandatory disclosure requirement. She said that WTO Members were ready to start text-based negotiations on the CBD/TRIPS issues. She said that, as a co-sponsor of document TN/C/W/52, her delegation recognized two important implications of the consultations conducted by Minister Støre in July: the existence of shared objectives on the TRIPS/CBD issue and the agreement of two thirds of the WTO Members on the key parameters of the three TRIPS issues. These facts needed to be taken into account in informal or formal decisions. She said that document TN/C/W/52 should be a basis for further discussions and that the TRIPS issues should be part of the Single Undertaking.

110. The representative of Japan said that his delegation's position on the relationship between the TRIPS Agreement and the CBD remained unchanged. It was of the view that the issue of compliance with the CBD be addressed separately from the issue of erroneously granted patents. In this regard, his delegation had made a proposal on database systems for patent examination purposes. He said that the issue of compliance with the CBD needed to be discussed in a comprehensive manner. His delegation was not convinced by the argument that the mandatory disclosure requirement could effectively monitor the violation of the CBD. He said that more in-depth, comprehensive, technical and factual discussions were needed. He informed the Council that the issue of compliance with the CBD had been intensively discussed at the 9th Conference of the Parties (COP-9) of the CBD in Bonn, Germany in May 2008 and would continue to be tackled at COP-10 to be held in 2010. He also informed the Council that the WIPO IGC had addressed the interface between intellectual property and genetic resources or related traditional knowledge. He said that discussion in the WTO should take account of those exercises. He said that, since intellectual property was an essential tool for technology transfer, knowledge dissemination and profit gains for benefit sharing, it was definitely complementary to the CBD objectives. The proposal of a mandatory disclosure requirement should be carefully examined taking into due consideration the adverse impact it might have on intellectual property systems, patent applicants and overall innovative activities. He further said that the issues of TRIPS/CBD and GI extension should be discussed individually on their own merits.

111. The representative of the United States said that his delegation's position on the three agenda items was well-known, and had been reiterated in the various meetings and discussions held in connection with the July ministerial meeting. His delegation did not support amending the TRIPS Agreement to address the concerns of the proponents of the patent disclosure requirement as doing so would not be the most effective way of addressing those concerns. His delegation continued to believe that Members should focus on the shared objectives that had been revealed through the Council's work to date. His delegation agreed that prior informed consent and equitable benefit sharing with respect to the use of genetic resources and related traditional knowledge were important issues, and also agreed on the importance of avoiding erroneously granted patents. However, Members continued to diverge on the premise that a disclosure requirement would be an effective means of achieving the shared objectives. His delegation disagreed with this premise and therefore was not able to support the initiation of negotiations as part of the Single Undertaking towards a preordained outcome that would not, in its view, accomplish the shared objectives.

112. He said that, at a fundamental level, the most critical element in ensuring appropriate compliance with prior informed consent and access and benefit-sharing requirements was the development and strengthening of national regimes and legal frameworks designed specifically to accomplish these objectives. Bringing the patent system into the equation would not make sense in the absence of well-functioning access and benefit-sharing regimes. Even if strong prior informed consent and access and benefit-sharing systems were in place, his delegation wondered how new patent requirements, including the possibility of denial of patents or revocation of patents in some circumstances, would help accomplish the legitimate and important shared objectives. The most effective way to ensure the effective sharing of benefits was to generate benefits in the first place. Benefits would be generated when useful and good products were developed and commercialized and the existence of an incentive through the patent system was a critical element in encouraging such development and commercialization. With this, and with meaningful national access and benefit-sharing systems in place, Members could have confidence that the common objectives could be achieved.

113. Finally, he noted that the agenda of the Council limited Members' discussion to consideration of the three items in tandem. He said that some references had been made to document TN/C/W/52, which included only one issue on the agenda. The two other issues that it covered were not reflected on the Council's agenda. The fact that some Members had found it useful to address these issues together through a parallel approach did not overcome his delegation's vigorous opposition to their

being considered as a package in the context of the Doha Development Agenda negotiations, particularly in light of differences in negotiating mandates, or the lack thereof, with respect to these issues. He said that these issues must continue to be considered on their individual merits and within the specific bodies and consultation mechanisms designated in previous ministerial guidance, which could not be short circuited by the work of the Council. Returning to the items that were reflected on the Council's agenda, he said that his delegation remained committed to being actively engaged in the Council's examination as well as consultation of these issues.

114. The representative of New Zealand did not accept the artificial parallelism between three TRIPS issues. He said that the insistence that process and outcomes on these three issues should be linked was not a negotiating position, but a demand by the proponents based on tactical positioning. He reiterated that Members needed to address each issue on its own merits. His delegation, together with a number of Members, had outlined their concerns in a non-paper circulated on 6 June 2008. While this paper did not have the support of 110 Members, it was co-sponsored by a broad cross-section of the membership with a wide geographical spread, including developed and developing countries. He said that there was a mandate for negotiations on the issue of GI register, and therefore his delegation was committed to the successful conclusion of these negotiations as part of the Single Undertaking. By contrast, there was no mandate for negotiations on the issues of GI extension and TRIPS/CBD, and the substance of these two issues was different. Regarding the issue of GI extension, he said that the proponents had failed to justify the need for the GI extension and therefore his delegation rejected the assertion that this issue was ripe for text-based negotiations. Regarding the issue of TRIPS/CBD, he noted the "important common ground on key underlying objectives" indicated in the Director-General's report, and said that New Zealand shared the objective of preventing the misappropriation of biological resources, but was not convinced that an amendment to the TRIPS Agreement was the best way to achieve that objective. He said that Members had been negotiating constructively on the issue of TRIPS/CBD in the Council, and his delegation would continue this engagement. However, his delegation could not accept the proposal in document TN/C/W/52 because it posed real commercial risks for New Zealand and potentially created new barriers to trade. He said that the starting-point for these discussions should be the reports from the Chair of the Special Session of the TRIPS Council (document TN/IP/18), and the Director-General (document TN/C/W/50). These two reports noted the areas where significant divergences and potential convergence existed. He said that his delegation was ready to continue substantive discussions.

115. The representative of Egypt associated his delegation with the statement made by Côte d'Ivoire on behalf of the Disclosure Group. He said that there was a continuing lack of engagement from a few Members on this issue, which had significant impact on developing countries, particularly with respect to the development prospects of the communities in these countries. He said that there was a need to introduce an amendment to the TRIPS Agreement to include a mandatory disclosure requirement, the principle of prior informed consent, and equitable benefit sharing, in order to bring the TRIPS Agreement in line with the CBD precepts. Therefore, he urged all Members to proceed in good faith towards this end. He also said that all three TRIPS issues needed to be considered in parallel and to be included as part of the horizontal process.

116. The representative of Korea said that his delegation had not heard any convincing argument that there existed a conflict between the TRIPS Agreement and the CBD which necessitated an amendment to the TRIPS Agreement in order to address the CBD goals. Therefore, Korea still remained of the view that the TRIPS Agreement and the CBD could be implemented on their own. He said that the discussion on this issue had not been exhausted in terms of substantive and technical elements. It was impossible to move on to the protection of traditional knowledge and folklore before Members reached consensus on their definition and scope. He said that it would be meaningful for the Council to await the outcome of related discussions in WIPO. He also expressed his delegation's concern over the linkage between the three TRIPS issues. He said that the so-called parallelism

would make it complicated to find solutions in this situation of stalled negotiations, and that each issue should be discussed on its own merits. He fully supported the statements made by Japan, the United States and New Zealand. His delegation stood ready to engage in technical discussions on the CBD/TRIPS issue in the future.

117. The representative of Canada said that it had not been demonstrated that there was a problem that would require an amendment to the TRIPS Agreement. In his view, the TRIPS Agreement and the CBD were mutually supportive, and therefore there was no need to amend the TRIPS Agreement. The most meaningful way to advance the discussion on the relationship between the TRIPS Agreement and the CBD in the WTO was to engage in a fact-based technical discussion of the various proposals made in the TRIPS Council. Time and consideration should be given to a full scoping of the issue before proceeding further, with particular focus on either best practices or problems in the implementation of the CBD. He expressed his delegation's disappointment that the July meeting had ended in an impasse. Nonetheless, his delegation remained strongly committed to the WTO and the multilateral process and supported ongoing discussions to try to reach full modalities in agriculture and NAMA by the end of the year. He said that attempts to interlink the three TRIPS issues and include them as part of the Single Undertaking were not helpful. His delegation did not support this artificial parallelism and believed that these three issues should be dealt with individually. Finally, he said that his delegation was committed to accelerating the work of the WIPO IGC as per its mandate and to achieve concrete outcomes. He informed the Council that great efforts had been made during the last IGC session to find a way forward and to establish a process seeking to accelerate the work on the protection of traditional cultural expressions, traditional knowledge and genetic resources. His delegation looked forward to engaging with other member States and the new Chair in order to build a consensus in advance of the next session of the IGC scheduled for March 2009.

118. The representative of the European Communities said that, as a co-sponsor of document TN/C/W/52, his delegation had agreed to include the three TRIPS issues as part of the horizontal process and to support parallel progress in each of the three issues at stake. Despite the failure of the Ministerial Conference in July, his delegation remained committed to this common platform. Like other co-sponsors, his delegation considered that technical discussions on these three TRIPS issues had been exhausted and it was time to move to text-based negotiations. With regard to the disclosure issue, his delegation had taken a constructive stance from the outset and expressed readiness to meet developing countries' concerns while preserving the balance of rights and obligations of the patent system. He reiterated three key elements of the common platform. First, a legally binding disclosure requirement should be introduced regarding the country of origin or source of genetic resources and associated traditional knowledge in patent applications, with this requirement applying to international, regional and national patent applications at the earliest stage possible. Second, Members should work further on the concept of traditional knowledge in order to agree on a definition. Third, patent applications should not be processed without fulfillment of the disclosure requirement, which would occur if the patent applicant failed or refused to declare the required information and if, despite being given the opportunity to remedy that omission, continued to do so. While his delegation did not necessarily share each element of every disclosure proposal, he said that document TN/C/W52 was a common platform shared by a wide range of WTO Members. In conclusion, he reiterated his delegation's commitment to engage in constructive discussions on this issue.

119. The representative of Australia opposed the artificial parallelism in linking the three TRIPS issues and said that these three issues should be dealt with separately on their own merits and in their appropriate forums according to their separate mandates. On the TRIPS/CBD issue, he said that there were common objectives, and therefore Members could work towards them in appropriate forums. He urged the proponents to keep their demands realistic and to have a practical and focused approach. He said that, as a mega-biodiverse country with a unique indigenous culture, his delegation had as strong an interest in equitable access to genetic resources and associated traditional knowledge as any

other developed or developing country Member. Australia considered that the TRIPS Agreement and the CBD were consistent and could be implemented in a mutually supportive manner. As a party to the CBD, his delegation shared its relevant objectives, including to facilitate access to genetic resources with prior informed consent and mutually agreed terms and to take measures aimed at equitable sharing of benefits and utilization of genetic resources, and to respect, preserve and maintain traditional knowledge. As Australia took all these issues seriously, it called for full consideration of the assertion that the patent disclosure requirement was the best mechanism for achieving the shared objectives. He said that his delegation supported continuing fact-based discussions, particularly in WIPO which was the place to consider many of the technical implications of the different proposals. He said that Australia's national experience indicated that effective benefit-sharing regimes could be implemented outside of the patent system. Australia had implemented legitimate systems and contracts to that effect. He reiterated his delegation's concerns over the mandatory disclosure requirements which had not been adequately addressed by the proponents, namely its implications for the integrity of the patent system and the administrative capacity of patent offices. Accordingly, he said that his delegation preferred to consider the efficacy in designing the patent disclosure requirement in more detail before commencing discussions on any proposed TRIPS amendment.

120. The representative of Cuba said that, as a co-sponsor of document IP/C/W/474, his delegation advocated an amendment of the TRIPS Agreement so as to fulfil the objectives of the CBD and to minimize or prevent misappropriation of genetic resources and associated traditional knowledge. He said that, although the issues of GI extension and GI register were important for a significant group of Members and his delegation supported horizontal modalities on a text-based negotiating process without prejudging any outcomes, it did not welcome the proposal concerning the GI Register in its present form because it exceeded the mandate provided for in Article 23.4 of the TRIPS Agreement in substantive respects. Regarding the GI extension issue, he said that even if this issue were dealt with separately from the system proposed by the European Communities, his delegation did not support it as part of a negotiating package. In view of the above, horizontal negotiations appeared to be an appropriate way of clarifying how to move forward towards a common understanding.

121. The representative of South Africa supported the statement made by Côte d'Ivoire on behalf of the Disclosure Group. He recalled that the proposal contained in document IP/C/W/474 called for the amendment to the TRIPS Agreement to include a mandatory disclosure requirement. He said that over a number of years, the Disclosure Group had set out its case in the Council and had clearly proven that there was a conflict between the TRIPS Agreement and the CBD. He said that the time had come to remove that conflict and that Members should move forward in terms of text-based negotiations. He welcomed the European Communities' support for the introduction of a legal requirement in the TRIPS Agreement. Concerning the proposal contained in document TN/C/W/52, he said that his delegation did not see any link between the issues of TRIPS/CBD, GI extension and GI register, and that the TRIPS/CBD issue should not be used to get a free ride for GI issues. He said that the CBD/TRIPS issue was a stand-alone issue that should be negotiated on its own merits, and that other issues should be also negotiated on their own merits wherever there were mandates.

122. The representative of Argentina said that his delegation did not support the artificial parallelism between the three TRIPS issues as proposed in document TN/C/W/52. He said that Argentina also suffered from misappropriation of genetic resources but did not endorse the solution proposed by the co-sponsors of that document, nor support amending the TRIPS Agreement. He said that Members should continue discussions on the TRIPS/CBD issue without forgetting that substantive work was being done in WIPO and the CBD.

123. The representative of Angola supported the statement made by the African Group. He said that the time had come to put an end to the squabble over the past nine years on this issue. He said that while over 110 Members had true concerns, some Members in the minority had other concerns.

He proposed that the Council take into consideration both sides' concerns and draft a text which all Members could agree to.

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

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

125. The Chairman recalled that paragraph 8 of the waiver Decision 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.

126. He said that the Secretariat had prepared a draft cover note for the Council's report modelled on that of last year's report (JOB(08)/102). The draft cover page contained factual information on the implementation and use of the system established under the Decision and on the acceptance of the Protocol Amending the TRIPS Agreement. He proposed that, in accordance with the way that the Council prepared its report last year, the part of the minutes of the meeting reflecting the discussions held under this agenda item be attached to the cover note.

127. He informed delegations that, since the circulation of the draft cover note, Canada had provided a communication to the Council informing it that the first shipment of the generic medicine produced under Canada's Access to Medicines Regime (CAMR) had taken place on 24 September 2008 (IP/C/W/526). The final version of the cover note for the Council's report would be updated accordingly.

128. 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, since the Council's meeting in June, Jordan had notified its acceptance of the Protocol on 6 August 2008 (document WT/Let/630). The Secretariat had circulated an update to the note on the status of acceptances of the Protocol that the Council had requested it to prepare at its meeting in October 2006 (IP/C/W/490/Rev.3). He said that the Secretariat would continue to update it periodically.

129. The Chairman recalled that the Protocol would enter into force for the Members that had accepted it upon acceptance of the Protocol by two thirds of the Members. It was open for acceptance by Members until 31 December 2009 or such later date as may be decided by the Ministerial Conference. He encouraged Members to ensure that the necessary measures were being taken in capitals to allow the consideration of the acceptance in a timely fashion.

130. The representative of Canada informed the Council that, following Rwanda's notification to the Council in July 2007 regarding its intention to import drugs under CAMR, the Canadian pharmaceutical company Apotex had been awarded a tender from the Rwandan Government to export the triple combination HIV/AIDS drug "ApoTriavir" in May 2008. This had occurred after the Commissioner of Patents had granted Apotex the first ever compulsory licence under the terms of the Decision, as implemented by CAMR. On 24 September 2008, Apotex had sent its first shipment of lower-cost HIV/AIDS drugs produced under CAMR to Rwanda. The representative of Canada said that his Government recognized the devastating impact of HIV/AIDS and was engaged in a long-term, comprehensive approach to fighting the disease. The first shipment of ApoTriavir was a key achievement with regard to access to medicines in developing countries. He hoped that this would lead to a better understanding of how CAMR could be used to effectively advance this humanitarian objective. While CAMR received continuing support, he noted that it was only one part of the

Government's broader response to improving access to medicines in developing countries. His delegation also supported a number of other initiatives to provide medicines and vaccines to countries in need. For example, CAN$450 million had been pledged over the next three years to the Global Fund to Fight AIDS, Tuberculosis and Malaria, which facilitated the purchase and delivery of life-saving medicines to developing countries. Domestic legislation had also been amended to facilitate the transfer of essential medicines to developing countries through the Donations of Medicine Eligibility Program. With respect to the draft report to the General Council (JOB(08)/102), his delegation agreed with the contents and suggested removing the square brackets currently found in paragraph 6 of the draft report.

131. The representative of India welcomed the first shipment of HIV/AIDS drugs to Rwanda which was a key achievement in the use of the system established under the Decision. He proposed that the Secretariat prepare a compilation of documents concerning national implementing legislation adopted by WTO Members with a view to facilitating the use of the system by those Members with insufficient or no manufacturing capacities in the pharmaceutical sector.

132. The representative of Ecuador expressed his satisfaction with the first export of medicines based on the system established under the Decision. He paid tribute to the Canadian Government for having taken measures to facilitate the export of medicines which enabled developing and least developed countries with no or limited manufacturing capacities to deal with public health emergencies. However, his delegation considered the procedures for such exports set up by the system to be too complex and bureaucratic, seriously reducing the chances of meeting the objectives of the Decision, i.e. to enhance access to medicines and to protect public health. This was witnessed by the procedures in Canada, which took some three years to achieve the supply of medicines to Rwanda. His delegation appealed to Members with manufacturing capacities to implement the system in a flexible manner into their national law and to ensure the availability of simple and operational procedures. He informed the Council that his Government was drawing up a programme on access to medicines and intended to make full use of the flexibilities contained in the system, as well as of other flexibilities in the TRIPS Agreement, to address the public health needs of its population.

133. The representative of the European Communities said that his delegation attached great importance to the system established under the Decision. He welcomed the fact that, following the notification by Rwanda on its intention to use the system and Canada's decision to authorize the manufacture and export of the drugs concerned under compulsory licence, the first shipment of the drugs had left Canada in September 2008. The shipment of seven million doses to Rwanda would help save the lives of several thousand patients. This was an important step which demonstrated that the system worked when it was used. He recalled that his delegation had adopted Regulation 816/2006 implementing the Decision in 2006. This allowed European companies to produce generic drugs under compulsory licence for export to countries facing public health problems. His delegation stood ready to respond to requests from developing countries in need of medicines. He also encouraged those WTO Members who had not yet accepted the Protocol Amending the TRIPS Agreement to do so as soon as possible. It was important for Members to confirm their commitment to this process so that the Protocol could enter into force as soon as possible.

134. The representative of China said that the supply of medicines by a generic manufacturer from Canada based on the system established under the Decision set a good example. His delegation attached great importance to the issue of TRIPS and public health. It had ratified the Protocol Amending the TRIPS Agreement in 2007 and had launched the process of amending relevant national laws and regulations to implement the Protocol in 2008. The results would be notified to the Council after completion of this process. His delegation welcomed the notification of national implementing legislation by some Members. He encouraged those Members who had already amended their

national laws to make presentations to the Council with a view to setting out their implementing measures, as well as any problems they had encountered and the way in which those had been addressed. This information was important for many developing country Members potentially facing some technical difficulties in amending their national laws and regulations.

135. The representative of Switzerland welcomed the first use of the system established under the Decision by a developing country and commended Rwanda for doing so. As referred to in the draft report, his delegation had notified the Council of the entry into force of its revised Federal Law on Patents for Inventions on 1 July 2008. Its Article 40*d* provided for the possibility of granting a compulsory licence for export purposes in accordance with the draft Article 31*bis* of the TRIPS Agreement. Through the implementation of the system into national law, his delegation had made available its manufacturing capacities in the pharmaceutical sector to developing and least developed countries facing a situation which was intended to be addressed by the system and enabling them to make use of the new flexibility introduced in the TRIPS Agreement. For more detailed information, he referred Members to the revised law as notified to the Council (IP/N/1/CHE/P/9). As regards China's proposal to invite Members to present their implementing legislation to the Council, he said that his delegation stood ready to do so in a future meeting. He supported India's proposal to compile national legislation implementing the system which could serve as a reference tool for Members intending to make use of the system.

136. He said that his delegation was concerned about the status of acceptances of the Protocol Amending the TRIPS Agreement. The Secretariat's revised note showed that only 18 Members had accepted it so far whereas more than 100 acceptances were needed for the amendment of the TRIPS Agreement to enter into force. He encouraged WTO Members who had not yet ratified the Protocol to expedite national procedures so that the amendment could enter into force by the end of 2009. This would also provide a safe legal basis in the TRIPS Agreement for those Members who had already put in place implementing legislation or were in the process of doing so.

137. The Chairman proposed that the Council agree to the cover note to the report, as contained in JOB(08)/102 and updated concerning Canada's latest communication, and also that the Council minutes containing the record of the discussion be attached to it.

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

I. NON-VIOLATION AND SITUATION COMPLAINTS

139. 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.

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

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

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

142. No statements were made under this agenda item.

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

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

144. The Chairman recalled that Article 24.2 provided that the Council should keep under review the application of the provisions of the GI Section of the Agreement. He said that, since its meeting in June, the Council had received responses from Colombia to the Checklist of Questions contained in document IP/C/13 and Add.1. These responses had been circulated in document IP/C/W/117/Add.32.

145. He also recalled that, at its meeting in February 2007, the Council had agreed that the Chair hold further consultations in due course on how the Council should organize its future work on the review. Given that the Chairman had not received any representations from delegations on this issue, he had not yet held such further consultations. However, he said that, like his predecessor, he remained ready to hold such consultations once he sensed an active interest in pursuing the matter.

146. He urged those delegations that had not yet provided responses to the Checklist of Questions contained in document IP/C/13 and Add.1 to do so. Also, those Members that had already provided responses could provide updates to the extent that there had been any significant changes to the way they provided protection to geographical indications.

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

L. SIXTH ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT

148. 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. He said that the second set of detailed annual reports under the Decision had been presented to the Council's meeting in October 2006. At its meeting in June 2008, the Council had requested developed country Members to submit a second set of updates to those reports for the October meeting. The Secretariat had issued on 14 July an airgram (WTO/AIR/3223) to remind developed country Members of this request.

149. The Council had received reports from the following developed country Members: Japan, New Zealand, Norway, the United States, Switzerland, Canada, 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), as well as from Australia (being circulated in document IP/C/W/519 and addenda).

150. As regards the purpose and conduct of the review of this information, he recalled that paragraph 2 of the Decision on the Implementation of Article 66.2 of the TRIPS Agreement explained that the annual review meetings shall 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.

151. He said that, since some of the information had been received only very recently, and most of it was available only in its original language, he intended to provide an opportunity at the next meeting for Members to make further comments on the information which had just been submitted and which might not have been studied by Members, as well as on any further information that might be provided before that meeting.

152. He recalled that, just before the Council's meeting in June, the delegation of Lesotho, on behalf of the LDC Group, had sent a request to the WTO Secretariat to organize a workshop that would bring together LDC and developed country experts to discuss transfer of technology under Article 66.2 back to back with the Council's meeting in October. Pursuant to that request, the Secretariat had organized such a workshop the day before the present meeting. He said that he understood that there had been a constructive exchange of views which had been useful to both LDC and developed country delegations.

153. He further said that, as requested by the Council at its meeting in June, the Secretariat had prepared a brief background note setting out the reports that had so far been submitted under the Decision, including the reports for the annual review that had been submitted by 20 October. The note had been circulated in document IP/C/W/522.

154. The representative of Lesotho, speaking on behalf of the LDC Group in the WTO, thanked developed country Members for having agreed to the LDC Group's request for the workshop on Article 66.2 and for the commitment they had shown in explaining their reports. It had been a very good experience that had helped LDCs to understand what their developed country partners had provided them with under Article 66.2. While a lot had been achieved, it could not always be clearly understood. This was mainly because of the lack of a uniform reporting mechanism, as well as of a common definition of the term "transfer of technology" and of what constituted "incentives to be provided to institutions and enterprises".

155. She said that the LDC Group saw the implementation of Article 66.2 as an important issue and considered the TRIPS Council decision on 19 February 2003 on the implementation of Article 66.2 (IP/C/28) to be critical for LDCs to effectively utilize the transition periods accorded under the Agreement in order to create a sound and viable technological base for development.

156. She further said that the LDC Group's understanding on Article 66.2 comprised the following points: first, the provision was mandatory for all developed country Members; second, it was owed specifically to LDCs and not to developing countries in general; and third, developed countries were to provide "incentives" to institutions and enterprises in their territories. "Incentives" included financial, regulatory, administrative and legislative measures taken by developed country Members, including preferences for those institutions and enterprises that effectively transferred technology. The key point was that the incentives would induce particular sets of actions on the part of those to whom they were directed. Further, incentives were to be provided to enterprises and institutions in developed country Members' territories, which encompassed private actors, quasi-government agencies, public-private partnerships, educational institutions, research institutions and even government agencies. Incentives should be for the purpose of promoting and encouraging technology transfer. Therefore, technology transfer could not be an incidental result or part of some broader effect of another measure, as had been clearly noted in the reports by developed country partners. Qualifying measures must not only be specifically targeted at technology transfer, they must in addition promote such transfer.

157. She said that, during the workshop of the previous day, it had been understood that without clear definitions and parameters, there could be no clear and useful indicators for measuring the performance or for monitoring, evaluating and analyzing the implementation of Article 66.2. LDCs understood technology transfer to mean a process that involved the interactive provision of a package

of measures. It was not necessary to reinvent the wheel as parties could draw on sources such as UNCTAD and Agenda 21 for a definition. The LDC Group understood technology transfer to be a transfer from one party to the other of a package including, at a minimum, but certainly not limited to: (i) physical capital and goods, including specialized equipment, and goods embodying or incorporating the relevant technology or idea; (ii) skills and know-how, technical and manual skills training, scientific and academic training, knowledge of operating the technology or equipment, training and technical advice and assistance necessary to assemble, maintain and operate a viable system or technology; and (iii) information and data, including manuals, designs, blueprints, operating instructions, scientific and technical publications and reports. She said that the possibility of adopting clear parameters, including the above criteria, should be discussed and agreed to, in order to ensure uniform reporting based on similar measurable indicators that addressed squarely the implementation of Article 66.2 and not other provisions or broader measures.

158. She said that the obligation in Article 66.2 implied that international technology transfer from developed countries to LDCs had to occur on less than commercial terms. Thus, the incentives provided by developed country measures had to be accompanied by financial measures that ensured that LDC enterprises and institutions accessed technology at grant or concessional rates. Further, given the legitimate expectations of LDCs in creating a sound and viable technological base, the outcome of any technology transfer had to ensure that institutions and enterprises in LDCs were able to use, reproduce and adapt the technology to the same extent as a licensee of a patented technology. Without such a capacity, it was impossible to build domestic capacity for commercial scale activities related to the technologies. This would be one of the measures of effectiveness of the incentives provided by developed countries. As stated by the LDC Group in the workshop, there were two forms of technology transfer, one through the supply of hardware such as plant machinery, and second, through the supply of software such as research and training and education.

159. Least developed countries held the view, which she said had been shared by developed countries during the workshop, that there was so far no uniform reporting format, making the analysis and measurement of the measures implemented more difficult. In that regard, the LDC Group pointed out the need for a review of the implementation of Article 66.2 in which measures should be discussed and agreed to. There was also a need to develop a tool kit to help LDCs self-assess whether technology transfer by developed countries had occurred. During the development of the tool kit, issues of definition of terms and a uniform reporting mechanism should be sorted out. There was a need to use a uniform reporting format, as was adopted for SPS and TBT, which ensured comparability of reports. Persons/contact points/agencies responsible for implementing Article 66.2 should be identified in both LDCs and developed countries to ensure consistency, clear reporting mechanisms and implementation. If this was done, it would be clear that technology transfer occurred to LDCs under this provision, which was not the case so far since most of the reports had tended to mix measures granted to both LDCs and developing countries.

160. On behalf of the LDC Group, she recommended that another workshop be organized back to back with a TRIPS Council meeting in the course of 2009, not later than August, to ensure that the outcomes were reflected in the final reports to the TRIPS Council. Such a workshop should have the participation of all Members. In this regard, she requested the WTO Secretariat to sponsor at least one capital-based official dealing with transfer of technology from LDC Members to ensure effective participation.

161. She said that the LDCs' understanding was that there was an agreement to have the review of Article 66.2 in order to include, among others, a uniform reporting mechanism, clear parameters of what constituted technology transfer and incentives by the developed countries, as well as the development of a tool kit to help the assessment of technology transfer. The LDC Group remained ready to engage with Members to ensure that Article 66.2 became operational and effective, so as to enable LDCs to build their technological base for development.

162. The representative of Brazil said that his intervention under the agenda item stemmed from a systemic concern with regard to the implementation of the TRIPS Agreement. Article 66.2 was an important element of the Agreement and also one of the key elements of the trade-off between rights and obligations underlying the Agreement. He said that transfer of technology was a concept to which Brazil attached the utmost importance. In reviewing the reports presented under Article 66.2, the Council had to avoid any interpretation that might lead to a restriction or narrowing down of the concept, for example to mere technical assistance activities. Article 66.2 required the establishment of real flows of technology sufficient to assist LDCs in creating a sound and viable technological base. The notion of transfer of technology encompassed a whole range of activities, incentives and policies, which had to target promoting the inclusion of LDCs into the knowledge-based economy.

163. The representative of Bangladesh thanked developed country Members for the submission of their reports in pursuance of the TRIPS Council decision of 19 February 2003 and said that his delegation associated itself with the statement made by the delegation of Lesotho on behalf of the LDCs. At the request of the LDCs, a day-long workshop had been held on 27 October 2008 to enhance the understanding of LDCs in respect of the annual submissions of developed countries in compliance with the obligation under Article 66.2. His delegation hoped that the workshop would bring more transparency in the future reports of developed country Members.

164. The provisions of Article 66.2 were mandatory in nature and not best-endeavour clauses. Ministers in Doha had instructed the TRIPS Council to put in place a mechanism for ensuring full implementation of the obligations in Article 66.2, the main objective of which was to help LDCs create a sound and viable technological base by transferring technology from developed country Members. He said that, at the Maseru Conference, LDC Ministers had urged developed country Members to provide incentives to enterprises and institutions in their territories that achieved effective technology transfer to LDCs and that went beyond workshops and seminars. LDC Ministers had also stressed the need for establishing a monitoring mechanism to review the situations where enterprises and institutions of developed country Members had transferred technology to LDCs as a result of such incentives in order to create a sound and viable technological base.

165. He said that, as Article 66.2 was dedicated to LDC Members, the reporting should also be dedicated to LDCs. Reviewing different submissions, his delegation had seen that not all developed country Members had shown their programmes LDC-wise and project-wise. LDCs needed information of the appropriate kind and a clear understanding of the reporting system under Article 66.2 so as to evaluate whether and how it benefited LDCs. He said that his delegation was not saying that developed country Members should have dedicated programmes for LDCs but that the reporting should be LDC-wise. This would help ascertain from LDC capitals the status of the programmes in question.

166. He said that there should be a common understanding between developed country Members and recipient LDCs about the types of incentives given by each government agency or other entity and the effectiveness of these incentives in promoting and encouraging transfer of technology. His delegation had noticed that there were different perceptions about technology transfer and suggested that a common definition could be followed. His delegation understood that the private sector in developed country Members could play an important role in transfer of technology and that developed country governments could create an enabling atmosphere by providing incentives to their domestic institutions and enterprises.

167. The TRIPS Council decision of 19 February 2003 called for new detailed reports to be provided every third year and annual updates every other year. He requested the Secretariat to inform his delegation of the reports made by each developed country Member. His delegation sought information on: (i) the type of technology that had been transferred by enterprises and institutions and the term on which it had been transferred; (ii) the mode of technology transferred; (iii) specific

LDCs to which developed country enterprises and institutions had transferred technology; (iv) the extent to which incentives were specific to LDCs; and (v) any additional information that would help assess the effects of measures in promoting and encouraging transfer of technology to LDCs.

168. He reiterated the request made by the delegation of Lesotho that another similar workshop be organized for the next year, back to back with the year-end TRIPS Council meeting.

169. The representative of Uganda said that there was no clear standard of how reporting on Article 66.2 should be done. In his view, it was clear from the workshop that there were gaps in the reports which he hoped would be identified and filled. He said that there was a need to have a review of reports under Article 66.2 in order to include, among other things, a uniform reporting mechanism and to agree on the parameters that constituted technology transfer, in order to allow operation and effectiveness of the provision.

170. The representative of Switzerland said that he believed there was a general agreement among Members that the workshop held the previous day had been conducted in a positive spirit and resulted in an informative exchange of experiences and views. His delegation would be glad to participate in and contribute to another workshop next year as it was convinced that such a dialogue would lead to improvements in the processes of implementation of Article 66.2 and the quality of reports.

171. He said that a proposal had been made during the workshop to compile best practices and information on successful programmes and Switzerland believed it could provide helpful information and assistance to developed country Members to focus on measures which had proved to be successful and mattered most to LDCs. His delegation was willing to contribute to a process to enhance the transparency and comprehensibility of the reports prepared by developed country Members under Article 66.2.

172. He said that setting incentive measures in developed country Members alone would neither be sufficient to actually bring about technology transfer to LDCs nor allow LDCs to create a sound and viable technological base. In the end, it was the enterprise's decision as to whether or not to transfer its technology to a third country and that, while incentive measures might be one consideration, there were also other factors. Other elements should be considered and directly addressed at the national level in the LDCs so as to create a better framework of conditions that would encourage developed country enterprises to invest in these countries and make use of incentive measures available in order to transfer their technology.

173. He said that his delegation looked forward to continuing the excellent cooperation that they had had the previous day with LDC partners and to further implement Article 66.2 obligations and cooperate with them in a wider context of technology transfer.

174. The representative of the United States said that the workshop had been very useful, particularly in light of the fact that in 2009 his delegation would be producing the new triennial report under Article 66.2. He said that developed country Members had come away from the previous day's workshop with a lot of very concrete ideas about how they could continue to improve the quality of reporting and make it as clear as possible. A number of suggestions had been reiterated in the clear and comprehensive statements made by LDCs in the present Council session with respect to, for example, a greater degree of information about points of contact in connection with various incentive programmes. This was an area where his delegation had begun to make some progress but would continue to do more in the context of what was stated by the delegations of Lesotho and Bangladesh about focusing as much as possible on the activities that were having effects in LDCs, even when the same programme might have targets in non-LDCs. A number of other suggestions had been made that gave his delegation a lot of food for productive and fruitful thought.

175. The representative of the European Communities said that his delegation was committed to the review exercise and to the provision of incentives for technology transfer under Article 66.2 with a view to helping LDCs to create a sound and viable technological base. He thanked the LDC Group for taking the initiative on the previous day's workshop where a number of issues had been highlighted and some suggestions made concerning the reports. His delegation stood ready to engage in further discussion as to how best to fulfil developed country Members' reporting obligations.

176. The representative of Australia said that there had been many productive exchanges during the workshop on the previous day and many comments and suggestions made, particularly by Lesotho, Bangladesh and Uganda, addressing the case for transparency and contact points and that reports should focus on LDCs and confusion avoided by providing information that might overlap with technical capacity-building activities. These had been useful insights that developed country Members could take on board.

177. She said that her delegation looked forward to utilizing these suggestions in its report next year and would also be pleased to participate in future workshops as it saw the value of maintaining a productive dialogue. She agreed with Switzerland that Article 66.2 itself was a necessary but not sufficient condition to facilitate technology transfer and that there were other issues which needed to be addressed in the domestic framework of LDCs in order to improve absorptive capacity.

178. The representative of Japan said that the workshop had been very enlightening and helpful to his delegation in order to improve its cooperation with LDC Members. While sharing the view expressed by Switzerland that transfer of technology decisions were made by individual private enterprises, he said that the Japanese Government would make utmost efforts to improve the business climate which was conducive to the transfer of technology. His delegation looked forward to working further with LDC colleagues in this context.

179. The representative of New Zealand said that useful discussions had taken place during the workshop the previous day on definitions and reporting criteria, including on the merits of uniform reporting by developed country Members. Issues had been specifically raised with respect to New Zealand's report, which his delegation would be able to reflect upon in order to improve next year's report. He said that his delegation supported the continuation of discussions and welcomed the suggestion of further workshops between developed countries and LDC partners in future years.

180. The Chairman said that he felt encouraged by the tenor of exchanges about the workshop held the previous day and said that he would like, on his own behalf as Chair, to compliment the delegation of Lesotho and the LDC Group as well as the developed country Members for their work and the success that they had achieved. He looked forward to continuing a deepening of that process. He urged those developed country Members that had not yet provided reports to do so. He reiterated his intention to provide an opportunity, at the Council's next meeting, for Members to make further comments on the information submitted for this meeting that they had not yet had been able to study, and to continue the discussion on the implementation of Article 66.2.

181. The Council took note of the statements and so agreed.

M. TECHNICAL COOPERATION AND CAPACITY-BUILDING

182. The Chairman recalled that the Council had agreed, at its meeting in June, to hold its annual review of technical cooperation at the present meeting. In preparation for this annual review, developed country Members had once more 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 14 July, the Secretariat had issued an airgram

(WTO/AIR/3222) reminding Members of this request. Intergovernmental organizations observers to the Council as well as the WTO Secretariat had also been invited to provide information.

183. The Council had received information from the following developed country Members: Norway, Japan, New Zealand, the United States, Switzerland, Canada, the European Communities and individual member States (namely Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Lithuania, Portugal, the Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom, and the European Patent Office), as well as from Australia (being circulated in document IP/C/W/517 and addenda). Updated information had been obtained from the following intergovernmental organizations: OECD, WHO, FAO, UPOV, UNCTAD and WIPO (being circulated in document IP/C/W/516 and addenda). In addition, the IMF had informed the Secretariat, by means of a letter dated 15 July 2007, that it did not undertake any TRIPS-related technical assistance and, hence, did not have any information to provide of direct relevance 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/515.

184. He also recalled that paragraph 2 of the TRIPS Council's 2005 decision on the "Extension of the Transition Period under Article 66.1 for Least-Developed Country Members" provided that "with a view to facilitating targeted technical and financial cooperation programmes, all the least-developed country Members will provide to the Council for TRIPS, preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement". To that date, the Council had received such information from Sierra Leone and Uganda. Since the Council's meeting in June, Sierra Leone had followed up its earlier needs assessment by translating it into an initial two-year technical assistance project to enable the country to start taking forward the implementation of the TRIPS Agreement, and presented this project to the Council in a new document IP/C/W/523. In this communication, Sierra Leone had requested further consultations with its developed country partners. He understood that such consultations would be held the following day.

185. He further recalled that, at the Council's meeting in June, Brazil had introduced an advance copy of its communication entitled "Technical Cooperation and Capacity-Building: 'Cluster' A of the Development Agenda" (subsequently circulated as document IP/C/W/513). Brazil had suggested that the Council take note of the 14 proposals contained in 'Cluster A' acknowledging, where applicable, their relevance for the implementation of Article 67 of the TRIPS Agreement. Given that Members had not had an opportunity to study the communication in advance, the Council had agreed to revert to it at the present meeting.

186. The representative of Lesotho, speaking on behalf of the LDC Group in the WTO, said that the LDCs supported the contents of paragraph 2 of the 2005 Decision, and the steps that Uganda and Sierra Leone had taken in conducting their priority needs assessment and carrying forward the process. Other LDCs were in the process of preparing their needs assessment. Once LDCs had submitted their priority needs assessments, developed country partners should live up to their pledges of providing the needed technical and financial assistance in order to develop the necessary infrastructure. Such infrastructure would enable LDCs to achieve the necessary technological base that would set the ground for compliance with the TRIPS Agreement.

187. The representative of Bangladesh, supporting the statement by Lesotho, said that his delegation was committed to the multilateral trading system as provided by the Agreement. Adequate technical and financial cooperation was vital to help LDCs to implement the TRIPS Agreement. The economic, financial and administrative constraints faced by LDCs, including Bangladesh, had not changed and there continued to be need for flexibility to create a viable technological base. At the Maseru Conference, LDC Ministers had urged developed country partners to provide financial and technical assistance in response to LDCs' needs assessments and to implement their bankable projects.

He thanked Uganda and Sierra Leone for having submitted their needs assessments and informed that assessments by other LDCs were in the pipeline. He drew Members' attention to paragraphs 3 and 4 of the 2005 Decision and said that developed country Members should provide technical and financial cooperation in favour of LDCs as per Article 67 of the Agreement, with a special reference to paragraph 2 of the 2005 Decision.

188. He thanked the developed country partners, especially the European Communities, for the funding of the EC-Bangladesh IPR Project under WIPO. The implementation of the Agreement had development implications and the provision of technical assistance should not be linked to the compliance with the Agreement. He underlined the importance of flexibilities to allow countries, especially LDCs, to promote their social policies and interests. Given past experiences, he said that a clear plan detailing the nature and type of technical and financial assistance to be provided to LDCs should be drawn up by the membership.

189. The representative of the United States said that his delegation was available to discuss the details of the reports with those Members who might have questions or feedback with respect to the submission of annual reports. He further said that his delegation deemed the communication with LDCs to be a valuable way of refining and improving its activities in connection to the technical cooperation obligation. The workshop held on the previous day had proved very useful in providing concrete indications from individual LDCs on how they perceived their needs as they moved to implement the Agreement. He looked forward to continuing the engagement with those LDCs which had already provided needs assessments and to receiving additional such assessments in due course.

190. The representative of Sierra Leone supported the statement made by Lesotho. Encouraged by developed country Members and the WTO Secretariat and by Uganda's experience, Sierra Leone had developed its initial communication into a modest initial trial technical assistance project, so as to enable it to take steps to implement the TRIPS Agreement. This document, entitled "IP for Sierra Leone Project", identified four clusters: (i) update of the policy, legal and regulative framework; (ii) increasing awareness and improving education; (iii) administration; and (iv) capability and enforcement. In principle, these clusters aimed at ensuring compliance with the Agreement so that Sierra Leone could use the Agreement to foster its economic growth and development. The project document also dealt with project management and implementation mechanisms, as well as governance, monitoring, review and evaluation of projects. Sierra Leone was keen to set up a project implementation unit and requested financial assistance from developed country partners to do so. It was the expectation of Sierra Leona that the project would commence on or before 1 June 2009, with a lifespan of two years and a total cost of US$1.4 million. He requested the Chair to use his good offices to set up consultations with developed country Members, WIPO and UNCTAD with a view to securing technical and financial assistance for the implementation of the project.

191. The representative of the European Communities said that his delegation was ready to look at the documents submitted by Sierra Leone and Uganda in a positive spirit. Regarding the submission of Uganda, his delegation had agreed to support many of the activities identified by Uganda in the areas of IP regulation, administration, enforcement and other relevant areas, and several activities were being launched. His delegation would participate in the meeting on this topic scheduled for the following day with the main donors. He encouraged all developed country Members to contribute to this important process and said that his delegation was ready to consider any new submission on priority needs coming from other LDC Members.

192. The representative of Uganda congratulated Sierra Leone for its revised document. He thanked the European Communities and the Czech Republic for having already expressed their interest in funding parts of Uganda's projects, and requested other donors to join the European Communities and to ensure that the implementation process got started. Uganda still needed support for its implementation unit.

193. The representative of Brazil recalled that, at the previous session, his delegation had presented an advance copy of the communication introducing to the Council "Cluster A" of the WIPO Development Agenda (IP/C/W/513). The WIPO Committee on Development and Intellectual Property (CDIP) had begun the implementation process of the 45 agreed recommendations contained in the WIPO Development Agenda. Cluster A dealt with technical assistance and capacity building, comprising a range of principles and activities aimed at promoting effective flow of technical assistance to developing and least-developed countries. He understood that, under Cluster A, technical assistance should be seen as: (i) development oriented; (ii) demand driven; (iii) transparent; and (iv) must take into account the priorities and special needs of developing countries. Looking at Article 67 of the TRIPS Agreement, his delegation expected the TRIPS Council to take into account the 14 recommendations of WIPO, which his delegation considered to be relevant points of reference to enlighten the work carried out by the Council, either on Article 67 or in another area.

194. The representative of China expressed his appreciation of the document submitted by Brazil and said that technical assistance and capacity building should not be limited to the implementation of the TRIPS Agreement, but instead should focus on how to benefit from the rights resulting from the Agreement and prevent abuses of IP rights. Only appropriate objectives could lead to right and effective activities from which the developing country Members could get real benefits.

195. The representative of the United States welcomed Brazil's continuing interest in technical cooperation and took note of Brazil's paper concerning the CDIP and the recommendations that it had been given the task of implementing. His delegation had been highly involved in the work of the CDIP and would continue to be so in order to contribute to continuous successful work. The CDIP had had two meetings so far and was still in its formative stage, working with the WIPO Secretariat to establish proper and necessary steps to be taken to implement each of the adopted recommendations, including programme and budgetary issues related to their implementation. However, many of the recommendations did not make sense outside WIPO as they expressly concerned its responsibilities, capabilities and resources. It was inappropriate to assume that those recommendations could apply outside of the functioning of the CDIP. While individual WTO Members and the TRIPS Council could take into account the recommendations, his delegation was not ready to pursue their institutionalization within the TRIPS Council.

196. The representative of Argentina welcomed document IP/C/W/513 and said that the WIPO Development Agenda was extremely important and his delegation had participated in the negotiations that had led to it.

197. The representative of Ecuador, supporting the statements by Brazil and Argentina, said that his delegation had also actively participated in these negotiations and believed that the recommendations should be taken into consideration.

198. The representative of Egypt said that the relevant recommendations should be borne in mind when discussing technical assistance and capacity building, since they provided useful guiding principles.

199. The representative of Canada thanked Brazil for its proposal and said that his delegation was committed to implementing the Development Agenda at WIPO, including its recommendations under Cluster A, by mainstreaming the development dimension into all of the organization's activities. Although linkages could be drawn between the Development Agenda and the Article 67 process, he was of the view that WIPO's efforts in this sense were complementary and should not form the basis of the consideration of issues related to technical assistance and capacity building under Article 67 of the TRIPS Agreement. He reiterated Canada's commitment under the WTO and WIPO with regard to

these issues and believed that the two Organizations should continue to work collaboratively on these matters.

200. The Chairman said that, since some of the information provided for the annual review had been received only very recently, and most of it was, so far, available only in its original language, it was his intention to provide Members an opportunity at the next meeting to make further comments on the information submitted for this meeting that they might not yet have been able to study. He also encouraged other LDC Members to provide information on their individual priority needs for technical and financial cooperation.

201. The Council took note of the statements made.

N. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

202. The Chairman said that the Republic of Cape Verde had become the 153rd Member of the WTO on 23 July 2008. In paragraph 246 of the Report of the Working Party on the Accession of Cape Verde (WT/ACC/CPV/30), the representative of Cape Verde had confirmed that it would apply the TRIPS Agreement by no later than 1 January 2013, according to an action plan contained in the Report and with the understanding that, for the obligations covered by Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections, Cape Verde would apply the TRIPS Agreement no later than 1 January 2016, in light of paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health. He added that further details could be found in the Report. This commitment had been incorporated into paragraph 2 of the Protocol of Accession of the Republic of Cape Verde (WT/L/715).

203. The Council took note of the information provided.

O. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

204. The Chairman said that there were 17 pending requests for observer status in the TRIPS Council. A list of these requests was contained in document IP/C/W/52/Rev.11. Since the Council's meeting in June, the Executive Secretary of the secretariat of the Convention on Biological Diversity, in his letter to the Director-General dated 3 July 2008, had renewed the application for accreditation of the CBD secretariat as an observer in the TRIPS Council.

205. He recalled that, at its last meeting, the Council had requested the Chairman to hold consultations on the request for observer status from the CBD secretariat. He informed the Council that he had consulted with those delegations who in the past had had some difficulty in granting observer status to the CBD secretariat. The situation continued to be, in essence, as reported by his predecessor at the Council's meeting in March. One of these delegations believed that, without prejudice to its position regarding the issue of permanent observer status, it might be possible to make progress in this particular case following the model used in the Special Session of the Committee on Trade and Environment and the Negotiating Group on Trade Facilitation, namely by inviting the CBD secretariat as an *ad hoc* invitee on a meeting-by-meeting basis. However, another delegation continued to have concerns on the grounds that an observer should have a broad interest in the TRIPS Agreement not only limited to some particular issues and that the broader question about observership remained unresolved. He said that, therefore, it did not seem possible to make progress on this matter at that stage. However, he stood ready to continue his consultations, as requested by one delegation that he had consulted.

206. The representative of India said that his delegation appreciated the efforts made by the Chairman and his predecessor in finding a solution to the long pending requests for observer status from the secretariat of the CBD. He reiterated the concerns his delegation had expressed at the

previous Council meeting. While he was aware of the list of 17 pending requests, he felt that the CBD presented a special case due to its direct relevance to the issues being discussed in the Council. Members were engaged in the Council and elsewhere in the WTO in discussions that had a direct relationship with the CBD, including under three permanent items on the Council's agenda, one of which was the "Relationship between the TRIPS Agreement and the Convention on Biological Diversity". He agreed with those delegations that had said that there was a need for coherence between the work on CBD-related issues being carried out in several organizations, and that the CBD Secretariat's presence at the Council would be helpful in this regard. At Doha, Ministers had recognized the importance of granting observer status to MEA secretariats with a view to enhancing mutual supportiveness between trade and environment (para. 30(ii)). He said that about 80 Members had co-sponsored the disclosure proposal which sought to enhance mutual supportiveness between the TRIPS Agreement and the CBD. He felt that the request by the CBD secretariat had to be decided positively and expeditiously. In the meantime, an *ad hoc* invitation should be extended to the CBD secretariat, for which there were several precedents in the WTO. He requested that the Chairman continue his consultations with the relevant Members.

207. The representative of Ecuador supported the request from the CBD secretariat. A number of the Council's regular agenda items were relevant in this respect, namely the review of the provisions of Article 27.3(b), the relationship between TRIPS and the CBD, and the protection of traditional knowledge and folklore. He appealed to Members, specifically those who were the most reticent in approving the request from the CBD secretariat, to move forward in a constructive dialogue that would enable them, at least, to invite it to the Council's regular meetings on an *ad hoc* basis, that was to say, on a meeting-by-meeting basis, until Members had definitively resolved this issue. He requested that the Chair continue his consultations.

208. The representative of Brazil said that he believed that the CBD secretariat would have a very useful role to play as an observer to the Council, since one of the most relevant agenda items was the relationship between the TRIPS Agreement and the CBD. For this reason, it would be in the interest of every Member to grant it observer status. At the Council's previous meetings, the possibility of conferring the CDB secretariat *ad hoc* observer status had been raised as a compromise to pull Members out of the present impasse. He requested that the Chair continue his consultations in order to find a satisfactory solution to this matter.

209. In the light of the requests made, the Chairman proposed that he continue his consultations on the request for observer status received from the CBD secretariat.

210. The Council took note of the statements made and so agreed.

P. ANNUAL REPORT TO THE GENERAL COUNCIL

211. The Chairman said that the draft Annual Report of the Council had been circulated in document JOB(08)/106. He suggested that the Secretariat be requested to update the draft to reflect the discussions at the present meeting and to fax the revised draft to Members, who would have one week to comment on the updated parts of the draft report once it had been circulated by the Secretariat.

212. The Council so agreed.[2]

[2] The Annual Report (2008) of the Council for TRIPS was subsequently circulated as document IP/C/51.

Q. OTHER BUSINESS

Dates of the Council's meetings in 2009

213. The Chairman suggested that the Council agree on the following dates for its meetings in 2009: Tuesday and Wednesday, 3 and 4 March; Monday and Tuesday, 8 and 9 June; and Tuesday and Wednesday, 27 and 28 October.

214. The Council so agreed.