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IP/C/M/72

13 May 2013

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Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING
HELD IN THE CENTRE WILLIAM RAPPARD ON 5-6 MARCH 2013

Chairperson: Ambassador Dacio Castillo (Honduras)

The present document contains the record of the discussion which took place during the Council for TRIPS meeting held on 5-6 March 2013.

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1 NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

1.1. The Chairman said that, since the Council's meeting in November 2012, Montenegro, a new Member of the WTO, had made its initial notification of its laws and regulations. The list of notified laws and regulations was being circulated in document IP/N/1/MNE/1, and the texts of those laws and regulations were being made available in the sub-series of documents in electronic form on the Documents Online database. Its responses to the Checklist of Issues of Enforcement were being circulated in document IP/N/6/MNE/1.

1.2. In addition, the Council had received a number of updates to earlier notifications of laws and regulations notified under Article 63.2. of the Agreement:

- Cuba had notified a Resolution on an official list of plant species, including hybrids;
- Cape Verde had notified a Decree-Law revising its law on copyright;
- Jordan had notified 2007 amendments to its patent law;
- Mexico had notified a Decree promulgating the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;
- Canada had notified a consolidated text of its Copyright Act, as amended by Bill C-11;
- the United States had notified its consolidated Copyright Regulations, Consolidated Patent Laws, Patent Law Treaties Implementation Act of 2012; an Act to implement the provisions of the Hague Agreement and the Patent Law Treaty; changes to implement micro-entity status for paying patent fees; and an amendment to the Trademark Act; and
- Georgia had notified a Law on Appellations of Origin and Geographical Indications of Goods.

Those notifications of laws and regulations were being made available in the IP/N/1- series of documents, and the actual texts of laws in sub-series of documents in electronic form on the Documents Online database.

1.3. As regards notifications of contact points under Article 69 for the exchange of information and cooperation on trade in infringing goods, since the Council's meeting in November, Montenegro had notified its contact point. In addition, updates to contact points notified earlier had been received from Indonesia; Hong Kong, China; Macao, China; and Lesotho. The information on the Members' transparency toolkit page had been updated accordingly.

1.4. The Chairman urged those Members whose initial notifications of laws and regulations remained incomplete to submit the outstanding material without delay. Equally, he urged other Members to fulfil their obligation under the TRIPS Agreement to notify any subsequent amendments of their laws and regulations without delay after their entry into force. He especially encouraged Members to notify changes made to their laws and/or regulations to implement the Decision on TRIPS and public health.

1.5. The Council took note of the information provided.

2 REVIEWS OF NATIONAL IMPLEMENTING LEGISLATION

2.1 Follow-up to the review of legislation of Maldives

2.1. The Chairman recalled that, at its meeting in June 2012, the Council had initiated the review of Maldives' implementing legislation. At the Council's meeting in November, Maldives had introduced the responses it had provided to the questions posed to it. At that meeting, he had indicated that, since the responses had been made available as advance copies and were not yet available in all WTO languages, he intended to provide Members more time to study the

responses. Since then, the introductory statement made by Maldives, the questions put to it and the responses given in connection with that review had been circulated in document IP/Q/MDV/1.

2.2. Since there were no further follow-up questions, he suggested that the review of Maldives be removed from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from that review at any time.

2.3. The Council so agreed.

2.2 Follow-up to other reviews already undertaken

2.4. The Chairman said that, as regards the reviews of national implementing legislation that had been initiated at the Council's meetings since April 2001, the reviews of three Members remained on the Council's agenda, namely those of Cuba; Fiji; and Saint Kitts and Nevis.

2.5. He recalled that, prior to the Council's meeting in November 2012, Cuba had provided responses to the questions posed to it in connection with its review. Those responses had been circulated in IP/Q/CUB/1. At that meeting, the representative of Cuba had provided an introductory overview of Cuba's IP legislation and the changes made to it. Since then, that statement had been circulated in document IP/Q/CUB/1/Add.1.

2.6. At that meeting, he had said that, since the responses had been circulated just before the meeting and were not yet available in all WTO languages, it was his intention to provide Members more time to study the responses.

2.7. Since there were no further follow-up questions, he suggested that the review of Cuba be removed from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from that review at any time.

2.8. The Council so agreed.

2.9. As regards the follow-up to the reviews of Fiji and Saint Kitts and Nevis, the Chairman urged the delegations concerned to provide the outstanding material as soon as possible, so as to allow the Council to complete the follow-up to those reviews. He suggested that the Council revert to the matter at its next meeting.

2.10. The Council so agreed.

2.3 Arrangements for the review of the national implementing legislation of Montenegro

2.11. The Chairman recalled that, at its meeting in June 2012, he had informed the Council that Montenegro had become a new Member of the WTO, and that it had agreed to apply the TRIPS Agreement no later than the date of its accession to the WTO, without recourse to any transitional period. The Council had agreed to revert to the arrangements for the review of its national implementing legislation once it had received Montenegro's initial notification of its TRIPS implementation. As indicated under item 1, Montenegro had now made its initial notification of its TRIPS implementing laws and regulations.

2.12. In scheduling the review of the implementing legislation of Montenegro, the Council should reserve enough time for other Members to prepare questions to be posed to it in the context of that review. The Council would also need to ensure that Montenegro has sufficient time to prepare its responses. Accordingly, he suggested that the Council schedule the review for the Council's third meeting in 2013, which had tentatively been pencilled in for 10-11 October 2013.

2.13. In accordance with the standard procedures for the review, he proposed that the Council set the following target dates for the submission of questions and answers in that review:

- questions should normally be submitted to Montenegro, with a copy to the Secretariat, 10 weeks before the meeting in which the review takes place; accordingly, he suggested a target date of 1 August 2013;

- responses to questions posed within that deadline should normally be submitted four weeks before the meeting; accordingly, he suggested a target date of 12 September 2013.

2.14. The Council so agreed.

2.4 Arrangements for the review of the national implementing legislation of Tajikistan

2.15. The Chairman said that, under item 14, he intended to provide Members information on the accessions of the Lao People's Democratic Republic and Tajikistan. He noted that Tajikistan had agreed to apply the provisions of the TRIPS Agreement no later than the date of its accession to the WTO, without recourse to any transitional periods.

2.16. He suggested that the Secretariat be requested to contact Tajikistan concerning the notification procedures of the Council. He also suggested that the Council revert to the arrangements for that review at its meeting in June 2013.

2.17. The Council so agreed.

2.5 Arrangements for the review of the national implementing legislation of the Russian Federation

2.18. The Chairman recalled that, at its last meeting, the Council had agreed to review the national implementing legislation of the Russian Federation at its next meeting scheduled for 11-12 June 2013. Concerning the arrangements for that review, the Council had set the following target dates for the submission of questions and answers: questions should be submitted to the Russian Federation, with a copy to the Secretariat, by 2 April 2013; and responses to questions posed within that deadline should be submitted by 14 May 2013.

3 REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)

4 RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY

5 PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

5.1. The Chairman suggested that the Council continue to discuss the three agenda items together on the basis of contributions by Members as had been the practice at past meetings. He recalled that, as requested by the Council at its meeting in November 2012, he had continued his predecessor's consultations on the suggestions that the Secretariat of the Convention on Biological Diversity (CBD) be invited to brief the Council on the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization that had been adopted at the tenth meeting of the Conference of the Parties to the CBD held in Nagoya, Japan in October 2010. He said that, unfortunately, he was not in a position to report any new developments in delegations' positions on that matter.

5.2. He also recalled that, at its meeting in November 2012, the Council had agreed to revert to Ecuador's proposal that the WTO Secretariat be requested to update three factual notes that summarized the points delegations had made in the Council's past discussions on the review of the provisions of Article 27.3(b); the relationship between the TRIPS Agreement and the CBD; and protection of traditional knowledge and folklore.

5.3. The representative of Indonesia said that, in order to ensure that the TRIPS Agreement and the CBD were mutually supportive and capable of promoting the sustainable use of genetic resources, Members should take bold steps to make substantive progress at the multilateral level. As protection of traditional knowledge and folklore was crucial not merely for developing countries but also for many other Members, it was pressing for the Council to intensify the discussion. His delegation attached great importance to the harmonization between the TRIPS Agreement and the CBD, especially on the issue of disclosure requirements. The disclosure requirements would not be burdensome to patent applicants. Instead, the disclosure requirements would have a positive effect by ensuring a predictable environment for governments, investors, traditional communities and researchers.

5.4. As the Nagoya Protocol had been concluded, it was important for all Members to consider the issue as a matter of urgency. It would be in Members' best interest to articulate through the TRIPS Agreement the aim to afford sufficient level of protection of traditional knowledge and folklore. He highlighted the importance of making a concrete connection between the discussions in the Council and in other forums, notably within WIPO. A WIPO Asia-Pacific Regional Symposium on Intellectual Property Rights, Traditional Knowledge and Related Issues had been held in Jakarta, Indonesia in October 2001 and an International Symposium on Ensuring Protection for Genetic Resources and Traditional Knowledge and Folklore through the Creation of Databases had been held in Bali in June 2012, which showed Indonesia's commitment to that particular matter and reflected its commitment to making a concrete connection between the Council and other forums. In conclusion, he encouraged Members to make substantive and significant progress on those agenda items.

5.5. The representative of China said that the TRIPS-CBD issue, as part of the Doha Round negotiations, was a long-standing issue. The Doha Round negotiations had been restored and Members had been busy with the preparations of the 9th Ministerial Conference. The TRIPS-CBD issue did not seem to be one of the candidates for an early harvest. In her view, the TRIPS-CBD issue deserved an urgent resolution. She said that, as a co-sponsor of documents TN/C/W/52 and TN/C/W/59, China believed that the TRIPS Agreement, the CBD and the Nagoya Protocol should operate in a mutually supportive way. A mandatory disclosure requirement would safeguard the rights related to genetic resources and traditional knowledge within the patent system, contribute to improving the transparency and legal certainty regarding the utilization of genetic resources and traditional knowledge, and would make the patent system supportive of the provisions of the CBD and the Nagoya Protocol. As indicated in document TN/C/W/59, it would not be burdensome for patent applicants to disclose information concerning prior informed consent and access and benefit sharing in view of the legitimate objectives pursued by the disclosure requirement.

5.6. Contractual arrangements proposed by some Members were insufficient to ensure the protection of genetic resources as such arrangements depended on the voluntary behaviour and did not impose restrictions on third parties. Compared with the large quantity of genetic resources available in the world, information contained in databases and likely to be accessible to patent examiners before the granting of patents would be limited. The responsibility to respect a sovereign right over genetic resources should rely upon legal or natural persons who accessed or used the genetic resources and traditional knowledge at first hand.

5.7. She highly valued the on-going work in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), but said that it should not prevent Members from seeking solutions in the WTO. She suggested that WIPO report to the Council on progress in the ICG in a timely manner. She also encouraged Members who had participated in the IGC to volunteer to brief the Council on on-going work. She supported Ecuador's proposal to ask the WTO Secretariat to update its notes on the three agenda items which would help Members have a good understanding and facilitate discussions. In addition, she suggested that consultations on this matter be conducted in a timely manner. She also encouraged Members to share §national experiences and provide empirical studies to enable Members to have a good basis for further discussions.

5.8. The representative of the Plurinational State of Bolivia said that the review of the provisions of Article 27.3(b) had been pending since the entry into force of the TRIPS Agreement in 1995. The Agreement clearly stated that this Article "shall be reviewed four years after the date of entry into force of the WTO Agreement". The review of Article 27.3(b) was also an issue within the mandate of the Doha Work Programme under paragraph 19 of the 2001 Doha Ministerial Declaration (WT/MIN(01)/DEC/1). That review was also an outstanding implementation-related issue pursuant to paragraph 12 of the Ministerial Declaration. Paragraph 12 referred to the adoption of the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17) to address a number of implementation problems faced by Members. It also clearly stated that the "negotiations on outstanding implementation issues shall be an integral part of the Work Programme".

5.9. Over the years, various submissions and proposals had been tabled on the review of Article 27.3(b). They had raised a number of significant concerns such as the need to amend or clarify Article 27.3(b) to prohibit the patenting of all life forms, and the need to protect farmers' rights, genetic resources, traditional knowledge and traditional practices in developing countries.

The African Group, for example, had made two submissions, one in 2000 (IP/C/W/206) and another entitled "Taking forward the review of Article 27.3(b)" in 2003 (IP/C/W/404). The LDCs had also made a submission in October 2001. All those submissions, including the two made by Bolivia in 2010 and 2011, reflected the need for a more in-depth analysis of the implications and effects of authorizing the patenting of life forms and parts thereof, as permitted under Article 27.3(b) of the TRIPS Agreement. Unfortunately, such an analysis had never been carried out as thoroughly and seriously as it should have been given the importance of that issue.

5.10. The adoption of Article 27.3(b) marked the start of a race to patent microorganisms, genes, plants, seeds, cells and biochemical components, and today those patents fell under the monopoly of a small number of multinational corporations. In agriculture, for example, a small group of multinational corporations (six) controlled 77% of climate change-resistant patents, which should be a cause for concern given the implications in terms of food security and sovereignty.

5.11. At a number of previous meetings, Bolivia had emphasized various points that needed to be addressed, including the ethical and moral implications of allowing the commercialization and privatization of life itself, the danger of allowing patents for resources of such fundamental importance to the future of mankind to lie in a small number of private hands, the negative impact on innovation and access which was becoming ever more apparent and, last but not least, the awarding of patents for gene discovery where genes had merely been isolated and were clearly not inventions, a practice that contradicted the very foundations of the patent system and made such patents highly questionable. He said that patents on life forms and parts thereof could not be treated like patents in other areas of science and technology, due to the implications and effects, a detailed analysis of which had yet to be carried out by the Membership.

5.12. Lastly, he supported the proposal made by China and Ecuador on requesting the Secretariat to update the documents relating to the three agenda items. He also supported the proposal to invite WIPO to report to the Council on the work in the WIPO IGC.

5.13. The representative of India said that the inadequacy of the TRIPS Agreement to combat biopiracy and misappropriation of genetic resources and traditional knowledge needed no elaboration. The TRIPS Agreement was inconsistent with IPR-related obligations provided in the CBD, which predated the TRIPS Agreement. That contradiction between the TRIPS Agreement and the CBD was one of the factors leading to an imbalance in the TRIPS Agreement. The geographical spread and the socio-economic profile of the co-sponsors of the disclosure proposal made it clear that a Doha Development outcome could not be complete without satisfactorily addressing that issue of immense importance to a vast majority of WTO Membership. There could be undesirable consequences to the development of biotechnology and similar fields in the absence of internationally acceptable legal regulations. The issue must therefore be dealt with urgency and priority.

5.14. He said that his delegation had closely observed the discussions in the WIPO IGC in February 2013. There had been substantial progress over the consolidated text whereby there was clarity over the positions of different Members on different aspects of the issue. It was unfortunate that despite the acceptance of the fact that there was misappropriation of genetic resources, and free riding, the opponents of the issue would not like to move beyond the cosmetic proposals, such as creation of databases and IT-related solutions.

5.15. After a great deal of detailed technical work, the disclosure proposal had been submitted in 2006 in document IP/C/W/474, followed by the submission of document TN/C/W/52 in June 2008 with the support of 108 Members. The latest document TN/C/W/59, entitled "Enhancing mutual supportiveness between the TRIPS Agreement and the CBD", had been submitted by a vast majority of WTO Membership in April 2011. The submission captured the developments in the past including the Nagoya Protocol, which had been signed by 192 countries and contained a significant implementing legislation regarding prior informed consent and access and benefit sharing. He said that the submission could be a good basis for future negotiations to maintain the credibility of the patent system. India remained committed to moving that process forward and expected constructive engagement from other Members.

5.16. He conveyed his sense of disappointment at the lack of progress on the TRIPS-CBD issue despite exhaustive technical work for more than a decade and overwhelming support of WTO

Membership. Moreover, the proponents of the disclosure proposal had consistently demonstrated the spirit of compromise and constructive engagement. While most Members agreed that work on all areas on the Doha Work Programme must progress apace, it was ironical that there had been no progress on the TRIPS-CBD issue. He said that an outcome on that issue was an essential element of any development package that emerged from the Round.

5.17. The representative of Tanzania said that, as a Member of the LDC Group, Tanzania recognized the objectives of the TRIPS Agreement and the CBD, and the need and value of advancing the negotiations on the TRIPS-CBD issue. She said that the incorporation of mandatory disclosure requirements in patent applications was necessary for fair and equitable sharing of the benefits arising from the utilization of genetic resources and associated traditional knowledge towards a county's development. She supported the proposal contained in document TN/C/W/59 to amend the TRIPS Agreement in the form of a new Article 29*bis*. She said that the disclosure requirement would not constitute a substantive requirement for patentability. In accordance with the TRIPS Agreement, patents shall be available for all inventions that are new, involve an inventive step and are capable of industrial application. The question that Members needed to deliberate upon was the consequence of the failure to comply with the disclosure requirement in line with the proposal contained in document TN/C/W/59. She said that the TRIPS-CBD issue should continue to be discussed until the new mechanism was agreed upon by Members. Tanzania remained committed to moving that matter forward.

5.18. The representative of Brazil seconded the statements made by Indonesia, China, India and Tanzania and supported an amendment to the TRIPS Agreement to introduce a mandatory requirement of disclosure of the origin of genetic resources in patent applications. He said that misappropriation of genetic resources and associated traditional knowledge could only be properly addressed with the full disclosure requirement in patent applications. The disclosure requirement would allow mega-biodiverse developing countries to benefit from their own genetic resources and associated traditional knowledge. As one of the co-sponsors of documents TN/C/W/52 and TN/C/W/59, Brazil supported the full implementation of the Nagoya Protocol and the broad interplay between the TRIPS Agreement and the CBD.

5.19. He supported the proposals to invite WIPO to report on the IGC's work to the Council, and to invite the CBD Secretariat to take part in the Council's meetings.

5.20. The representative of Colombia reiterated her delegation's interest in the issue of the misappropriation of components of biological diversity through product or process patents, where access to biological or genetic resources or products derived therefrom and/or traditional knowledge had not been legally obtained on the basis of prior informed consent and terms mutually agreed with the country of origin of the material, as agreed under the CBD. She said that it was necessary to revise IP systems and incorporate mechanisms that would help address the monitoring and follow-up difficulties highlighted by mega-diverse countries dealing with biopiracy, by identifying points of convergence between the rules on IP protection and those relating to the conservation of biological diversity and the use of its components, including genetic resources, so as to ensure that the regime covering access to genetic resources and benefit sharing was consistent with the objectives of both protection systems and that these were thus mutually supportive, pursuant to Article 16.5 of the CBD and Article 4 of the Nagoya Protocol. That in turn would make it possible to address the mandate provided for in paragraph 19 of the Doha Declaration in a constructive manner.

5.21. She highlighted the positive developments made at the February 2013 session of the WIPO IGC, which had been devoted to the issue of genetic resources with special emphasis on disclosure of origin. She hoped that the IGC's work would progress even further and have a positive impact on the work carried out in the Council. Lastly, she reiterated her delegation's interest in inviting the CBD Secretariat to give a presentation on the Nagoya Protocol within the TRIPS Council framework.

5.22. The representative of South Africa said that there was a fundamental conflict between the spirit and objectives of the CBD and the TRIPS Agreement. Three areas of conflict were identifiable based on the objectives of the two agreements. Firstly, Article 3 of the CBD provided that states had sovereign rights over their biological resources and the TRIPS Agreement overlooked states' sovereignty but recognized private IP rights over those resources. Secondly, the CBD provided states with an opportunity to demand sharing of the benefits arising from the commercial use of

biological resources while the TRIPS Agreement negated that legal authority. Thirdly, the CBD was aimed at reducing biopiracy by requiring prior informed consent whereas the TRIPS Agreement did not have such a requirement, which meant that patent applications could be submitted over biological resources or traditional knowledge of certain local communities in any other countries. The TRIPS Agreement recognised patent rights on the basis of novelty, but did not take into account traditional knowledge and cultural practices. He said that there was a need to avoid erroneously granted patents for inventions that involved the use of genetic resources and related traditional knowledge. There was also a need to secure compliance with national access and benefit-sharing regimes. It was clear that the implementation of the TRIPS Agreement might threaten the preservation of biological resources and traditional knowledge.

5.23. Referring to Article 16.5 of the CBD that IPRs must not conflict with the sustainable use of biodiversity, he said that what could aid in reconciling the two agreements was a proper legal review of both agreements with the aim of making amendments where necessary to ensure mutually supportive application. Under the current review of Article 27.3(b) of the TRIPS Agreement, amendments could be made to incorporate the CBD objectives into the TRIPS Agreement in order to preserve biodiversity, prevent biopiracy and include the protection of local community rights in accordance with the spirit and purport of the CBD.

5.24. The representative of Peru said that biological diversity was one of the main pillars of the Peruvian economy. Some 99% of Peru's fishing activities depended on hydrobiological resources, 65% of its agricultural production was based on native genetic resources, 95% of its livestock farming used native natural pastures, and 99% of its forestry industry used native woodland and species. Moreover, biological diversity was an important source of direct employment and livelihood for a large part of Peru's population. That was why Peru was pushing for an amendment to the TRIPS Agreement that would bring it into line with the provisions of the CBD, thereby providing Peru with an international instrument that would establish firm rules with which to fight against biopiracy.

5.25. He said that a requirement for multilateral and mandatory disclosure would be the most effective way to address the international problem of misappropriation of genetic resources and traditional knowledge, as it would allow all countries to identify the country supplying the biological resource by requiring patent applicants to disclose the country of origin and provide evidence of compliance with prior informed consent and benefit sharing. That conviction, in addition to the need to improve the system so as to prevent biopiracy and system misuse to the detriment of developing countries, had prompted Peru to co-sponsor, with some 110 Members, document TN/C/W/52, and to submit, in conjunction with a considerable number of other delegations, document TN/C/W/59 on enhancing the relationship between the TRIPS Agreement and the CBD, through which Peru was seeking to protect access to or use of its genetic resources with a view to ensuring that they were used sustainably and to the benefit of all Peruvians and particularly the indigenous communities. Inclusion of the disclosure of origin requirement would ensure recognition of the legitimate rights of peoples over their genetic resources.

5.26. Peru was fully convinced of the importance of the IP system as a tool for economic, social and cultural development, and therefore attached such importance to that issue as one of the outstanding implementation-related issues mentioned in paragraph 12 of the Doha Declaration. In his view, only a balanced result that dealt with the problem of biopiracy would enable Members to establish a proper balance in the patent system and in the IP system in general for the benefit of all, particularly the local and indigenous communities of developing countries.

5.27. He supported the proposal that WIPO report on the IGC's progress in the Council. He said that the IGC of 4-8 February 2013 meeting had resulted in a revised version of the text that would be used as the basis for IGC negotiations on genetic resources and associated traditional knowledge. That text, which incorporated the various viewpoints of proponents and *demandeurs* was, despite some remaining differences of opinion, a fundamental step forward in that process, as it allowed Members, for the first time in over a decade of negotiations, to envisage, with cautious optimism, the real possibility of convening a diplomatic conference in the not too distant future.

5.28. In that context, as one of the 17 countries in the world that were considered mega-diverse, Peru believed that those negotiations should take into consideration the following points. Firstly,

the inclusion of the concept of "derivatives" of genetic resources as protected subject-matter. More than 60% of patents in the world of biotechnology, pharmaceuticals and cosmetics, etc. were awarded to inventions based on products derived from genetic resources, which meant it would be of little use to protect only the genetic resources as such. Second, it should be ensured that the requirement to disclose the origin of the genetic resource and/or its derivatives and associated traditional knowledge in a patent application was clear and expressly recognized. Thirdly, this disclosure requirement should also oblige the patent applicant to present the respective access contract for the genetic resource concerned, as well as the formal agreement with the respective local communities, where appropriate.

5.29. The representative of Nepal said that the debate on the TRIPS-CBD issue had been going on for years. In the view of his delegation, there was a need to work for ensuring mutually supportive and complementary relationship between the two instruments. The salient principles agreed in the CBD needed to be observed. The CBD underlined the sovereign right of states over their genetic resources as well as prior informed consent on the use of such resources and equitable sharing of benefits arising from their commercial use. Those were the principles that Members were working to ascertain in the negotiations on legal instrument(s) for the protection of genetic resources, traditional knowledge, and folklore. The Council needed to recognize the developments that Members had agreed in other relevant forums. He reiterated his delegation's voice for the mandatory disclosure requirement of the origin of genetic resources in patent applications and supported international efforts to prevent misappropriation of genetic resources and traditional knowledge. To that end, he said that Members needed to ensure that the user should disclose the country of origin of the genetic resource, evidence of prior informed consent from the country of origin and benefit-sharing agreements between users and the country of origin. He said that that issue was an important element of the Doha Development Agenda.

5.30. The representative of Cuba supported the statements made by China, India and Brazil, and, in particular, Ecuador's proposal that the Secretariat update the factual notes bringing together the discussions of the three items. With regard to the statement made by Bolivia, Cuba was in favour of examining the various practices applied by Members under Article 27.3(b), with a view to understanding the ways in which the flexibilities provided for in that Article were used and the problems faced by developing countries in that respect. She said that it was positive that developing countries incorporated the flexibilities of Article 27.3(b) into their domestic legislation with a view to safeguarding public health and food security interests and other domestic policy priorities.

5.31. The representative of Pakistan said that her delegation supported the important matter under discussion.

5.32. The representative of Bangladesh said that his delegation did not support patenting of life forms like plants and animals as per its domestic laws and also on moral and ethical grounds. States were sovereign, and traditional knowledge and genetic resources belonged to either indigenous people or to the states. Safeguarding genetic resources and traditional knowledge and folklore was imperative to protect them from being misappropriated in the form of patents of non-original innovations, which had been a matter of great concern for developing countries. Genetic resources and traditional knowledge could be protected by effective disclosure mechanisms and by obtaining prior informed consent. The TRIPS-CBD issue had been a critical implementation issue for all the developing countries and especially LDCs. Both the TRIPS Agreement and the CBD and the Nagoya Protocol broadly upheld the use of innovation for the development of the people and those agreements should be complementary to each other. The CBD had provided for establishment of legitimate rights over genetic resources, and it was only moral that patent applicants would disclose the source of inventions if they accessed and used a particular genetic resource of which they were not the rightful owners. The disclosure requirement was also consistent with the transparency principle established in the multilateral trading system and would help reduce the number of erroneous patents and biopiracy. The disclosure requirement would also ensure the access to benefit sharing to the rightful owners of the resources. He said that the mandate provided for in paragraph 19 of the Doha Declaration and reinforced in the subsequent Ministerial Declarations should be implemented in an early and constructive manner.

5.33. The representative of the United States said that Members themselves were in the best position to describe their perspectives on the negotiations in the WIPO IGC. To his understanding, China had been present at those negotiations and the United States looked forward to hearing

from China on its perspective. He asked for clarification on whether China suggested that a report from the WIPO Secretariat be a condition precedent for any intervention from China on that issue.

5.34. He said that the IGC had continued text-based negotiations related to the protection of genetic resources, and had begun with a review of a "Consolidated Document Relating to Intellectual Property and Genetic Resources". An informal expert group, including representatives of WIPO member states and indigenous peoples, had worked to identify the core issues, reduce the number of options and streamline the text. At the IGC, there remained a wide diversity of views regarding whether the work related to genetic resources should have as an objective to ensure that patents were appropriately granted, or whether the objective should be to ensure compliance with national laws with respect to prior informed consent and benefit sharing. The draft text that had resulted at the end of the session had a number of options and bracketed text. That draft text would be transmitted to the WIPO General Assembly, which would meet from 23 September to 2 October 2013. In accordance with the IGC's mandate and work programme for 2013, the WIPO General Assembly would take stock of progress made and decide on whether to convene a diplomatic conference. In addition to the text that would be considered by the WIPO General Assembly, new documents considered included: a Joint Recommendation on Genetic Resources and Associated Traditional Knowledge (by Canada, Japan, Norway, Korea and the United States); a Proposal for the Terms of Reference for a Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems (submitted by Canada, Japan, Korea and the United States); and a Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources (submitted by Canada, Japan, Korea and the United States). The United States, like many WTO Members, had been actively participating in the negotiations of the IGC, and looked forward to working to advance the IGC's discussions.

5.35. With regard to the request for a presentation from the CBD Secretariat, he said that the United States was not in a position to support such a request. Turning to the request from Ecuador to update the three documents with information from the Council's recent meetings, he said that the request would amount to asking the Secretariat to pull Members' interventions from the minutes of the Council's meetings, which were already available to Members, and place citations to those interventions in a revised report. Given the limited value of such an intensive exercise, his delegation was not convinced that revising the 2006 documents to update footnotes would be a useful use of the WTO Secretariat's already constrained resources. As a result, his delegation did not support updating the three information documents.

5.36. Regarding patent disclosure requirements, he said that the proposals to mandate the disclosure of the source of genetic resources, prior informed consent, and mutually agreed terms, would neither improve the patent system, nor promote the shared objective of providing a mechanism to address misappropriation. Such proposals would inject significant uncertainty and unpredictability into a system that was essential to promoting the innovation that could solve many of the problems that faced the world. The risks posed were not worth the price, particularly when patent disclosure requirements would do so little to promote shared objectives. The patent examination process was not a suitable mechanism for ensuring compliance with unrelated regulatory requirements. The origin of genetic resources had as much of a rational relationship to the patent system as tax filings, vehicle permits, or workplace safety rules, in other words, no relationship at all. The best mechanism for addressing misappropriation would be to employ a contractual model within a national system, with the control and benefits retained by the holders of the underlying genetic resources and traditional knowledge. The contract approach encouraged research and development, and created a sustainable economic model. On the other hand, requiring disclosure of the origin of genetic resources added uncertainty to the patent system and would shift resources from researchers to patent attorneys, without improving the patent system. That requirement would also put any benefit sharing agreements at risk.

5.37. The representative of Nigeria, speaking on behalf of the African Group, said that the African Group supported the amendment of the TRIPS Agreement to introduce the mandatory disclosure requirement of the origin of genetic resources into patent applications. As stated by China, material transfer agreements or the contractual approach would not address the issue of misappropriation of genetic resources sufficiently. The incorporation of the objectives of the CBD into the TRIPS Agreement would go a long way in addressing the problem of misappropriation of genetic resources. He said that there was a need to resume the Director-General's consultations in

order to reach a solution. He requested the Chairman to transmit the appeal of the Africa Group to the Director-General.

5.38. The representative of Korea said that it was unnecessary to revise the TRIPS Agreement through the review of Article 27.3(b), and that the TRIPS Agreement and the CBD did not conflict with each other. His delegation continued to oppose the proposal on a mandatory disclosure requirement. In Korea's experience, databases of genetic resources and traditional knowledge would greatly assist in preventing the granting of erroneous patents. The Korean Intellectual Property Office (KIPO) had spent six months in studying the use of generic resources in Korean patent applications in 2012. More than 100,000 patent applications had been filed with KIPO. KIPO had limited the scope of its study by using the international patent classification (IPC) in the field of biotechnology. The study could not be extended to include other international patent classifications as it would need an overwhelming amount of resources. Even with the limited scope of the study, there were still too many applications. KIPO had further limited the scope of the study to the applications received in the past two years. The study found that generic resource related patents needed systematic databases, and that most of the generic resources in the patent applications had been disclosed in different ways. KIPO had searched more than 5,000 genetic resources one by one in order to clarify which specific genetic resource had been used. The study found that the origin of the genetic resources was unclear as it could be traditional markets, certain areas near the applicant, or regular companies. In the view of Korea, a mandatory disclosure requirement would place significant burdens on IP offices.

5.39. The representative of Japan, recognizing the importance of the three agenda items, said that active discussions were on-going in the WIPO IGC. As the IGC was an appropriate forum for Members to have technical discussion, further work needed to be done in the IGC. He said that, in order to achieve sustainable growth, it was crucial to seek appropriate measures to address the misappropriation of genetic resources without adverse effect on existing IP systems.

5.40. He recalled that Japan had proposed to establish a one-click database system that would provide information on genetic resources and associated traditional knowledge. The database system was a feasible and effective way to prevent patents from being erroneously granted without adverse effect. The database system would significantly enhance the quality of patent examination, which would lead to innovation and dissemination of technology. His delegation would continue to pursue the database proposal given the broad support of Members in that regard. His delegation did not see a need to introduce a disclosure requirement in patent applications.

5.41. The representative of Australia said that Australia was an island continent with diverse biological resources and a unique and vibrant indigenous culture. Australia sought to protect genetic resources and traditional knowledge of indigenous people while retaining legal certainty in IP systems. Australia considered that WIPO was best placed to consider the complex IP issues relating to genetic resources and traditional knowledge. Australia strongly supported the on-going negotiations in the WIPO IGC, and would continue its active engagement with a view to reaching agreement on an instrument or instruments on genetic resources, traditional knowledge and traditional culture expressions.

5.42. The representative of Canada reiterated her delegation's position that the TRIPS Agreement and the CBD were mutually supportive. She acknowledged the important work of WIPO in that regard, and said that WIPO remained the best forum for technical discussions – and, indeed negotiations – on genetic resources, traditional knowledge and traditional cultural expressions as they related to IP. Canada had participated actively in the February 2013 session of the IGC which had been dedicated to genetic resources. Canada welcomed the progress achieved at that meeting where Members had been able to further delineate the various options for the protection of genetic resources and associated traditional knowledge. Canada was fully committed to the WIPO IGC and looked forward to continuing to work with all WIPO member states towards bridging differences in hope of reaching agreement on a quality outcome that could garner the consensus it needed to be successful.

5.43. The representative of Switzerland said that the TRIPS Agreement and the CBD were mutually supportive. Nevertheless, that relationship could be further enhanced through the inclusion of a provision on a mandatory, non-burdensome requirement to declare in patent applications the source of genetic resources and traditional knowledge on which an invention was

directly based. Switzerland was convinced that such a provision in the TRIPS Agreement would work in favour of the credibility of the patent system as a whole and the acceptance of the patentability of inventions in the field of biotechnology in particular. Therefore, Switzerland was a Member of the W/52 coalition - a large group of WTO Members which had proposed modalities language for three TRIPS issues negotiated in the Doha Round.

5.44. He said that a high-level panel and roundtable on the three TRIPS issues had been organized by the W/52 coalition back-to-back with the Council's meeting in November 2012. The broad participation and attendance in that event was evidence of the importance that Members attached to those topics. Those issues were firmly established items on the negotiation table.

5.45. He supported Ecuador's proposal that the WTO Secretariat update the three compilation documents and China's proposal that WIPO inform the Council of the state of play and outlook of the related work underway in the WIPO IGC.

5.46. The representative of China said that collaboration among international organizations which dealt with similar issues was an approach to improve global governance, openness, and transparency in international economic areas. Therefore, many Members supported the proposal of information sharing between the WIPO IGC, the CBD Secretariat and the Council. She said that open and transparent discussions would be the only approach to conduct negotiations and resolve those issues. The disclosure requirement might place some burdens on patent applicants, but those burdens would be worth bearing in view of the legitimate objectives pursued by it.

5.47. The representative of the United States thanked China for its confirmation that the disclosure requirement would be burdensome, and reiterated that the United States was not in a position to support a report from the WIPO Secretariat with respect to the negotiations in the WIPO IGC.

5.48. The representative of China said that both the disclosure requirement and the patent system could be burdensome.

5.49. The Chairman said that he would convey the appeal by Nigeria on behalf of the African Group and China to the Director-General to resume his consultations. As to the request that the WIPO Secretariat brief the Council on the on on-going work of the WIPO IGC, he noted that, as an observer in the Council, the WIPO Secretariat could request the floor whenever it deemed necessary. He suggested that the Council request the Chair to continue consulting on the suggestions that the CBD Secretariat be invited to brief the Council on the outcome of the Nagoya meeting, and that the Secretariat be requested to update the three factual notes that summarize the points delegations have made in the Council's past discussions on the three agenda items.

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

6 NON-VIOLATION AND SITUATION COMPLAINTS

6.1. The Chairman recalled that the Eighth Session of the Ministerial Conference had 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 its next Session; it was agreed that, in the meantime, Members would not initiate such complaints under the TRIPS Agreement (WT/L/842). The Council should, therefore, agree on its recommendations to the Bali Ministerial Conference at its end-of-year meeting tentatively scheduled for 10-11 October. He recalled that, under the initial timeline established by the TRIPS Agreement, the Council had been required to make recommendations on scope and modalities by the end of 1999, and that this period had been extended five times since then.

6.2. At the Council's last meeting, many delegations had welcomed the updated Secretariat note summarizing the Council's earlier discussions on the matter (IP/C/W/349/Rev.2), as well as the briefing session it had organized. He said that it might be helpful if delegations would have any examples of situations where non-violation complaints might be relevant or any suggestions for modalities for the Council's consideration. Apart from any comments on the substance, he encouraged delegations to share any ideas on how the discussion on the matter could best be facilitated.

6.3. The representative of the United States said that non-violation complaints were fully appropriate in the context of the TRIPS Agreement. There were several reasons supporting this conviction. Non-violation disputes had long been part of the WTO and the GATT. Such disputes were part of a long tradition. Moreover, non-violation complaints served an interest all WTO Members shared, which was to assist Members in protecting against measures that nullified or impaired concessions. This concept had proven useful to address a number of situations.

6.4. He said that some Members had suggested that non-violation complaints would be at odds with the balance of rights and obligations in the Agreement. This view was fundamentally at odds with the Agreement itself. Article 64.1 clearly stated that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein". Article 64.2 provided that the provisions of non-violation and situation complaints in GATT Article XXIII would not apply for a period of five years following the entry into force of the WTO Agreement. It was clear that after five years, those provisions would apply to the TRIPS Agreement. Finally, Article 64.3 was explicit and unambiguous that any extension of the five-year period must be agreed by consensus. It was, therefore, difficult to accept the view of some delegations that non-violation complaints had not been envisioned by the drafters of the TRIPS Agreement as applying to the Agreement. In fact, such intent was explicit in Article 64.1.

6.5. Turning from the text to its application, he agreed with those Members who had suggested that more analysis was required. The United States had provided that analysis. In support of its view, it had provided detailed statements of position, including in document IP/C/W/194, where it went into considerable depth regarding the applicability of non-violation disputes to the TRIPS Agreement. He also directed Members to previous interventions of the United States before the Council, including those reflected in documents IP/C/M/27, paragraph 160, and IP/C/M/30, paragraph 205, for example.

6.6. He said that there were also Members that had simply asserted that non-violation disputes did not apply to the TRIPS Agreement, without explanation or support. This was insufficient to secure an extension of the moratorium. The onus was on those Members seeking an extension to secure consensus to do so. Without a consensus, the moratorium would expire at the next Ministerial Conference.

6.7. Article 3.2 of the Dispute Settlement Understanding (DSU) was quite clear. Panels and the Appellate Body were bound by Article 3.2, which expressly stated that "[r]ecommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements". Moreover, Article 3.5 of the DSU provided that all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, had to be consistent with those agreements and should not nullify or impair benefits accruing to any Member under those agreements nor impede the attainment of any objective of those agreements. Given that the Marrakesh Agreement had been the result of a single undertaking, it was highly unlikely that, even absent that express language in the DSU, a panel would ever determine that something a Member had agreed to under one part of that single undertaking had nullified and impaired benefits agreed to under another. He continued to believe that the provisions of Article 26 of the DSU and past panel decisions under the GATT as well as discussions in the WTO already provided sufficient guidance or modalities for panels and the Appellate Body in dealing with any non-violation dispute.

6.8. The representative of China said that the TRIPS Agreement was different from GATT 1994 in two ways. Firstly, it was a minimum standards agreement rather than a pure market access agreement. Secondly, it was regulating private rights rather than setting the minimum threshold for the rules and regulations that a Member needed to comply. Application of non-violation complaints to the TRIPS Agreement would upset the delicate balance of rights and obligations in the Agreement and limit the use of flexibilities provided under. She continued to believe that the application of non-violation and situation complaints under the Agreement was not appropriate. She welcomed the updated Secretariat note on and briefing session in October 2012.

6.9. The representative of Nigeria, speaking on behalf of the African Group, supported China's statement. During the Uruguay Round, agreement could not be reached on the scope and modalities of non-violation complaints, and the Council continued to be unable to do so for reasons

set out in earlier submissions by almost all Members. The Council should therefore recommend to the next Ministerial Conference that non-violation and situation complaints would not apply to the TRIPS Agreement.

6.10. The representative of India supported the statements made by China and Nigeria. The TRIPS Agreement, unlike other WTO agreements, was a sui generis agreement, which was not designed to protect market access or the balance of tariff concessions but rather to establish minimum standards of IP protection. TRIPS Article 1 explicitly stated that Members were not obliged to implement more extensive protection. If the Council was to make a recommendation in terms of the four possibilities listed by the Council's Chairperson in May 2003, he would favour the first option, i.e. banning non-violation complaints in TRIPS completely.

6.11. The representative of the Plurinational State of Bolivia said that non-violation and situation complaints were not applicable within the framework of the TRIPS Agreement, which differed clearly from other WTO agreements. Members had agreed on concessions which could be measured on economic basis, but as far as the TRIPS Agreement was concerned, Members had agreed on a minimum level of protection. Therefore, non-violation complaints could not be applied to IP.

6.12. The representative of Switzerland said that his position well known, and referred to his statement at the Council's previous meeting (IP/C/M/71, paras. 148-151), where he had set out in more detail the reasons why non-violation and situation complaints apply under the TRIPS Agreement. It was up to those Members who believed that additional rules on scope and modalities beyond those already contained in the DSU were necessary to present proposals.

6.13. The representative of South Africa said that South Africa was fully committed to upholding its obligations and commitments as set out in the different WTO agreements. The purpose and aim of GATT Article XXIII was to ensure compliance with the GATT rules and principles by providing Members with an opportunity to make representation should the situation provided for in subparagraphs 1(a) and 1(b) arise. This was different from what the TRIPS Agreement sought to achieve. The TRIPS Agreement was a sui generic agreement. It was not aimed at promoting market access or harmonizing the standards of Members with regard to the protection and enforcement of IPRs. It provided the minimum standards for the protection and enforcement on IPRs.

6.14. The application of subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 in the TRIPS context would undermine the sovereign rights of the respective Members as far as putting in place the laws that would protect IPRs within their borders were concerned. The application would furthermore restrict the flexibilities provided to Members and defeat the balance that had been maintained under the TRIPS Agreement. South Africa recognized the need for the protection and enforcement of IPRs but the application of non-violation and situation complaints would not be practical under the TRIPS Agreement.

6.15. The representative of the European Union said he did not see any immediate usefulness in applying non-violation and situation complaints in the TRIPS context. He was, however, interested in this debate, to hearing others' views, and in favour of continued discussions. The Secretariat updated note was very useful. As the issue had been addressed in certain bilateral agreements, he said he would welcome discussion on how non-violation had been approached in those contexts, and how such approaches could be transposed into the TRIPS context.

6.16. The representative of Brazil said that his delegation's position was reflected in the minutes of the Council's previous meeting. Non-violation and situation complaints should be determined applicable in the TRIPS context. However, he would not oppose any further discussions of this issue. The Council might be enlightened by some concrete cases brought to its attention for information.

6.17. The representative of the United States said that the TRIPS Agreement was a market access agreement. As stated in its preamble, the Agreement was intended "to reduce distortions and impediments to international trade ... and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."

6.18. The standards and procedures established were for the identification, grant, enjoyment and enforcement of private rights, in most cases, but, as noted earlier, it did so in the same way that the Agreement on Technical Barriers to Trade or the Agreement on Sanitary and Phytosanitary Measures established minimum requirements that governments must meet before imposing limitations on goods that may be sold in their markets based on health, environmental or other factors.

6.19. Inadequate legal systems for the protection and enforcement of IPRs could mean, for example, that an anticipated increase in market access resulting from a negotiated tariff reduction for a certain product or elimination of a quota would not be realized because others could market identical products freely in spite of the existence of a patent claiming that product or a trademark associated with it. Under those circumstances, the market access for which countries negotiated could be devalued, absent some uniform minimum standards on which Members could rely.

6.20. Turning to the question of scope and modalities, he said that, during 1999 the Council did examine the scope and modalities of non-violation complaints. Papers were circulated by Canada and the United States. The Council, however, reached no conclusions and made no recommendations. 1 January 2000 arrived and the delay provided by Article 64.2 ceased. It was only on 14 November 2001 that Members decided to continue to examine the scope and modalities for such complaints and to make recommendations to the Fifth Session of the Ministerial Conference, which had included an agreement not to initiate such complaints under the TRIPS Agreement until the 2003 Ministerial Conference. However, no such recommendations were adopted at the 2003 Cancún Ministerial Conference, meaning that the moratorium was not continued. It was not until July 2004 that the General Council agreed by consensus to a new moratorium on non-violation complaints.

6.21. The Chairman recalled that the Council was to provide its recommendation to the Ministerial Conference at its end-of-year meeting in October, which was less than eight months away. In case any delegations had any ideas to share, he encouraged them to do so as soon as possible so as to allow the Council sufficient time to consider them. He suggested that the Council request the Chair to hold consultations on the matter and that it revert to the matter at its next meeting.

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

7 REVIEW OF THE IMPLEMENTATION OF THE TRIPS AGREEMENT UNDER ARTICLE 71.1

7.1. No statements were made by Members under this agenda item.

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

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

8.1. The Chairman recalled that Article 24.2 provided that the Council shall keep under review the application of the provisions of the Section on geographical indications of the Agreement. The principal tool used to coordinate the review process was a Checklist of Questions contained in document IP/C/13 and Addendum 1, which a number of Members had submitted, but many had not yet completed. In addition, at its meeting in March 2010, the Council had agreed to encourage Members to share information on and notify to the Council bilateral agreements relating to the protection of GIs which they had entered into.

8.2. As the question of GI protection remained of continuing interest and a point of discussion, Members were likely to benefit from a more complete and up-to-date picture. He therefore urged those delegations that had not yet done so to consider providing responses to the questions. Likewise, he encouraged those Members having already responded to the Checklist to provide updates to the extent there had been any significant changes in the way that they provided protection to GIs. He added that the Secretariat advised that only 49 Members had submitted responses, and that the majority of these dated back to the period from 1998 to 2002. Since there had been significant developments at the national and bilateral levels, it would be beneficial for Members to have a fuller base of updated information.

8.3. In line with the Council's recommendation made in March 2010, he also encouraged any Member that was a party to any bilateral agreements related to the protection of GIs and had not yet shared such information with the Council to do so as soon as possible.

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

9 FOLLOW-UP TO TENTH ANNUAL REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT

9.1. The Chairman recalled that, at its meeting in November 2012, the Council had taken up the tenth annual review of developed country Members' reports on their implementation of Article 66.2 of the TRIPS Agreement. In concluding that item, he had indicated that delegations would be provided with an opportunity at the present meeting to make further comments on the information submitted for that meeting, which they had been unable to examine.

9.2. At that meeting, Haiti, on behalf of the LDC Group, had requested the Council to adopt the proposed format for reports submitted by developed country Members under Article 66.2 contained in a communication submitted by Angola on behalf of the LDC Group prior to the ninth review (IP/C/W/561). He had consulted with interested delegations on this suggestion. Their positions remained in essence as expressed at the Council's November meeting. LDCs felt that more uniformity in the information on the way in which incentives were being provided would facilitate progress. Donor countries had indicated their willingness to take into consideration the format in preparing their future reports, but felt that a uniform format would fail to reflect the diversity of various incentives they were providing.

9.3. He recalled that, in view of the ongoing implementation of the recommendations for savings and more efficient use of resources made by the Budget Committee (WT/BFA/128), the Council, at its meeting in June 2012, had invited the Secretariat to identify ways of facilitating the submission, processing and circulation of that information, and to consult with delegations at a technical level. The Secretariat had reported at the Council's November 2012 meeting on its work to develop an information management tool for that purpose. In his subsequent consultations with interested delegations, both the recipient and donor countries had expressed interest in the development of such a tool, which would provide easier access to the wealth of information contained in these reports, and better respond to their needs and expectations.

9.4. The representative of Nepal, speaking on behalf of the LDC Group, said that Article 66.2 stated that developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDCs in order for them to create a sound and viable technological base. The commitment made by developed countries in Article 66.2 had been reaffirmed in paragraph 11.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, which had emphasized the importance and mandatory nature of that commitment. There had been some momentum in implementing that commitment, and some developed countries had notified the Council of their involvement in the process of transfer of technology. The Council decision of February 2003 on the Implementation of Article 66.2 of the TRIPS Agreement had provided that developed Members submit reports annually on actions taken or planned relating to the incentives as referred to in Article 66.2. Nonetheless, compliance with the obligations laid down in Article 66.2 had not been fully met as reflected by the reports on activities presented, with many activities recorded having failed to include technological components as required under Article 66.2. In that respect, in 2012, out of the 245 reported cases, only 47 programmes had been specifically designed for LDCs, i.e. less than 19%. Even among those activities that targeted LDCs, only a few related to technology transfer resulting from incentives.

9.5. In order to avoid being locked in a lengthy debate and with a view to achieving concrete progress on the implementation of Article 66.2, the LDC Group had, in October 2011, presented the Council with a proposal for a uniform reporting format. He had noted some positive developments in the use of that reporting mechanism. He said that the LDC Group stood ready to engage further with Members with a view to enabling the Council to adopt the proposed reporting format.

9.6. The representative of Angola supported the statement made by Nepal, and commended the Chair's outstanding efforts in leading consultations regarding the adoption of the proposal for the reporting format. As stated by Nepal, their development partners had been implementing the reporting process. However, a detailed examination of the programmes reported in 2012 demonstrated that only 47 out of 245 programmes were effectively defined for LDCs. Furthermore, among those 47 programmes or projects only perhaps two or three programmes had been consistent with the core objective of Article 66.2.

9.7. He confirmed the LDC Group's willingness to engage with their development partners on that issue. Further discussion would be required as the LDC Members felt that the latter were not willing or perhaps were not in a position or lacked the capacity to fulfil the requirements. He also commended those development partners who had already submitted their reports in line with the reporting format. As might be seen, they could start to assess and ascertain the impact of those projects. He therefore again encouraged delegations to support the initiative with a view to the adoption of the reporting format by the Council.

9.8. The representative of the Secretariat said that the Secretariat's work to improve the flow of information did not preempt the Council's ongoing consideration of a standard format, nor did it go into the domain of analysing or interpreting submissions. The work focused on practical ways of managing the flow of information, at the point of collection, processing and distribution and at the point of users of that information. This had important practical implications on Secretariat resources. The work of the Council accounted for almost 10% of all of the documentation and translation functions of the WTO overall, more than the double of that of any other Council or Committee. Furthermore, while it demonstrated the high volume of valuable information that the Secretariat was dealing with, it was also a reminder that practical ways of managing that flow could be found to improve its accessibility and utility. Therefore, in that regard the Secretariat was in informal consultation with delegations directly.

9.9. The Secretariat was working on an optional reporting tool under Article 66.2, which would give reporting Members the option of a simplified online or digital means of capturing the information. This would then automatically flow more easily into reporting and distribution of the information as well as reducing some of the costs associated with the documentation. A tentative prototype was in preparation and the Secretariat would be engaging with interested and notifying delegations when it became available. He was hopeful such discussions could take place before the next session of the Council.

9.10. The Chairman suggested that the Council request the Chair to consult on the request by Haiti on behalf of the LDC Group that the Council adopt the proposed format for reports submitted by developed country Members under Article 66.2 contained in a communication by Angola on behalf of the LDC Group (IP/C/W/561).

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

10 TECHNICAL COOPERATION AND CAPACITY-BUILDING

10.1. The Chairman recalled that, at its last meeting, the Council had taken up its annual review of technical cooperation. Given that some information from Members and intergovernmental organizations had been made available only a short time before the review, he indicated that he would offer them a further opportunity to make comments on that material.

10.2. As regards notifications of contact points for technical cooperation on TRIPS, since the Council's last meeting in November, Macao, China had notified its contact point for technical cooperation on TRIPS. The information on the Members' transparency toolkit page had been updated accordingly.

10.3. As regards LDC needs assessments, he 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 the 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".

10.4. Since the Council's meeting in November, Madagascar had submitted information identifying its individual priority needs for technical and financial cooperation (IP/C/W/584). Seven other Members, namely Sierra Leone, Uganda, Bangladesh, Rwanda, Tanzania, Senegal and Mali, had earlier already submitted their information on what they needed as a priority for technical and financial assistance.

10.5. The representative of Madagascar thanked the Secretariat for the quality and relevance of the work it had done so far on behalf of LDCs in general and Madagascar in particular. This valuable support had enabled the technical group concerned to finalize their communication relating to priority needs for technical and financial assistance and its accompanying matrix. He re-emphasized the rationale behind the formulation of those priority needs, the values that consistently underpinned the steps initiated several years ago with a view to enhancing IP -related capacity, and the objectives pursued by the capacity-building plans listed in the document. Like the countries that preceded it, Madagascar was pleased to present the relevant information concerning its technical and financial assistance needs with a view to securing adequate support.

10.6. Madagascar attached particular importance to the identification of priority needs for coordinated technical assistance and to the response those would elicit from partner countries. The TRIPS Agreement contained a set of obligations which Madagascar had undertaken to respect in order to ensure that IPRs were protected in an efficient, effective and coordinated manner throughout the country.

10.7. The many levers of economic development included innovation and transfer of technology through the promotion and protection of what had already been achieved in the IP sphere. If they were known, adopted and respected, IPRs were not merely legal instruments available to economic operators, they were significant contributing factors to the competitiveness of a country such as Madagascar.

10.8. The values that had prevailed since these priority needs were formulated bore repeating, because he remained convinced that convergence of the values upheld by the bilateral and multilateral partners would be reflected in the follow-up to the matrix. Those values included protecting public health, human dignity, culture and heritage, taking the requisite action to ensure compliance with commitments undertaken, in particular the agreements signed within the various multilateral frameworks, and adopting an inclusive and transparent approach as well as a realistic and flexible outlook. The capacity-building programmes set out in the matrix presented to the delegations were part of a broader framework aimed in particular at:

a. boosting economic and trade competitiveness, and chiefly private investment in Madagascar.

b. Significantly reducing poverty by promoting and ensuring appropriate protection of industrial property rights.

c. Reducing poverty by promoting and ensuring appropriate protection of industrial property rights.

10.9. The programme comprised seven strategic approaches covering the following key topics:

- Policy formulation
- Implementation of reforms and improving cooperation
- Combating counterfeiting and piracy
- Establishing infrastructure and appropriate equipment
- Designing software and enhancing operations management

- Boosting science, technology and innovation
- Creating a stimulating and favourable environment
- Communication and dissemination of information among the general public
- Regional, bilateral and international cooperation
- Protection of the intangible heritage
- Arbitration and dispute settlement
- Participation in fairs, events, workshops and seminars
- Training of actors
- Application of the law

10.10. All of the above called for sustained innovative, transparent and effective support from their bilateral and multilateral partners, whose readiness had been amply demonstrated, and he was therefore confident that their communication would be well received by all their cooperation partners.

10.11. He said that the report was by no means an end in itself but the beginning of a lengthy process. His delegation remained at the disposal of all its cooperation partners to review the responses they might have to the needs identified.

10.12. The representative of Angola extended his thanks the Secretariat, on behalf of the LDC Group, for having organized the LDC Symposium in November 2012. The workshop had enabled LDC delegations to take stock of the necessity to conduct a needs assessment for the purpose of identifying their individual priorities for technical and financial assistance in order to facilitate the implementation of the TRIPS Agreement. He further highlighted two issues: firstly the difficulties encountered by developed countries in responding to the needs identified; and secondly, the predictability of funding for LDC Members that had not as yet conducted or completed their needs assessment. The majority of LDCs, had yet to formulate their needs due to a lack of financial resources. He drew attention to the inability of some development partners to provide technical assistance on account of certain LDCs' having failed to identify their needs, despite the availability of resources. He considered that the topic should be further discussed in the Council, with a view to seeking a compromise solution, and ensuring predictability of funding, so that those identified needs were met.

10.13. The representative of Senegal expressed concern that several LDC Members, including Senegal, had submitted their individual priority needs some years ago, but it would appear that those needs had not been addressed as yet by their development partners. He thought that the donor countries' lack of responsiveness could explain why a large number of LDCs had not submitted their priority needs as yet. He said that he would appreciate having some indications from those country Members that could possibly address his country's needs if they were willing to do so.

10.14. The representative of the European Union said the European Union attached great importance to the submitted requests and that it had participated actively in the Symposium that had been organized by the Secretariat on LDC Members' priority needs for technical and financial cooperation. His delegation had entered into contact with all the LDC Members having made the requests, including Senegal. He explained that the EU's technical assistance system was largely based in structures at the capitals of the recipient country. The European Union had already approached the Senegalese authorities, as it had done for other countries, and for a number of them it had already engaged in programmes themselves, some of which had already been implemented.

10.15. The representative of Angola requested the European Union to provide further information and concrete figures about the type of assistance provided to Senegal, for instance.

10.16. The representative of the European Union said that his delegation had provided more detailed information in its periodical reporting to the WTO and in more detail during the Symposium. Moreover, he noted that the European Union had already engaged with Uganda, Bangladesh, Zambia, the Democratic Republic of Congo, Tanzania, Lesotho, and also with regional organizations, including ARIPO and the OECS, on identified priority needs. In addition, it had implemented broader programmes with most of the ACP countries, which were not linked to priority needs. This information had been provided in the latest reports by the European Union (IP/C/W/582/Add.7 and IP/C/W/568) and he was ready to discuss it also bilaterally.

10.17. The Chairman invited delegations to further reflect on the issues raised by the delegations of Angola and Senegal, and engage in bilateral discussions.

10.18. The Council took note of the statements made.

11 REQUEST FOR AN EXTENSION OF THE TRANSITIONAL PERIOD UNDER ARTICLE 66.1 OF THE TRIPS AGREEMENT

11.1. The Chairman said that this item had been put on the agenda at the written request of the delegation of Nepal on behalf of the LDC Group. He recalled that, at the TRIPS Council's meeting in November 2012, Haiti on behalf of the LDC Group had briefly presented, under "Other Business", a request for an extension of the transitional period under Article 66.1 of the TRIPS Agreement (IP/C/W/583), and had suggested that the request be discussed at the present meeting.

11.2. The representative of Nepal, speaking on behalf of the LDC Group, said that the LDC Group's communication containing the duly motivated request of 5 November 2012 (IP/C/W/583) was self-explanatory. It contained an annexed draft decision and provided the rationale behind the request. The decision was that "[l]east developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until they cease to be a least developed country Member".

11.3. He said that an important flexibility available to LDCs under the TRIPS Agreement was the transition period, which was extendable. This flexibility was granted to LDCs in recognition of their special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a sound and viable technological base. As the initial 10-year transition period was to expire at the end of 2005, the TRIPS Council had approved, in 2005, an extension of the period, set to expire on 1 July 2013. The LDC Group was submitting a duly motivated request that the transition period be extended further. LDCs needed the continuation of flexibility, as their situation had not changed significantly over the years. Their marginalization continued. They had not been able to develop their productive capacities, which limited their meaningful integration into the world economy. LDCs continued to be characterized by multiple structural constraints, including low per capita income, low level of human development, and extreme vulnerabilities to external shocks. LDCs were home to more than 50% of over a billion people who lived in extreme poverty. These countries were the most off-track in the achievement of the internationally agreed development goals, including the UN Millennium Development Goals. They were bearing considerable health burdens, of both communicable and non-communicable diseases. In 2011, according to UNAIDS, some 9.7 million of the 34 million people living with HIV worldwide came from LDCs. Of these people, only 2.5 million had access to antiretroviral treatment.

11.4. LDCs' economic indicators had not changed since 2005. Trade in goods and services had not improved much; in fact, trade deficit in both goods and services had increased; per capital GDP growth had fallen. All LDCs were net payers of royalties. They had not been able to spend even a small fraction of their national budget on R&D, as they had to concentrate more on basics like health and education. The developmental schemes for transfer of technology provided in Article 66.2 of the Agreement had not effectively and adequately materialized. The level of technological development in the LDCs had remained low. In the UNDP's Technological Achievement Index, LDCs were at the bottom. So was the case in UNIDO's Competitive Industrial Performance Index and UNCTAD's Innovation Capability Index. Several WIPO's reports indicated that LDCs had not been able to enter the race for technology and innovation.

11.5. The Istanbul Programme of Action 2011 recognized that LDCs were lagging behind in the critical areas of science, technology and innovation. Unless LDCs had flexibilities to adopt policies

to stimulate technological catch-up with the rest of the world, they would continue to fall behind other countries and face deepening marginalization.

11.6. In terms of future outlook, UNCTAD's "Least Developed Countries Report, 2012" had noted that "LDCs have to prepare for a relatively prolonged period of uncertainty, with possible escalation of financial tensions and real economic downturn".

11.7. The flexibility agreed in Article 66.1 of the Agreement was in consideration of LDCs' special situation. It would not be possible to predict when LDCs would be able to overcome such situation. It had been recognized in the sixth recital of the preamble of the Agreement "the special needs of least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base". LDCs were of the view that the most logical and predictable approach would be not to set an artificial timeframe. Their proposed approach would give more certainty and predictability - once an LDC had graduated to the status of a developing country, it would have to comply. His Group had found precedence of such exemption in Article 15(2) of the Agreement on Agriculture.

11.8. LDCs' request had been motivated by the need for policy space too - to quote the UNDP's latest issue brief –"conserve the autonomy to determine appropriate development, innovation, and technological promotion polices, according to local circumstances and priorities". LDCs would need such space to ensure access to various technologies, educational resources, medicines and tools necessary for development. Most IP-protected goods and services were simply beyond the purchasing power of least developed countries and their people. To quote UNAIDS' Executive Director Michel Sidibé, "[a]n extension would allow the world's poorest nations to ensure sustained access to medicines, build up viable technology bases and manufacture or import the medicines they need".

11.9. TRIPS Article 66.1 specified an obligation to grant extensions once the TRIPS Council received a duly motivated request from LDCs. Ministers at the Eighth Ministerial Conference (MC8) had invited Members "to give full consideration" to a duly motivated extension request from LDCs. Executive Director Michel Sidibé specified that "sympathetic consideration shall be given to specific and motivated concerns raised by the least-developed countries in the appropriate Councils and Committees".

11.10. The representative of Nepal recalled the statement UN Secretary General Ban Ki-moon made back in 2007 at the opening of the ECOSOC session: "The rules of intellectual property rights need to be reformed, so as to strengthen technological progress and to ensure that the poor have better access to new technologies and products." What LDCs were seeking at this meeting did not go to the extent of reforming IPRs. LDCs were simply asking for the continuation of the flexibility already agreed in 1995, with reasons.

11.11. He extended to the Chair the LDCs Group's thanks for his constructive efforts to bring Members together on the issue. He also thanked other delegations for their interest in the LDC Group proposal. His Group had already had a couple of rounds of informal consultations with several Members, including the one the Chair had facilitated. His Group was encouraged to note the positive engagements. He further highlighted the fact that the LDC request and draft decision text had received strong support from the UN development agencies, civil society as well as from industry. His Group requested Members to extend support to the LDCs' request, which was duly motivated, and to adopt the draft decision contained in the annex of document IP/C/W/583.

11.12. The representative of Cambodia endorsed of the statement by Nepal on behalf of the LDCs. Although Cambodia had steadily grown in the last decade, the progress in structural transformation remained very limited. 20% of the population was still living below the poverty line. Substantive achievement in the structural transformation required much more time and sustained support from the membership and development partners. Like other LDCs, Cambodia attached great importance to the request for an extension. An extension would preserve the policy space and conserve the autonomy of Cambodia to determine appropriate development, innovation, and technological promotion policies within sufficient time to be provided for Cambodia to develop the necessary policies and balanced IP laws. This flexibility would help Cambodia in its effort to improve manufacturing capacity and to develop a viable technological base through the transfer of

technology as stated under Article 66.2 of the Agreement, through foreign direct investment and its own R&D.

11.13. Cambodia had used the existing TRIPS exemptions, including the exemption from granting patents for medicines until January 2016 for substantial cost savings on HIV/AIDS treatment by using generic medicines at USD$140 per person per year, compared to over USD$10,000 in some developed countries where HIV/AIDS medicines were patent protected. This was a concrete example of how Cambodia, along with other LDCs, had widely benefited from such an exemption under the Agreement. In this connection, the extension of the transitional period under Article 66.1 would benefit LDCs and their peoples in their causes of country development and access to cheaper generic medicines.

11.14. He asked all Members to provide support for the LDCs' request and adopt the draft decision as contained in document IP/C/W/583, in line with the instruction of Ministers at MC8 in 2011.

11.15. The representative of the Solomon Islands expressed support for the statement made by the representative of Nepal on behalf of the LDC Group. His country, as an LDC, would be one of those Members who would find it extremely difficult to take on TRIPS compliance obligations if the transition period were not extended. It did not currently have the capacity nor the infrastructure, let alone the ability to ensure compliance. The level of education of the population was still on the basics; R&D was not even on the agenda of institutions which should be carrying them due to the very limited financial and human resources. In the absence of such fundamental prerequisites and the structural constraints highlighted by the LDC Group's coordinator, the development of the technological base necessary to give impetus to development was just impossible.

11.16. He referred to the statistics provided by the LDC Group's coordinator, which were overwhelmingly in favour of the LDCs' argument that LDCs needed the continuation of flexibility, as their situation had not changed significantly despite the two previous extensions. His comments were also made in light of the fact that some developed Members had yet to agree to the reporting format proposed by the LDC Group under Article 66.2 of the Agreement. The reporting format would enable the LDCs to see the concrete steps made by developed Members in providing incentives for their investors operating in LDCs for the transfer of technology.

11.17. On the concern raised by some Members was that the LDCs' request for an extension until a Member ceased to be a LDC status would result in unpredictability and non-transparency. He said that, on the contrary, this approach was the most realistic, predictable and transparent: the process of graduation of a country in ECOSOC, of which most WTO Members pertained too, was a gradual process. It did not happen overnight. In other words, predictability and transparency fears could be dissuaded because the process was open and transparent. To opt for a given time period, in his view, was an arbitrary option with no basis.

11.18. The representative of the Solomon Islands appealed to all Members to support the LDCs' request for the extension of the transition period under Article 66.1 until an LDC Member concerned graduated to the status of a developing country.

11.19. The representative of Morocco, speaking on behalf of the African Group, said that the Group fully supported the cause of LDCs, which were facing a difficult economic situation as reflected in the statistics reported by various international organizations. He recalled the decision adopted by the MC8 regarding the request for an extension of the transition period for LDCs. The African Group fully supported the LDC Group's request. Article 66.1 of the Agreement did foresee a transitional period which could be renewed, given LDCs' special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base. The Article further stipulated that the TRIPS Council "shall, upon duly motivated request by a least-developed country Member, accord extensions of this period".

11.20. The representative of Brazil said that Brazil was supportive of the request of the LDCs for three reasons. Firstly, special and differential treatment provisions to be found in the various agreements that formed the acquis of the WTO, including the TRIPS Agreement, were an important systemic component. The role performed by this systemic component was to ensure that the international trading system be an effective instrument for social and economic

development for all Members. Secondly, Brazil had invariably supported the principle that the international IP system should have policy space for countries to adjust and calibrate their national legislation in accordance with their respective stages of social and economic development. Thirdly, the incorporation of developing countries, in particular the least developed ones, into the so-called "knowledge economy" had proved to be a daunting challenge, the complexity of which could not be properly assessed when the Uruguay Round was completed.

11.21. His delegation was ready to support the proposal of the LDC Group, either as originally drafted in document IP/C/W/583, or in any other formulation that could meet the consensus of the Council.

11.22. The representative of Bolivia supported the LDC Group's request and hoped a decision on extension could be agreed by consensus. In his view, the request was more than reasonable. As data had showed, LDCs' situation did not seem to be improving but getting worse instead. The multilateral trading system could be irrelevant, and trigger a change in the situation if there were willingness by Members to adopt realistic, timely and appropriate measures, so that these LDCs could have sufficient public policy space to develop the necessary tools to be able to improve their situation. These changes were not, as some believed, limited to a time factor. It was essential that qualitative improvements be made in the economies of these Members. An extension of the transitional period under Article 66.1 without any conditions was necessary for the economy of these countries. Even if they had developed some IP legislation they were not ready to implement the Agreement. They had to be given flexibility so that they could fulfill their commitments.

11.23. Article 66.1 required, as the sole condition for the extension, that the request be "duly motivated request". An extension must be extended to the whole group and not on a case-by-case basis, so as not to bring pressure to bear on individual countries, as had been the case in the past when they were requested to accept a non-rollback clause or an extension for a very short period.

11.24. Many intergovernmental and non-governmental organizations had expressed their support for an extension for different reasons. Bolivia believed that all these expressions of support were well-founded and must be considered.

11.25. He said that the issue of extension should not be considered as a part of the balance for the package of results for development for the next Ministerial Conference in Bali. Any decision pertained to the regular work of the Organization.

11.26. The representative of Jamaica, speaking on behalf of the ACP Group, which counted many LDCs among its members, said that Article 66.1 provided for a renewable extension of the transitional period for LDCs, in view of their special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base. Article 66.1 further stipulated that "[t]he Council for TRIPS shall, upon duly motivated request by a least developed country Member, accord extensions of this period". It was on this basis that on 29 November 2005, a TRIPS Council decision, IP/C/40, had extended this exemption until 1 July 2013. In their communication to the Council, the LDC Group had stated that "the least-developed country Members of the WTO continue to face serious economic, financial and administrative constraints and need maximum flexibility to create a sound and viable technological base".

11.27. He said that the ACP Group fully supported the "duly motivated request" of the LDC Group for a further extension of the transitional period. Members clearly contemplated that such extensions would naturally be obtained where the constraints identified in Article 66.1 remained unchanged or experienced little change. There could not be question that the extension provided for must remain as long as the LDC Member faced the constraints mentioned in Article 66.1, as they did now, and it is in this context that the ACP Group offered strong support for the LDC Group's request.

11.28. The representative of Angola said that LDCs remained very weak. They represented the poorest and continued to face a number of challenges, such as the high burden of infectious and non-infectious diseases, inadequate access to clean water and sanitation, low agricultural productivity, and environmental and climate change challenges. As underscored by Nepal, the situation of LDCs had not significantly changed since the last extension in 2005. LDCs' productive

capacity continued to be limited. They were facing serious problems in terms of infrastructure. They were still lagging behind in critical areas. In addition, they were having problems concerning technology transfer. He recalled that the MC8 had invited "the TRIPS Council to give full consideration to a duly motivated request from Least-Developed Country Members for an extension of their transitional period under Article 66.1 of the TRIPS Agreement, and report thereon to the WTO Ninth Ministerial Conference". Thanking for the support expressed by previous speakers, including developing country Members, he invited developed country Members to agree to the LDC Group's request for a transition period applicable as long as the country remained an LDC.

11.29. The representative of China said that LDCs continued to face serious economic, financial and administrative constraints, and needed maximum flexibility to create a sound and viable technological base to meet their developmental challenge. In accordance with the instructions from MC8, she supported the extension of the transitional period under Article 66.1. She hoped that the extension would give LDCs the maximum flexibility needed to take measures to promote development of a viable technological base and to address access to essential goods which were critical to facilitate development, allowing them to participate more effectively into this global trading system.

11.30. The representative of Zambia endorsed Nepal's statement. The request was necessitated by the multiple difficulties LDCs had had to deal with over the past transition periods to develop the necessary national conditions that would ensure the minimum levels of IP protection, while facilitating access, assimilation, adaptation and enforcement issues in the face of weak institutional capacities and limited but often competing financial resource needs. It was clear from the 2005 extension that the challenges faced by LDCs required a timeframe that was not arbitrary, but would take into account the prevailing economic, financial and administrative constraints to ensure that IP would facilitate the creation of a sound and viable technological base. For such a transition period to be effective, it must be supported by necessary technical assistance and capacity-building. IP was a highly complex subject matter. Its linkage with many sectors of the economy required careful planning and the development of multiple skills and expertise as well as strengthening institutional capacity for R&D, innovation and enforcement, for any effective implementation and meaningful spill-over economic benefits to accrue.

11.31. As highlighted by previous speakers, LDCs' economies were faced with economic, financial and administrative constraints as well as special needs and requirements that necessitated the maximum flexibilities under the Agreement to enable them to build the necessary conditions that would facilitate the effective protection of IP while maximizing economic benefits from the exploitation of IP. The need for maximum flexibility was not an invention emanating from LDCs themselves, but acknowledged in the Preamble of the Agreement and the objective therein was clear: to enable LDCs create a sound and viable technological base. She hoped that Members would give positive consideration to the LDC Group's request.

11.32. The representative of the Kingdom of Saudi Arabia said that S&D treatment for developing and least-developed country Members was a fundamental principle in the WTO and the proposal tabled before this Council was a good example of how to implement such treatment. Therefore, he supported an extension of the transition period, either in its proposed wording or in any other agreed language.

11.33. The representative of South Africa associated his delegation with the statements made by the coordinators of the LDC Group, the African Group and the ACP Group. The circumstances that gave rise to the transition period had not changed since the last extension in 2005. LDCs continued to confront resource and human constraints, increasing technological gaps and weak innovative capacities. Recognition of LDCs' special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility in order to create a viable technological base would make a strong case for the extension of the transition period, which should apply as long as a Member remains an LDC. By making this request, LDCs were clearly signalling to the TRIPS Council that they required further flexibility before they could be in full compliance with TRIPS measures. Therefore, South Africa lent strong support for the duly motivated request for the extension of the transition period for LDCs.

11.34. The representative of Singapore, speaking on behalf of the ASEAN Group, expressed his Group's support and understanding for the concerns expressed by LDCs in their request for an

extension of the transitional period under Article 66.1. In anticipation of further discussions on this issue, his Group encouraged Members to arrive at a pragmatic and mutually acceptable solution.

11.35. The representative of Tanzania associated her delegation with the statements made by the coordinators of the LDC Group, the African Group and the ACP Group. Tanzania attached great importance to an extension that would allow LDCs to be TRIPS compliant at the time of graduation. No LDC wished to remain an LDC forever. A transition period which would last as long a country remained an LDC was fully justified, since shorter extensions would not give LDCs adequate time to overcome capacity constraints, and to develop a viable and sound technological base. LDCs faced on-going resource and human constraints, widening technological gaps and weak innovative capacities. Overcoming these problems would take contextually specific policy flexibility and financial resources. Tanzania was of the view that Article 66.1 obliged the Council to approve without conditions a duly motivated request to enable LDCs to work on multiple difficulties they faced in the area of transfer of technology.

11.36. The representative of Sri Lanka said that, in view of the resource constraints the LDCs continued to face, he believed that the LDC Group's request was duly motivated, and should be considered favourably in the spirit of flexibilities provided under Article 66.1.

11.37. The representative of Haiti thanked the many delegations which have expressed support for the LDC Group's request. Given the special needs and limitations of LDCs and their economic, financial and administrative constraints, another extended transition period was required to give LDCs more flexibility and increase their ability to promote sustainable development, and to provide some respite to these countries in the implementation of the provisions of the Agreement. The statistical referred to by the LDC coordinator should facilitate the Council's task in granting the LDCs an extension.

11.38. The representative of India believed that the LDC Group's request was comprehensive, highlighting the vulnerability of LDCs' deprived population, the marginal role their economies still played in the world trade and their very limited productive capacity and technological infrastructure that could transform these economies. The framers of the TRIPS Agreement had rightly understood the special needs of the LDC Members and duly recognized their need for exemption from the obligations under the Agreement to enable them to create a sound and viable technological base. Apart from the Preamble to the Agreement, Article 66.1 reiterated the special needs of the LDCs along with their economic, financial and administrative constraints to develop a viable technological base, and therefore mandated the Council to grant them an extension from the obligations of the Agreement on the basis of a motivated request. The provisions of Article 66.1 were precise and provided no discretion to the Council to either deny the request or impose any further conditions on LDCs.

11.39. The 2005 extension was set to expire on 1 July 2013, and was for a limited period of 7½ years with an obligation on LDCs to submit priority needs to meet the objectives of Article 67 of the Agreement. The linkage with Article 67 was unnecessary and had created confusion. In fact, there was no relation between the transition period, which was meant to assist the LDCs in developing a viable technological base, and Article 67, which was an obligation for developed countries to provide technical assistance to LDCs to help them implement the TRIPS Agreement. Further, the non-rollback provision in the 2005 decision had no place in the Agreement and had in fact reduced the policy space for LDCs in utilizing the TRIPS flexibilities during the transition period to engage in technological development and ensuring access to affordable goods to its citizens.

11.40. Realizing that any artificial deadline would not help the LDCs in creating a sound technological base, and duly acknowledging the mandatory and independent nature of Article 66.1, India supported the motivated request made by the LDC Group. India was of the view that this issue was of utmost importance to the LDCs and assured its full co-operation and active engagement in future discussions on the issue.

11.41. The representative of the Dominican Republic associated his delegation with all those who had expresses support for the LDC Group's request for an extension of the transition period.

11.42. The representative of Cuba, recalling her delegation's statement at the last General Council meeting, said it was extremely important to ensure that issues of interest to LDCs be resolved

once and for all. The WTO must provide prompts solutions to the problems faced by LDCs, in particular the extension of the transition period under Article 66.1. The extension issue was within the purview of the regular session of the TRIPS Council, and should not be an exchange of views for the Bali Ministerial Conference.

11.43. The representative of Norway expressed her country's understanding of LDCs' need for flexibility and its support for an extension of the transition period. It wished to contribute to the discussions, with a view to reaching an agreed solution.

11.44. The representative of Canada welcomed the efforts made by LDCs toward implementation to date and recognized that challenges continued to exist in this regard. Canada supported a meaningful and effective solution that would effectively allow LDCs to address their difficulties in implementing TRIPS obligations. To this end, Canada remained interested in hearing more about the key challenges and concerns that LDCs were facing, along with constructive solutions to help them better integrate into the international trading system. It would encourage measures that would help create an enabling environment for development through a transparent and rules-based regulatory framework. Such efforts could help contribute to sustainable development and prosperity for all.

11.45. The common goal should be to find an outcome that would enable LDCs to be part of the global community. Canada therefore believed there was a need to find an appropriate timeframe to build upon the infrastructure and human capital in LDCs, and foster dialogue between relevant institutions, such as WIPO and the World Bank.

11.46. The representative of Argentina supported the LDC Group's request.

11.47. The representative of Bangladesh said that there were some ambiguities that needed to be cleared. LDCs were not asking for a total autonomy from the Agreement. They would still continue to be bound by its Articles 3, 4 and 5. Contrary to what certain delegations believed, the LDC Group's request was not aimed at getting a complete waiver.

11.48. The grant of an additional extension had to be automatic. Referring to the 6th recital of the Preamble to the Agreement, he said that the idea behind "flexibility" was to create a sound and viable technological base in the LDCs, but not to make them more TRIPS compliant. Citing Article 66.2, he said the Council "shall", upon duly motivated request by an LDC Member, accord extensions of the transition period. There was no way of otherwise interpreting the provision; extension must be automatically granted upon duly motivated request.

11.49. The last extension was granted seven years ago and, out of these seven years, four years were lost due to financial crisis and concomitant food and fuel crises. During this financial crisis, LDCs were the hardest hit. According to UNCTAD and other studies, the marginalization of the LDCs had increased over this period. The per capita growth had fallen to 1.2% compared to 5.7% in 2005, the year of the last extension. The LDCs' current account deficit was USD183 million in 2006, and was grown to an astonishing amount of USD15.5 billion in 2011. LDCs' imports rose more than exports.

11.50. Financial and technical cooperation and assistance were extremely inadequate. Almost no transfer of technology had taken place from developed countries to LDCs. Moreover, most of the LDCs were also vulnerable to climate change. There were no basic facilities like access to medicine. Under such circumstances, it was only natural that LDCs were assisted by all Members regarding the extension. He hoped that the Council would take the appropriate decision by supporting the LDC Group proposal in document IP/C/W/583.

11.51. The representative of Australia said his country recognized the challenges faced by LDCs in implementing the Agreement. It applauded those LDCs who had made significant progress in implementing their TRIPS obligations. Australia supported, in principle, a further extension of the LDC transition period. His delegation was considering the timeframe and any parameters for an extension within the context of a process of consultation with the LDC Group and other Members. Australia would favour an approach which would best assist LDCs to develop effective and sustainable IP frameworks as they work towards the goal of TRIPS compliance.

11.52. The representative of Rwanda supported the statement by Nepal. The rationale for the LDCs' request was that the economic situation in LDCs had not changed. In many countries it had even worsened. In particular, the technological base had not been developed due to lack of technological infrastructure, qualified personnel, necessary skills and lack of technology transfer. This was evidenced by the composition of exports, dominated by a handful of commodities without any technology and skills intensive products. The share of LDCs in total trade was 3% in 1954, compared to the current share of only 1%.

11.53. The language in Article 66.1 provided for an automatic extension once a "duly motivated request" was submitted. Rwanda was of the view that all Members, notably developed country Members, had the legal obligation to accept the proposed decision text.

11.54. The conditions attached to the previous extension IP/C/40 of 2005, especially the non-rollback clause must not be attached to the current decision text. The LDC Group's request was a new request under Article 66.1 and, hence, not bound by the conditions of the previous decision. The only TRIPS provision on non-rollback was encompassed in Article 65.5 for developed and developing country Members and economies in transition. Such short time-frame was insufficient to develop a technological base. Furthermore, the previous extension decision of 2005 contained a non-rollback clause, which had hitherto severely hindered the use of the flexibilities by LDCs. Article 66 did not contain such non-rollback clause. To put it in other words, LDCs were compelled in 2005 to violate the Agreement; they would not let this happen again.

11.55. He said that Article 66.1 was not about TRIPS compliance. The flexibility it provided was to address the special needs of LDCs and to develop a viable and sound technological base. The transition period granted and currently sought for would not be for the sake of TRIPS compliance but rather for building that sound and viable technological base through flexibility as the developed countries had done. On the issue of technical assistance, he said that this was not related to Article 66.1 and was covered by Article 67.

11.56. The proposed indefinite duration was specific and practical. Any shorter period would not be practical. The negotiated period in the last extension of seven and a half years was absolutely inadequate and of limited practical value to LDCs for dealing with development challenges and developing a viable and sound technological base. An indefinite duration would give LDCs certainty and predictability. Developed countries would also get predictability and certainty as they wold be clear that as an LDC would come closer to graduation – and the graduation process in ECOSOC was transparent - it would comply with TRIPS obligations. It was not the first time LDCs would be given an exemption for as long as they remained LDCs. Under Article 15(2) of the Agreement of Agriculture, LDCs were exempt from undertaking reduction commitments.

11.57. The LDC Group's request had received strong support from civil society groups, certain UN agencies, as well as from industry. In fact, letters and statements in support had been received from more than 375 civil society organizations, including trade unions, from around the world representing millions of people, from UNDP and UNAIDS, from the Electronic Information for Libraries (EIFL), which worked with libraries worldwide to enable access to digital information in developing countries, and from the Computer and Communications Industry Association (CCIA), an organization which represented the interests of a wide range of companies specialized in information technology, and telecommunications industries such as Google, Facebook and Yahoo. The CCIA in its press statement noted that the implementation of the Agreement would be counterproductive, adding costs to public health systems and other administrative burdens at a moment when LDCs were contending with human and technological barriers to modernization. The President and CEO of CCIA also said that "we look forward to the day when there are no more LDCs. But as long as any country's people are living on two dollars a day, they should have complete flexibility in IP protection." This statement was in line with the Preamble of the Agreement and consistent with empirical evidence.

11.58. Historically countries had tailored their IP regimes to suit the different stages of their economic development. That had facilitated the process of technological learning. They were only able to do this because they had policy space. So, LDCs must have the necessary time to build a sound and viable technology base for their legitimate development.

11.59. The representative of Mexico welcomed the LDC Group's request. Mexico was convinced that compliance with IPRs was vital and fundamental in promoting innovation, competitiveness, attraction foreign investment, and technology transfer. This had been Mexico's experience. It recognized that LDCs had considerable challenges and limitations in being able to fully comply with their obligations under the Agreement. These limitations continued to prevail, in spite of the extension in 2005. Therefore, one had to have a realistic look at the request, which was reasonable proposal and deserved serious consideration to find a more sustainable solution. Mexico wished to join other delegations to work together with LDCs and other Members in finding a solution.

11.60. The representative of Switzerland said that he understood that what the LDC Group was proposing was not a further extension of the transitional period but the non-application of the substantive TRIPS provisions for LDC Members as long as they retained the LDC status. This was a far reaching proposal, which had also WTO systemic implications, touching upon the Marrakech Agreement of 1994 Establishing the WTO and on the three pillars, GATT, GATS and TRIPS. It would therefore be important that the Council thoroughly discuss this and possible alternative proposals to work in favour of LDCs and the WTO.

11.61. Switzerland fully acknowledged the special needs and requirements of LDC Members, and the economic, financial and administrative constraints that they continued to face, even after many years since the WTO Agreements entered into force. It was supportive of a further extension of the transitional period. The 10-year transitional period agreed in 1995 and its 7.5 year extension in 2005 served the purposes of giving the LDCs more time to implement the TRIPS Agreement, one of several building blocks of a regulatory framework supportive of the national and international trade of a country, and thus also of its economic development. IP protection could provide legal certainty sought by businesses; for many innovative companies an IP system was an important factor when taking strategic decisions about whether and where to invest, where to do business and with which local partners to collaborate and transfer innovative technology. These were realities which should be kept in mind, in the light of the objective mentioned by several LDCs to create a viable technological base.

11.62. He wondered whether, from a long-term perspective, a decision of the Council to declare TRIPS provisions inapplicable to LDCs for good would actually be the most beneficial decision to promote the objective of establishing economic development and competitiveness of LDCs in the world trade system. LDCs had also to gain for their own IP assets as they implemented the Agreement and put in place an IP protection system. Using the example of geographical indications and Article 24.9, he recalled that a WTO Member could only claim protection for its own GIs if it protected them at home. Without protection in the country of origin, successful LDC GI products would be imitated and copied elsewhere without a legal possibility to prevent such free-riding, become generic terms, losing thereby all economic value for the LDCs and their economy on the world market. Such kind of issues should be taken into account when deciding on the right approach to extending the LDC transitional period. The ultimate goal of Switzerland was to create favourable long term conditions supporting LDCs in their efforts to better integrate and compete within the international trading system, of which TRIPS and IP protection formed part. In doing so, the specific needs and challenges of LDCs needed to be taken appropriately into account.

11.63. The representative of Hong Kong, China said that his delegation appreciated the various economic, financial and administrative constraints facing the LDCs, and was therefore sympathetic with the request to further extend the transitional period under Article 66.1 of the TRIPS Agreement.

11.64. The representative of the United States said that the transition period for LDCs to implement the provisions of the TRIPS Agreement was a matter of great importance to LDCs, to the United States, and to all other WTO Members. In 2005, the United States had supported the previous extension of the transition period, and worked constructively with LDC Members on securing that extension. Such support was premised on the importance of promoting IPR protection and enforcement, particularly as significant drivers of the development goals of LDCs. IPR protection and enforcement provided critical incentives for creativity and innovation that would promote economic growth, and create jobs, particularly in LDCs where these benefits were most needed. The implementation of the TRIPS Agreement facilitated these benefits.

11.65. He recognized that, while significant challenges existed, many LDCs had already IP laws and enforcement mechanisms in place, and taken significant steps toward implementing the Agreement. He commended progress by many LDCs in this regard, and thought it was essential to recognize and to preserve those accomplishments, and to continue that progress toward full implementation.

11.66. The United States supported an extension of the implementation period and was committed to a mutually agreeable outcome on this important matter. It did, however, have questions and significant concerns regarding certain aspects of the request and looked forward to discussions with LDC Members as part of its commitment to a satisfactory outcome. This was the first Council meeting at which Members had the opportunity to engage on this issue. More time was necessary to fully evaluate the LDC request. In these circumstances, his delegation was not in a position to support a Council's decision at this meeting.

11.67. The representative of Turkey said that LDCs faced numerous economic, financial and social challenges. Hence, the Council had agreed on 27 June 2002 that LDCs would have an additional transition period for introduction product protection for pharmaceuticals until 2016. Without prejudice to this extension, the TRIPS Council had extended the transitional period under Article 66.1 of the TRIPS Agreement for LDCs on 29 November 2005 until 1 July 2013.

11.68. Whilst understanding the challenges that LDCs were facing, and that it would take some time for them to fully implement the Agreement, she recalled that the Agreement provided for minimum standards for the protection of IP. Implementation of these minimum standards should not be delayed for an indefinite timeframe. Furthermore, some level of predictability would also help LDCs receive investments and support for the achievement of their development goals. In this light and to find consensus among Members on this important issue, she said delegations could rely on their past experiences and work on the basis of the previous Council decisions regarding the extension of transition periods for LDCs.

11.69. The representative of the European Union recognized that LDCs remained confronted with critical challenges in their economic development. Whilst underscoring the importance and role of trade and innovation for economic development, the EU also recognized the importance of flexibility and policy space for LDCs. Therefore the EU expressed its willingness to consider an extension beyond the current deadline of 1 July 2013.

11.70. This was not the first time the Council had been asked to consider an extension of the TRIPS transition period. In fact, it was the third time during the last decade and a half. Against this background, and before considering the future, his delegation believed it was not only useful but also necessary for Members to look back at what was done in the past in the TRIPS Council, and at what had happened on the ground in LDCs during the past transition period in particular, in order to help Members move forward. It would otherwise be irresponsible. In 2005, the Council had extended the transition period for seven and a half years. It had also considered enhanced technical cooperation for LDCs, including an assessment of each LDC's individual priority needs for such technical and financial cooperation. However, for this new extension, the proposal did not mention any specific timeframe or need for cooperation.

11.71. Through informal consultations with LDCs, his delegation had been able to appreciate the thinking behind the LDC Group's proposal. They had explained that the proposal used the same threshold as that of 2005 – or graduation from LDC status on the date from which the TRIPS would be implemented. In his delegation's view, this threshold did not relate to the timeframe of the transition period, but dealt with its scope. From the moment an LDC graduated, it could simply not benefit from a privilege designed for LDCs only. Making that as the criterion for the transition period itself rather than considering it a marker for its scope was difficult to accept. It did not consider in any way what and how IP could help LDCs to transition out of LDC status, which should be the ultimate aim. Nor did it take into consideration the efforts that many LDCs had made so far.

11.72. In the EU's view, any transition, whatever its nature would be, should consider two questions: where did the Members stand and where were they going? Members were in need of a compass, even if it did not provide for nothing more than a broad sense of direction.

11.73. As to the first question, he said that an EU Member State was funding an independent consultant study on the progress made by LDCs in introducing IP systems in their jurisdictions. He expressed the hope that such a study could be a valuable starting point for the Council's discussion and for knowing what were the outstanding challenges regarding TRIPS implementation. His delegation looked forward to engaging with LDCs further on this question without, however, wanting to create a reporting or notifying burden for them.

11.74. As to the second question, he said that the most important concern the EU had with the proposal was that it lacked a clear and predictable perspective and at the same time remained silent on how IP and the Agreement could specifically help LDCs build a viable technological base. LDCs had repeatedly made their voices heard at the WTO, notably in the priority needs symposia, of the importance they attached to IP and innovation as tools for development. Significant work had already been achieved in developing IP systems, for which LDCs should be congratulated and encouraged.

11.75. Extensive technical assistance efforts had been made by Members and international organizations like WIPO. The EU had indeed striven to do its part in this regard and would be ready to help LDCs further where they most needed it. That said, the EU needed space to take into consideration the various realities on the ground. All Members were interested in having a better understanding of the state of play of implementation. The study commissioned by the EU Member State would be most welcome. Appropriate consideration should be given to how technical assistance could be targeted to help LDCs, perhaps focusing primarily on areas of most immediate utility, and with realistic time-frames.

11.76. He said that the most appropriate step forward would be to examine a sensible and useful extension for LDCs as a group that would take account of the situation on the ground. Agreeing a more thought-out process for the future would help Members adopt an organized and flexible approach.

11.77. The representative of Japan expressed his delegation's general support for the statement made by the US delegation. Firstly, it should be recognized that IPRs were an important instrument to support economic development. Their protection would secure a higher level of investment in R&D, which itself would promote innovation. IP protection was conducive to the promotion of economic development. Secondly, the incentives to take measures for implementing the Agreement should be considered. Japan would continue to actively engage in future discussions in order to make a constructive contribution to the issue.

11.78. The representative of Chile said that Chile – as a country which had undergone the process of implementation - understood the difficulties and challenges that LDCs were facing in implementing the Agreement. For this reason, Chile supported an extension of the transition period. It expressed support for those delegations calling for flexibility on the specific language of such an extension.

11.79. The representative of Rwanda, responding to the EU's mentioning of a study which would show different stages of IP implementation and compliance with the Agreement in LDCs, expressed the hope that the study would also show how the LDCs were building a sound and viable technological base, which was the main objective of Article 66.1, and not compliance.

11.80. The representative of Angola said that he was observing considerable support for the LDC Group's proposal. In fact, there seemed to be acceptance of the principle, which was a good start. There were, however, certain Members that had some major problems. LDCs had done their share of the work: they had drafted and submitted their request to the Council to take account of the comments that they had not been doing their homework. The ball was now in the other camp, which must come forward with concrete proposals.

11.81. Recalling Mexico's statement, he said the LDC Group's proposal seemed to be reasonable. For example, LDCs had a transition period for implementing the provisions of the Agreement on Agriculture, one of the most important areas for many countries. In his view, having a transition period for LDCs in the TRIPS area until they graduated should not be a problem.

11.82. He said that the LDC Group was preparing the ground, and any study should first be agreed to by the countries concerned. He recalled that a number of studies had already been published and that most of them had reached the same conclusion: there was no response to the needs assessments provided by several LDCs.

11.83. As was said by the EU delegation, he agreed that Members needed to know where they stood and where there were going. So, whilst LDCs had shown willingness to work together by preparing needs assessments, it was the same countries in other organizations that were pushing for reducing technical assistance budgets for LDCs, and for developing countries as well. This was, in his view, a paradoxical situation.

11.84. The representative of Nepal, speaking on behalf of the LDC Group, thanked all the delegations for the overwhelming support and greater understanding of the special situation of LDCs and the challenges they were facing. His Group would continue to engage with Members to reach a positive decision in the next Council meeting.

11.85. The challenges for LDCs were widely recognized by developing countries and many other Members. LDCs had explained that the need for developing a technological base still existed, and hence a need for a transition period. The right approach to address Article 66.1 should be oriented towards addressing the special needs and difficulties of LDCs rather than seeking for compliance.

11.86. Concerns had been voiced regarding LDCs' intention to depart from their TRIPS commitments. He reiterated that LDCs would continue to be bound by Articles 3, 4 and 5, and as long as the conditions stipulated in Article 66.1 prevailed and LDCs did not graduate, they would ask for a series of extensions in the future.

11.87. In response to Members' interventions on technical assistance, he said that for the LDC Group – and pursuant to the spirit of Article 66.1 - technical co-operation was not linked to the policy space granted by that Article. Technical co-operation could be addressed under Article 67, and his Group would be willing to cooperate with partners in identifying needs. His Group had a strong stance regarding the policy space available, and LDCs' special needs and challenges must be acknowledged without any condition. Any condition put on Article 66.1 would actually mean re-writing of the TRIPS Agreement, and would be unacceptable to his Group. His Group held the view that the extension should be automatically granted: once there was a duly motivated request, the Council was bound to provide the extension. He expressed the hope that all Members would understand the situation and take a decision in favour of LDCs at the earliest opportunity.

11.88. The Chairman said that there was a clear wish to find a solution on the issue of extension. He suggested that the Council revert to the matter at its next meeting scheduled for 11-12 June 2013, and request the Chair to hold consultations with a view to resolving the matter at that meeting.

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

12 PROPOSED MEASURE BY NEW ZEALAND: NOTIFICATION CIRCULATED IN DOCUMENT G/TBT/N/NZL/62, DATED 24 JULY 2012, ON A PROPOSAL TO INTRODUCE PLAIN PACKAGING OF TOBACCO PRODUCTS IN NEW ZEALAND.

12.1. The Chairman said that this item had been put on the agenda at the written request by the delegation of the Dominican Republic.

12.2. The representative of the Dominican Republic said that his delegation wished to reiterate its serious concern over the plain packaging measures for tobacco products proposed by New Zealand in its "Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand: Consultation Document" notified the Committee on Technical Barriers to Trade on 24 July 2012 as document G/TBT/N/NZL/62. He said that his delegation had previously detailed its concerns regarding similar measures notified by Australia, which were currently under consideration by the Dispute Settlement Body (DSB). New Zealand's plain packaging measures were a threat to many IPRs vital for international trade and should be a matter of concern to each and every Member. In particular, these measures were inconsistent with New Zealand's obligations under the TRIPS Agreement and

the Paris Convention for the Protection of Industrial Property ("Paris Convention"), which formed part of the TRIPS Agreement.

12.3. With respect to the impact of the measures, he said that for any product that could be lawfully sold for consumption, registered trademarks, geographical indications and other elements of a product's packaging played an important role in providing information on the product and its producers, which was essential for consumers as it enabled them to differentiate and choose between competing products.

12.4. He said that New Zealand's plain packaging measures would eliminate all the distinctive features of tobacco sector products by banning designs and trademarks, as well as by requiring packaging for different tobacco products to be virtually identical. These measures would, therefore, negate IPRs, preventing customers from obtaining basic information on products they could lawfully purchase, thereby creating confusion in the market and lessening the opportunities for competition among imported tobacco products.

12.5. At the same time, he said, these measures would not succeed in promoting public health goals. On the contrary, they were expected to have serious negative consequences as tobacco consumption would increase – not decrease – as prices fell, because all tobacco products would look virtually the same. Furthermore, plain packaging would make it easier to counterfeit and smuggle such products and market them.

12.6. He said that, instead of adopting such inappropriate and extreme measures to reach the objectives sought, New Zealand should focus on other available measures which would really be effective in promoting public health. Such measures would not negate IPRs related to lawful products and would not undermine the benefits given to consumers by such rights.

12.7. The Dominican Republic considered that New Zealand's proposed plain packaging measures for tobacco products would violate Articles 20, 22.2(b) and 24.3 of the TRIPS Agreement, as well as Article 10*bis* of the Paris Convention. Falling under Article 20 of the TRIPS Agreement, the "use" of registered trademarks relating to tobacco products would be "encumbered" by "special requirements" determined by the proposed plain packaging measures for tobacco products. In retail sale, he said, New Zealand intended to prohibit the use of any design feature of the registered trademark, allowing only the mention of the brand name and the variety in a predetermined location, font style and size on an identical background. These special requirements authorized the use of registered trademarks only in a "special form" that was "detrimental to [the trademark's] capability to distinguish the goods or services of one undertaking from those of other undertakings".

12.8. He said that New Zealand's plain packaging measures would also violate Article 10*bis* of the Paris Convention, which prohibits "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor". The plain packaging measures posed a serious risk of confusion among competing tobacco products because New Zealand would impose the use of virtually identical packaging for all tobacco products. For similar reasons, the plain packaging measures would also violate Article 22.2(b) of the TRIPS Agreement - which referred back to Article 10*bis* of the Paris Convention - by creating confusion in relation to geographical indications.

12.9. His delegation wished to reiterate that the Dominican Republic had implemented the TRIPS obligations in its domestic legislation also in order to give traditional products that were well known in domestic and international markets competitive advantages, for example, through geographical indications. The Dominican Republic had developed its first geographical indication, "Cigarros Dominicanos", which was the fruit of two years of joint work by the National Tobacco Institute and the National Industrial Property Office, and was intended to identify and highlight the quality of its cigars throughout the world. His delegation therefore considered that New Zealand's plain packaging measures would also violate Article 24.3 of the TRIPS Agreement, which prohibited WTO Members from "[diminishing] the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" on 1 January 1995. By eliminating the right to use geographical indications for the retail sale of tobacco products, New Zealand would violate this obligation, and the plain packaging measures would therefore be detrimental to this specific geographical indication in New Zealand.

12.10. His delegation wished to emphasize its particular concern over the effect the proposed measure could have on small and vulnerable economies that had invested in the production and export of tobacco and high-quality tobacco products. In the Dominican Republic, 55,000 people were employed directly in tobacco production and another 63,000 worked in the tobacco industry, which meant a total of 118,000 direct jobs and more than 500,000 indirect jobs across the country. In 2012, tobacco exports amounted to US$520 million and currently represent nearly 10% of total exports from the Dominican Republic. Moreover, according to TradeMap (UNCTAD/WTO) data, the Dominican Republic was the leading exporter of cigars in volume terms in 2011, accounting for 49% of the global total. Cumulative investment in this area totalled US$2.8 billion, and had been used to develop an export-oriented industry based on high-quality products. He said that this was an indication of the tremendous social impact that excessively restrictive measures could have on poor countries such as the Dominican Republic. His delegation wished to repeat its support for tobacco control initiatives; however, it objected to speculative measures, without any credible or reliable evidentiary basis, that would ruin the competitive opportunities of high-quality producers, and which could be replaced by less restrictive alternative measures.

12.11. In view of the foregoing, the Dominican Republic wished to urge New Zealand not to approve this proposal, or at least to wait until the issue had been ruled upon by the DSB.

12.12. The representative of Cuba said her delegation shared the concerns expressed by the Dominican Republic regarding the plain packaging measures proposed by New Zealand. She said that in the area of health, Cuba had repeatedly stated that it fully recognized governments' rights to protect the health of their populations and this had been its own priority with clear and recognized results over the past 50 years of revolutionary government. However, her delegation had also regularly repeated before the relevant WTO bodies its concerns with the impact that such measures could have on the economies of developing countries that produce tobacco such as Cuba, the Dominican Republic and many others. Cuba was therefore analysing this communication in capital with a view to putting forward possible measures.

12.13. The representative of Nicaragua said his delegation fully associated itself with the concerns put forward by the Dominican Republic and Cuba regarding the plain packaging proposal put forward, and had already transmitted its concerns directly to the Government of New Zealand. As an exporter and producer of tobacco, Nicaragua recognized and supported New Zealand's right to legislate to protect public health. However, Nicaragua was concerned with the incompatibility of New Zealand's measures with the rules and regulations of the WTO, in particular the provisions of the TRIPS and TBT Agreements as well as commitments taken on in other international treaties. His delegation believed that the measures put forward on plain packaging were far from complying with WTO obligations and would put an end to the protection of all IPRs. As there was no scientific evidence that plain packaging would have an impact on consumer behaviour or reduce tobacco consumption among young people, New Zealand's' measure would merely limit trade, and therefore would not contribute to reaching the legitimate objective pursued. Furthermore, it would also have a negative impact on the competitiveness of countries like Nicaragua on the international market. The introduction of plain packaging would hamper tobacco producers, would make it difficult to distinguish between different products, and would damage names that had been built over years. The measure would impair the economic interests of small countries such as Nicaragua, which depended to a large extent on the production of tobacco products. This production had been developed as a key element to cut poverty through job creation, be it direct or indirect jobs, investment and foreign currencies which were absolutely essential for the development of geographical areas where such products were produced. By affecting this process, the proposed measures would therefore hamper the development of the country in general.

12.14. The representative of Honduras said that his delegation wished to support the statement made by the Dominican Republic regarding the plain packaging measures notified by New Zealand. While Honduras fully shared the public health objectives which New Zealand was seeking with its legislation, its concern was based on the compatibility of such measures with WTO Agreements, especially the TBT Agreement and the TRIPS Agreement. He said that, in view of the existing cases before the DSB, his delegation would have hoped that there would not be a proliferation of similar legislation among Members. Considering that the outcome of these cases could give Members a line to follow that would comply with the WTO rules and regulations, his delegation would have hoped that New Zealand would have awaited the results of the cases under review before notifying this initiative.

12.15. The representative of Ukraine said that her delegation had previously raised concerns about Australia's trademark-restrictive and WTO-inconsistent plain packaging measures that appeared to violate Australia's WTO obligations, and which Ukraine had challenged under the dispute settlement rules of the WTO. Awaiting the outcome of that legal challenge before proceeding with the adoption of the proposed plain packaging measure would indeed have been an appropriate way for New Zealand to take into consideration the concerns expressed by many Members in respect of Australia's plain packaging measure. In terms of the substance of the proposed measure, her delegation wished to reiterate its views that plain packaging, as adopted by Australia and as envisaged by New Zealand, appeared to be a violation of Members' obligations under the TRIPS Agreement, including in particular its Articles 15, 16 and 20, as well as several provisions of the Paris Convention as incorporated into the TRIPS Agreement. She said that Ukraine would thus be interested to better understand how New Zealand took into account its obligations under the TRIPS Agreement when designing the measure, for example, whether New Zealand considered that trademarks could be prevented from being used on lawfully available products without justification, or whether New Zealand believed that trademarks could fulfil their function of distinguishing products simply by remaining on the register but without being used on the product to which they were to be applied and for which they had been registered.

12.16. She said that her delegation fully supported New Zealand's public health concerns and that Ukraine had also adopted a strict better control measures that sought to effectively reduce smoking prevalence rates. However, Ukraine considered that any such measure must comply with the obligations under the relevant WTO Agreements, including in particular the TRIPS Agreement.

12.17. The representative of Switzerland said that his delegation was supportive of public health measures, including in the area of anti-smoking. Such health measures, as any other government measures or national legislation, needed to be compatible with international obligations, including the substantive provisions of Part II of the TRIPS Agreement, as explicitly provided for public health measures by its Article 8.1. Accordingly, such measures had to be appropriate to reach the objective pursued, which meant that they had to be proportionate and effective. He said Switzerland encouraged New Zealand to take these principles duly into account in its legislative work for the new measures to ensure their compliance with the substantive TRIPS obligations.

12.18. The representative of Zambia said that her delegation noted the objectives of New Zealand's notification, which included allowing for consultations to ensure that the Government of New Zealand take an informed decision on this matter. Her delegation wished to highlight the following points for New Zealand to consider in consultations on a subsequent decision. How would New Zealand ensure that any plain packaging measures conformed to New Zealand's obligations under Article 20 of the TRIPS Agreement? Her delegation would also be interested to receive information from New Zealand on any impact assessments that may have motivated this proposal as a means of reducing the appeal of tobacco products to consumers, particularly young people. How would New Zealand ensure that consumers were not subjected to more harmful high toxin tobacco products through plain packaging, since marking and labelling was an important mechanism for consumers to be fully informed about the products they were using?

12.19. The representative of Zimbabwe said that, while her delegation appreciated New Zealand's efforts to protect the health of consumers, it shared the concerns expressed by the Dominican Republic and other delegations regarding tobacco plain packaging. The measures were inconsistent with the TRIPS Agreement and would impair Members' benefits.

12.20. She said that tobacco farming had become a major economic activity and source of livelihood for many farmers in developing countries. In Zimbabwe, over 200,000 families and their dependants relied on tobacco farming as a source of livelihood. Tobacco contributed significantly to GDP and was a major export earner. New Zealand's measures would therefore impact negatively on employment, economic performance and poverty alleviation efforts. She said that whilst there was no scientific evidence that the measures would influence the behaviour of consumers or reduce smoking amongst youths, it was evident that the measures would result in higher poverty levels and therefore compound the health challenges that developing countries faced. In light of the restrictive effect of the measures on trade and the negative impact on tobacco-producing developing countries' economies, her delegation wished to request New Zealand to suspend the measures.

12.21. The representative of Mexico said her delegation recognized that the objective of the measures planned by New Zealand was to reduce the consumption of tobacco, which was also a health problem in Mexico. However, undermining brands could represent an unjustifiable limitation to the use of a trademark and would constitute a barrier to legitimate trade. What was needed to improve public health was broad and coordinated action with the participation of all sectors of the society.

12.22. It was the view of her delegation that these measures raised wider systemic concerns since they were contrary to the TRIPS Agreement. She requested that New Zealand explain in greater detail the scope of these measures and how it had taken account of the provisions of the TRIPS Agreement.

12.23. The representative of New Zealand said his delegation welcomed the interest of other Members in its Government's recent decision to work towards the introduction of a plain packaging regime for tobacco products. In responding to that interest, he said he would comment on New Zealand's process to date, on the substance of New Zealand's plain packaging regime, and lastly on issues of legal compliance, and hoped that this would respond to the questions Members had posed.

12.24. With regard to the process, he said that New Zealand's decision to work towards the introduction of a plain packaging regime had followed a comprehensive public consultation process. The public consultation period had closed on 5 October 2012 and had been conducted on the basis of two main documents: the consultation document itself entitled the *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand* and a Regulatory Impact Statement, which was a domestic legal requirement. Both documents were available on the New Zealand Ministry of Health's website:

a. Consultation document: http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand

b. Regulatory Impact Statement: http://www.health.govt.nz/about-ministry/legislation-and-regulation/regulatory-impact-statements/plain-packaging-tobacco-products

A room document providing these links and briefly summarizing the key points of this intervention had also been made available.[1]

12.25. He said that the public consultation process had generated a substantial number of submissions from interested parties in New Zealand and around the world. His delegation wished to thank those delegations of the TRIPS Council that had also submitted comments on the proposal. A summary of submitted views, and other relevant documents, had been published on the New Zealand Ministry of Health's website at http://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/plain-packaging. The submissions received through the consultation process had been used to inform the Government's decision to work towards the introduction of a plain packaging regime for tobacco products.

12.26. He said that this decision was part of a long policy development process that would continue for some time yet. New Zealand officials would this year commence the process of developing draft enabling legislation providing for a plain packaging regime, and detailed regulations to implement the regime would be developed subsequently. He said that there would be opportunities during this process for interested parties to express their views on the design of the measure, and that any consequential amendments to IP legislation would be notified to the TRIPS Council.

12.27. Turning to the substance of the measures, he said his delegation wished to thank Members who had spoken both to support and to raise concerns about the decision to work towards the introduction of a plain packaging regime for tobacco products. Responses to the points made by Members and various other questions could be found on the Ministry of Health website that included the consultation document, the regulatory impact statement and a summary of the submissions. As part of a commitment to transparency regarding the information relied upon,

[1] Subsequently circulated in document IP/C/W/586.

Members could also find the paper that went to New Zealand's ministers, and other associated information, on that website.

12.28. His delegation wished it to be very clear that the reason for New Zealand's decision had been to protect public health. Smoking was the single largest cause of preventable death and disease in New Zealand with approximately 5,000 New Zealanders dying each year from smoking or exposure to second-hand smoke. In particular, New Zealand's indigenous people, the Māori, were overrepresented in all negative smoking statistics. With the prevalence of smoking among Māori almost double that of the general population, New Zealand was determined to continue tackling this tobacco epidemic and took the negative effect on public health of tobacco consumption extremely seriously. For that reason, in 2010 the Government had adopted the goal of making New Zealand essentially smoke free by 2025 in order to protect and promote public health.

12.29. He said his delegation firmly believed that there was strong evidence that plain packaging as part of a comprehensive tobacco control programme would contribute to the objective of improving public health, and that details of this evidence were included in the consultation documents.

12.30. He said that, in particular, plain packaging would:

- Reduce the appeal of tobacco products and smoking, particularly for young people;
- Reduce the wider social acceptance and approval of smoking and tobacco use;
- Increase the noticeability and effectiveness of mandated health warnings and images; and
- Reduce the likelihood of consumers acquiring false perceptions about the harm of tobacco products.

12.31. When combined with New Zealand's existing package of tobacco control measures, plain packaging would contribute to the broader objective of improving public health by:

- Discouraging people from taking up smoking, or using tobacco products;
- Encouraging people to give up smoking, and to stop using tobacco products;
- Discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing;
- Reducing people's exposure to smoke from tobacco products, and
- Supporting New Zealand to meet its international commitments and obligations under the World Health Organization Framework Convention on Tobacco Control (FCTC).

12.32. With regard to New Zealand's international obligations, his delegation wished to emphasize that it took these obligations extremely seriously. In developing its policy on plain packaging, New Zealand had closely examined the consistency of the policy with its obligations under the WTO, including the TRIPS Agreement. His delegation would ensure that it developed and implemented a regime for plain packaging that was compatible with the obligations under TRIPS and other relevant WTO Agreements. Again, implementing plain packaging measures would assist New Zealand to meet its obligations under the FCTC. Of particular relevance here were Articles 11 and 13 of the FCTC. The Conference of the Parties to the FCTC had agreed on guidelines for the implementation of Articles 11 and 13 that recommended parties to consider adopting plain packaging requirements

12.33. In conclusion, he said Ministers had agreed in the 2001 Declaration on TRIPS and Public Health that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. This was such a measure. His delegation hoped that these remarks would facilitate a better understanding of New Zealand's position.

12.34. The representative of Uruguay said his delegation wished to reiterate its position regarding the legitimacy of plain packaging measures for tobacco products under WTO rules. He said that public health protection was unquestionably part of state sovereign competence and each country could legislate in favour of the public good. New Zealand had undertaken to comply with its international obligations while adopting these measures it considered necessary to defend public health interests, and Uruguay was fully satisfied with the explanations and justifications that had been given by New Zealand in that respect. He said that Article 20 of the TRIPS Agreement provided that there should not be any undue complication of trademark use with specific requirements. In that respect New Zealand's application of measures intended to control tobacco consumption on its territory could not be considered as violating TRIPS as these measures were more than justified.

12.35. The representative of Australia said his delegation welcomed New Zealand's decision to legislate for tobacco plain packaging, which put it on track to become the second country in the world to implement this measure. Tobacco plain packaging was a legitimate measure, designed to achieve a fundamental objective – the protection of human health. All WTO Members had to confront the global tobacco epidemic. He said that the joint WTO-WHO-WIPO study "Promoting Access to Medical Technologies and Innovation" launched in February 2013 had confirmed that tobacco use represented the second highest global risk for mortality in the world (after high blood pressure) and was responsible for the deaths of almost one in ten adults worldwide.

12.36. He said that Australia and New Zealand were both parties to the FCTC which recommended plain packaging in the implementation guidelines for Articles 11 and 13 of the Convention. The tobacco plain packaging measure was endorsed by leading public health experts as well as the WHO and was supported by extensive research reports and studies. Australia was of the firm view that Members had the right to implement measures necessary to protect public health, while complying with relevant international treaty obligations. His delegation appreciated New Zealand's consistently strong support for Australia's measure, including in meetings of this Council, and looked forward to supporting New Zealand as it developed its own measures.

12.37. The representative of Canada thanked New Zealand for providing information on its experience with plain packaging which would help other Members gain a better understanding of the complex issues at stake. Canada followed with interest the on-going international developments regarding the plain packaging of tobacco products, and how such a measure interacted with both international trade and public health. Canada had itself been a pioneer in package labelling requirements for tobacco products and thus recognized how challenging it was to introduce tobacco-control measures that had never been implemented before. Canada had been in a similar situation a decade ago when it introduced pictorial health warnings on tobacco packages. Her delegation was looking forward to hearing more from New Zealand and other Members in respect of the plain packaging initiative and its various implications.

12.38. The representative of Brazil said this was not the first time that a Member's anti-smoking measure had been brought to the attention of this Council. The very similar case of plain packaging legislation for tobacco in Australia had been discussed in this Council and was now a case in the Dispute Settlement Body, which Brazil was following very closely. His delegation's position had not changed from the time when the Australian case had been discussed. Brazil was a party to the WHO FCTC, and tobacco control was a top public health priority there. Article 8.1 of the TRIPS Agreement established that Members may, in formulating or amending, their laws and regulations adopt measures necessary to protect public health and nutrition. Equally, and possibly even more relevant, a subsequent agreement, the Doha Declaration on TRIPS and Public Health established in its paragraph 4 that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health and that the Agreement can and should be interpreted and implemented in a manner supportive of Members' right to protect public health. In conclusion, he said, it was his delegation's view that the existing international framework regulating the interplay between IPRs and public health provided ample scope for countries to adopt measures that they saw fit to protect public health in their national legislations.

12.39. The representative of Norway thanked New Zealand for providing information concerning legislation to put tobacco products into plain packaging. As previously stressed both in the Council and in other fora, public health and tobacco control were topics of particular interest to Norway. Her delegation believed that it was within the rights of each Member to adopt measures necessary to protect public health as long as these measures chosen were consistent with WTO Agreements.

12.40. She said that plain packaging of tobacco products was a recommended measure under the FCTC. It was Norway's firm view that the FCTC and the relevant WTO Agreements were mutually supportive and that it was possible to implement measures intended to regulate the packaging of tobacco products in line with both sets of binding obligations. Her delegation therefore wished to signal support to New Zealand concerning its right to introduce this kind of measure in order to protect public health in consistency with its WTO obligations and its obligations under the FCTC.

12.41. The representative of China said that her delegation saw this as another challenge for the TRIPS Council to strike a balance between public health and IP protection. Another, if not the first, occasion had been the adoption of the Declaration on TRIPS and Public Health 2001. The only difference from her delegation's point of view was that on that occasion the issue had been raised by developing countries while this time it came from a developed country.

12.42. She noted that, in notifying its intention to introduce plain packaging legislation, New Zealand had also indicated that Members would have further opportunities to comment if the decision to introduce a plain packaging regime was made. Article 8 of the TRIPS Agreement authorized Members to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to social, economic and technological development. At the same time, Article 8 required that such measures be consistent with the provisions of the TRIPS Agreement. China believed that Members should have the right to take measures to protect public health, and that such measures should not contravene the TRIPS obligation. She said that her delegation would continue to follow the development of this issue very closely.

12.43. The representative of the World Health Organization (WHO) said that, as the WHO had previously stated in this forum, tobacco use was one of the greatest threats to public health the world had ever faced, and the single most preventable cause of death in the world today. Globally, tobacco consumption killed nearly six million people a year through both direct use and the deadly effects of second-hand smoke - more than 70% of whom resided in low- and middle-income countries.

12.44. Tobacco also represented the leading modifiable risk factor in the fight against the growing epidemic of non-communicable diseases (NCDs). NCDs, primarily cancers, diabetes, cardiovascular and chronic lung diseases, currently accounted for 63% of all deaths worldwide. These diseases killed an astounding 36 million people each year, with nearly 80% of deaths occurring in low- and middle-income countries.

12.45. As necessary tobacco control measures continued to be implemented in developed countries, the tobacco industry, through aggressive marketing and interference practices, had shifted some time ago its focus to new markets in the developing world. As a result, tobacco-attributable mortality was rapidly increasing in developing countries, and, by 2030, more than 80% of the world's tobacco deaths would occur in low- and middle-income countries. Given that smoking caused 30% of all cancers, including greater than 70% of all lung cancers, 40% of chronic respiratory diseases, and nearly 10% of all cardiovascular diseases, it was a critical moment in the global effort to curb the tobacco epidemic through the introduction of necessary public health interventions under the WHO FCTC, like the measure under consideration here.

12.46. The economic costs of tobacco use were equally as devastating as the public health costs. Though the tobacco industry routinely cited the economic contribution of tobacco, the reality was that tobacco use put an enormous financial burden on countries, in addition to the fact that tobacco and poverty were inextricably linked at the individual level. Nationally, the costs of tobacco use encompassed increased health-care costs, lost productivity due to illness, premature death, and widespread environmental damage. Thus, as tobacco consumption rates and tobacco-related illnesses increased in developing countries, so did tobacco-related healthcare costs. Additionally, conservative estimates suggested that tobacco's more than US$500 billion drain on the world economy exceeded total annual health expenditures in low- and middle-income countries.

12.47. The economic burden of NCDs, with tobacco representing the largest risk factor, was also staggering. Recent macroeconomic simulations suggested that, over the next two decades, cardiovascular disease, chronic respiratory disease, cancer, and diabetes, would cause a

cumulative output loss of more than US$30 trillion, representing 48% of global GDP in 2010. This in turn would push millions of people across the planet below the poverty line. She said that, because NCDs would result in long-term macroeconomic impacts on labour supply, capital accumulation and GDP worldwide, with the consequences most severe in developing countries, strong public health interventions, like the plain packaging measure under deliberation here, were relevant in addressing both health and economic concerns.

12.48. She said that the WHO wished to draw the Council's attention to the fact that the impact of tobacco and NCDs on both public health and country economies had been highlighted at the recent United Nations High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, held in September 2011 in New York. At that meeting, the UN General Assembly, comprised of Heads of State, had adopted a Political Declaration which recognized the fundamental conflict of interest between the tobacco industry and public health, and wherein Member States unanimously committed to advancing the implementation of multi-sectoral, cost-effective, population-wide interventions in order to reduce the impact of NCD risk factors.

12.49. The WHO was of the view that the implementation of plain tobacco product packaging, representing a legitimate tobacco control measure, would have a substantial impact on tobacco consumption, was fully in line with the spirit and intent of the outcome of the UN High-level Meeting, and was in accordance with international legal obligations under the WHO FCTC.

12.50. Another representative of the WHO said that the FCTC had been negotiated under the auspices of the WHO in response to the globalization of the tobacco epidemic, and had been in force since 2005. Like other international legal instruments, States that were party to the FCTC undertook certain obligations. The number of States that were party to the Convention had risen to 176 - only 14 of the current 159 WTO Members were not Party to the FCTC. New Zealand had signed and ratified the FCTC among the first forty States that were required for the entry into force of the Convention.

12.51. She said that the FCTC contained a number of provisions that were relevant to the issue of plain packaging of tobacco products. As noted during previous sessions of the TRIPS Council, the FCTC set out in Article 5 the general obligations of Parties, including, inter alia, the obligation to "develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with" the FCTC. The recognition by the States Parties of the effectiveness of comprehensive multi-sectoral measures in the fight against the global tobacco epidemic was a theme that recurred throughout the Convention and the obligations it contained. It was through the implementation of such a comprehensive multi-sectoral approach that the tobacco control measures contained in the FCTC were most effective.

12.52. Turning to the matter of the plain packaging measures for tobacco under discussion, she said that Article 11 of the Convention required Parties to adopt and implement effective measures in respect of the packaging and labelling of tobacco products, including health warnings and other appropriate messages. According to the most recent Party reports on implementation, which were required pursuant to Article 21 of the Convention, 93 Parties had reported to have banned descriptors on packaging and labelling that were misleading, deceptive or likely to create an erroneous impression of the product, and 104 Parties had reported to have adopted policies requiring tobacco product packaging to carry health warnings describing the harmful effects of tobacco smoke. In addition, 97 Parties had introduced measures to ensure that health warnings were large, clear, visible and legible. After seven years of implementation, Article 11 was one of the articles of the Convention attracting the highest implementation rates among Parties.

12.53. She said that another specific provision of the FCTC that had been previously noted in this Council was Article 13, which required Parties to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. That comprehensive ban had to be read in light of the broad definition of "tobacco advertising and promotion" which, according to Article 1(c) "means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly." The Guidelines for the implementation of Article 13 adopted by consensus by the Parties included "packaging and product design features" on the indicative list of forms of advertising, promotion and sponsorship. The most recent Party reports indicated that 86 Parties had introduced a comprehensive ban on tobacco advertising, promotion and sponsorship.

12.54. The governing body of the Convention, the Conference of the Parties or COP, had adopted at its 4th session in November 2010 the Punta del Este Declaration (Decision FCTC/COP4(5)) regarding public health policy, international trade and the activities of the tobacco industry. The Punta del Este Declaration reiterated the firm commitment of Parties to the FCTC "to prioritize the implementation of health measures designed to control tobacco consumption" and made specific reference to Articles 7 and 8 of the TRIPs Agreement, as well as to paragraphs 4 and 5(a) of the Doha Declaration on the TRIPS Agreement and Public Health.

12.55. The representative of the Dominican Republic said his delegation wished to thank the WHO for its presentation and the new development theory which it had introduced, demonstrating that the poor who smoked were poor because they smoked, and that stopping smoking would therefore do away with poverty for all those who smoke. This was a new theory. His delegation believed that Members should stop exaggerating in these meetings and rather try to assess objectively what kinds of measures were imposed on other Members. If one wanted to exaggerate, one could also point out that the day with the highest number of car accidents in the United States was Thanksgiving because of the abuse of alcohol during that holiday. Therefore if one began with tobacco, it would continue with all other products that were impacting health according to the WHO. He said that it was further worth noting that Article 2 of the FCTC also provided that parties had to respect other agreements and obligations under other international organizations.

12.56. The Council took note of the statements made.

13 INTELLECTUAL PROPERTY AND INNOVATION: SMALL AND MEDIUM-SIZED ENTERPRISES

13.1. The Chairman said that this item had been put on the agenda at the written request of the delegations of Chile, Korea, Chinese Taipei, and the United States.

13.2. The representative of the United States said that his delegation was pleased to join Chile, Chinese Taipei and Korea in sponsoring this agenda item. At the November 2012 meeting of the Council, Members had conducted a productive exchange of views on national policies to promote innovation. During that exchange, many delegations had stressed the importance of innovation in spurring economic development and growth, and the role of IP protection as part of the enabling environment for innovation, including facilitating capitalization, stimulating R&D and advancing commercialization.

13.3. For small and medium enterprises (SMEs), the relationship between IP and innovation was particularly important, and for innovative entrepreneurs among them, IP was crucial. IP was the core of their business activities, and constituted a principal element of the value of the enterprise. Moreover, IP was a source of their future success, and thus had to be cultivated and protected.

13.4. No "idea", however innovative, could stand alone. In order to flourish, the "idea" had to attract venture capital and secure IP protection, as otherwise the goods or services or the IP itself would not be marketed, and consumers would not benefit. On the other hand, with those critical elements, SMEs could generate revenue, create jobs, pay salaries, and contribute to the social welfare. He agreed with the representative of Switzerland who had stated at the last meeting of the Council that IP was an important asset for SMEs because it could be bought, sold, or licensed out to a partner business. It thus provided not only a source of income, but also encouraged building partnerships with companies that had a related or different technological expertise, allowing otherwise fallow ideas to be effectively monetized.

13.5. He said that while excellent solar technologies already existed, financing was critical for their mass market adoption in emerging markets. He gave the example of Simpa Networks, an innovative enterprise that was based in the United States and India. The enterprise had developed a green energy solution for under-resourced communities with a pay-as-you-go system for accessing solar energy, whereby when a solar system was installed in a home, its resident purchased time and received a code to unlock the system, similar to a pre-paid phone. A patent application was pending under the WIPO Patent Cooperation Treaty, which was central to the company's full capitalization. Simpa's technology promised to make clean energy "simple, affordable, and investible" – simple and affordable for end users, and investible for the investors that had underwritten the capital costs of the solar equipment. Simpa's technology mitigated the

risks of investing in clean distributed solar energy in emerging markets, and Simpa had already demonstrated early success in unlocking investment capital for the expansion of access to clean energy. Simpa's IP assets were leveraged to increase the flow of capital into the sector, including by reducing the risk to investors who had provided much needed financing.

13.6. He said that another example was Wonderbag, a South African SME, which had developed a clean, heat retention cooking solution that helped prevent smoke inhalation. The product was produced locally in South Africa from recycled materials, generating local employment, and marketed in partnership with Unilever. With Unilever's partnering, Wonderbag's sales jumped by over 200%. For Wonderbag, IP protection provided the means to share its technology with others. Like many SMEs, the challenge was not whether IP helped innovators, but how to secure protection of their IP assets.

13.7. SMEs played a critical role in the economy of many countries and regions. In the Asian-Pacific Economic Cooperation (APEC) region, for example, SMEs accounted for some 90% of all businesses and employed as much as 60% of the work force. In the United States, entrepreneurship played an essential role in generating innovation and stimulating economic growth. New firms accounted for most net job growth, and small businesses employed 30% of high-tech workers. He said that beyond economic gains, it was critical to take account of the social gains of SME innovation, which typically greatly exceeded private returns. For example, inventions such as the telephone, transistor, light bulb, laser, CT scan, web browser and antibiotics had enormous, broad and ongoing social benefits far beyond any commercial profits enjoyed by the original creators.

13.8. He said that the United States had a variety of policies and programmes in place to promote innovation by SMEs. A core principle informing those policies was the need to maintain a stable and predictable environment for SMEs to develop and benefit from innovation, including by rewarding the risks inherent in the creative process. As part of the President's Strategy for American Innovation, the Administration had prioritized increasing access to capital for new businesses. Under the Small Business Jobs Act, for instance, which was signed into law by President Obama on 27 September 2010, the US administration provided additional programmes for SMEs to help them obtain investment and create jobs. In addition, under the Strategy, the administration had launched the Startup America initiative to increase the success of high-growth start-ups that had created broad economic growth and quality jobs. The objectives included accelerating the transfer of research breakthroughs from university laboratories; creating two well-financed programmes for impact investing and early-stage seed financing; improving the regulatory environment for starting and growing businesses; and increasing connections between entrepreneurs and high-quality business mentors. He said that the America Invents Act, which was signed into law in 2012, included a pro bono programme designed to assist financially under-resourced independent inventors and small businesses. In addition, US law provided patent rights for certain inventions arising from government-funded R&D to non-profit institutions and small businesses aimed at encouraging the commercialization of new technologies through cooperative ventures amongst the research community, small businesses and industry.

13.9. SMEs were a focus of US innovation policy because of their role in generating new jobs and technological advancement. Contemporary studies had demonstrated that SMEs were disproportionate innovators, with one well-known study concluding that SMEs were 2.4 times as innovative per employee as larger companies. He understood that contributions of SMEs to innovation were the most intense in new technologies.

13.10. Broadly speaking, innovation was often collaborative, whereby each partner could capitalize on the other partners' expertise in such areas as the local environment, distribution channels, a local skilled workforce, and specific technological expertise. In the words of one commentator, "the corporate contribution and that of the innovative entrepreneur are characteristically very different from one another and characteristically play complementary roles. Moreover, the contribution of the two together was super additive, that is, the combined result was greater than the sum of their individual contributions." Patents, for instance, made knowledge available, but also revealed complementary solutions and synergies, and facilitated the sharing of know-how, such as between companies and local SME partners.

13.11. IPRs played a critical role in defining the rules of the road between partners as well as between the partnership and other individuals and entities. IPRs promoted collaboration by

structuring the relationship – including the ownership and management of joint inventions – creating clear expectations and protecting individual contributions. For example, Pipeway International of Brazil, which had developed a pipeline maintenance technology, emerged from a partnership between the Catholic University of Rio and Petrobas. In Brazil, the IP resulting from the partnership belonged to the company, but was required to be licensed back to the University. The University then established Pipeway as a start-up, which developed follow-on innovations from the licence and additional technology solutions.

13.12. To be sustainable, innovation policies needed to respect IP rights. Gaining access to the fruits of innovation or relying on industrial policy would not be sufficient to produce innovation. Thus, local manufacturing requirements, local content requirements, preferences for domestic IPR holders, and other such policies did not promote, but indeed hindered, innovation. Invention must be incubated through collaboration between technology partners, whose investments and exchange of know-how were cultivated in a stable and predictable innovation environment, which included IP protection.

13.13. He concluded that SMEs were the key to unlocking a nation's innovative potential. In turn, IP rights were critical to maximizing that potential, from incentivizing innovation and creativity and promoting capital investment, to safeguarding assets, promoting cooperation, and securing commercialization.

13.14. The representative of Chile said that his delegation had decided to co-sponsor the agenda item with Korea, Chinese Taipei and the United States, as it believed that the role of IP and innovation was crucial for SMEs. In his view, it was vital that SMEs were able to use the various tools provided by IP and incorporate innovation into their production processes in order to improve their competitiveness in world trade.

13.15. SMEs in Chile differed from SMEs in the United States, the European Union or other developed countries, or developing countries with substantial domestic markets. In Chile, SMEs were often small-scale business initiatives, ranging from microenterprises with maximum annual sales of US$100,000 to medium-sized enterprises with maximum annual sales of around US$5 million.

13.16. Given the importance of the issue under discussion, the Government of Chile had named 2013 the year of innovation. Indeed, Chile firmly believed that innovation would enable the country to further its development. It was seeking to promote a shift in the country's economic paradigm, so that it was no longer based mainly on natural resources but on knowledge. Chile was also striving for a cultural change, where innovation was a matter of interest to everyone, from the man in the street to politicians and business leaders.

13.17. In 2013 Chile had developed a comprehensive agenda that included the participation of private sector actors and the Government. Within this framework, the Ministry of the Economy intended to promote 100 or so projects. The work would cover three main areas. The first concerned science and human capital. It was vital to promote and support scientific research. The second area concerned entrepreneurship and competitiveness, which was an engine for growth and employment. Numerous reforms were therefore expected to be undertaken, such as the new industrial property law and the law to facilitate the creation of enterprises. Moreover, a new law had been introduced on R&D, which provided for tax incentives to enhance the competitiveness of Chilean SMEs, with a view to encouraging development and the use of new technologies. Under that law, the cost of the resources used by SMEs for R&D might be reduced by 35% through tax benefits. The third area concerned improved quality of life: innovation had a direct impact on quality of life and it was therefore important to promote projects in that area. Worthy of note in that regard were the Santiago Design Biennial, International Innovation Week and the opening of several Innovation Centres.

13.18. At the last meeting his delegation had outlined a number of public projects currently being implemented in Chile which sought to facilitate the use of the IP system. His delegation had highlighted, for instance, the new e-learning courses on industrial property, the work carried out to ensure that Chile's National IP Institute was recognized as an International Searching Authority under WIPO's Patent Cooperation Treaty, and the fact that the Institute for Agrarian

Innovation (INIA) was recognized as an International Authority for the Deposit of Microorganisms under the Budapest Treaty.

13.19. He then described the following IP-related initiatives aimed specifically at SMEs:

- The Pro Pyme stamp (sello Pro Pyme) initiative sought to assist small enterprises in Chile by guaranteeing that they would receive payment within a maximum of 30 days. It was a form of certification mark awarded to large companies by the Ministry of the Economy, which certified that they would meet their payments to suppliers (SMEs) within a maximum of 30 days. The stamp was guaranteed by external auditors and made it easy for SMEs to recognize which large companies would meet their payments promptly. Further information about that programme was available at http://www.sellopropyme.gob.cl.

- The programme for the registration of entities for the purpose of patentability studies aimed to support IP protection activities carried out by institutions and companies conducting R&D projects, so that the technologies obtained as a result of R&D could be transferred and marketed more effectively within the technology market.

- The programme to enhance human capital in the area of technology transfer sought to develop human capital capacity in the areas of technology transfer management and R&D commercialization management.

- The programme comprising technological competitiveness associations provided benefits to companies that grouped together to conduct technological innovation work.

- The programme related to innovation management in Chilean enterprises concerned a line of financing provided by the Chilean Economic Development Agency (CORFO) to support capacity building in the area of innovation management. That initiative promoted a culture that facilitated and fostered the generation of ideas and knowledge and their transformation into projects that added value to SMEs.

- The Ministry of Agriculture was in the process of establishing a Germplasm Bank to enhance and strengthen systems for the conservation and exchange of genetic resources for scientists and companies working on contaminant mitigation, bioremediation and the breaking down of cellulose for biofuels, and in the biofertilizer and biopesticide industry, etc.

- Start-Up Chile was a Government-created programme aimed at encouraging high-potential entrepreneurs with companies in the start-up phase to come to Chile and use the country as a platform for international business. In 2010, the programme, then in its pilot phase, brought the first 22 start-ups to Chile from 14 countries, providing each of them with US$40,000 of capital and a one-year visa to develop their projects in the country for six months. It also gave them access to social and capital networks. In 2011, two selections processes had brought some 200 start-ups to Chile from over 30 countries. The programme had provided start-up companies with training on practical issues relating to patent strategies, such as value creation in grace periods, the appropriate time to file a patent, and the patentability of computer programmes or methods using software. Start-up companies had also received training on how to register trademarks in Chile and abroad, and on the most effective and least expensive ways of registering trademarks internationally.

- In July 2012, the Chilean Government introduced the "Origin Stamp" programme, aimed at promoting the use and protection of Chilean traditional products by means of geographical indications, appellations of origin, collective marks and certification marks. The purpose of the programme was to encourage entrepreneurship and production development in local communities and small businesses in Chile, promoting the aforementioned types of industrial property rights which could act as tools to foster the conservation of certain traditional methods of manufacturing and production. To promote the programme and its benefits a website - http://www.sellodeorigen.cl - had been created for the consultation of users and delegations.

13.20. He reiterated that the aforementioned initiatives aimed at innovation and SMEs were envisaged within a strong but balanced IP system - one in which IP acted as a tool for development and transfer of knowledge and as an incentive to develop new technologies, and where knowledge and technology in the public domain also played a key role.

13.21. While the situation was different in each country and there were no general solutions automatically applicable to the SMEs of other WTO Members, he was convinced that sharing national experiences could be extremely useful for improving their own innovation strategies and the way in which SMEs could benefit from the use of the IP system.

13.22. The representative of Korea said his delegation was pleased to join the delegations of Chile, Chinese Taipei and the United States in co-sponsoring the agenda item. Sharing the respective experience of Members would be all the more valuable, given that IP systems and policies on incentives offered to SMEs had recently played a more prominent role. In the context of the on-going global economic uncertainty, IP policies that focused on the socially and economically disadvantaged had been implemented. The Korean IP Office had provided a 70% reduction in fees to SMEs. In addition, various measures had been implemented in Korea aimed at simplifying the requirements for the filing of evidentiary documents of each application for SMEs and extending their validity to a maximum of four years. To prevent a decline in IPR applications due to the economic downturn, Korea would continue to seek and pursue policies to improve customer-friendly systems, reduce fees, and simplify procedures. In addition, it would continue to further develop policies for the socially and economically disadvantaged.

13.23. A second initiative by Korea concerned IP-related consulting for SMEs. To further help SMEs, a project had been implemented to support enhanced IP competitiveness among SMEs. The project was designed to support comprehensive patent consulting including IP management, patent maps, and prior art search by having patent consultants reside in "IP Centers" and support the technological development and commercialization of SMEs. The project had enabled companies to obtain the necessary and appropriate support for prior art search both in Korea and globally, and had provided opportunities for in-depth consulting by IP experts.

13.24. Furthermore, his country provided assistance for SMEs to develop their brands. Brand consulting was offered on all aspects from the development of brands to the acquisition of their rights to enhance the brands of SMEs and, so far, the project had successfully handled 2,252 brand management consulting cases for SMEs. An analysis of the 145 companies that were supported with brand management showed that exclusive manpower for brand management had increased by 30%, sales by 10.8%, and employment by 12.6%. In particular, trademark applications had risen by 107% over the previous year. For instance, in 2011 a company producing dental equipment in Korea had succeeded in signing a contract worth US$7 million with a company in the United States and had exported US$80 million worth of products, just through its brand development project. Korea would continue to spread the benefits of that project with as many SMEs as possible.

13.25. Last but not least, Korea provided customized support for patent training for SMEs. The in-depth training to enhance the patent capacity in SMEs centred on customized IPR training reflecting the characteristics of each business type and level of IPR awareness. The Korean IP Office had used the Internet training broadcasting system, which had been set up by the International IP Training Institute to provide enhanced convenience for companies and to conduct various training programmes. Since 2010, 20 SMEs had benefited from the in-depth training. As a result, the number of patent applications from the trained SMEs had increased by an average of 1.4 times.

13.26. He said that SMEs played a crucial role in enhancing national competitiveness as a whole, and had made a significant contribution to maintaining the level of national employment. Korea believed that the continued growth of SMEs could be sustained by ceaseless efforts made for innovation and maximization of IP. The Korean Government remained committed to developing and implementing necessary and adequate assistance policies for SMEs to promote innovation and IP.

13.27. The representative of Chinese Taipei said she was pleased to join Chile, Korea and the United States in sponsoring that agenda item. Among the enterprises in her community, the vast

majority (97.63% to be precise) were SMEs. In other words, SMEs were the very foundation of the sustainable development of its economy. Nonetheless, while many of those SMEs had a significant capacity for innovation, compared with the large corporations, they lacked the resources and expertise to put their patent deployment strategies fully into practice, especially in the R&D phase. Hence, it was crucial that programmes and projects were adopted that supported SMEs especially in the areas of IP management and deployment, in order to maximize the efforts to stimulate growth in the economy.

13.28. In addition to the Technology Marketplace Project noted at the Council's previous meeting, she highlighted the Intellectual Property Management System (TIPS), which provided consultation services to SMEs in the form of hosting experience-sharing sessions, workshops, training courses, and the like. The TIPS programme had helped over 500 domestic enterprises to build their own IP management systems, and strengthen their competitiveness capability.

13.29. In addition, an IP service platform for SMEs called the Innovative SMEs IP value Project had been established. The platform was dedicated to sharing IP consultation methods, enlarging SMEs' knowledge and capacity, and enhancing the quality of their IP decisions. Tailor-made IP consultations and diagnoses were also provided to individual SMEs, with a view to strengthening their patent deployment in the R&D phase, shortening the R&D process and thus increasing benefits. Statistics showed that, between 2010 and 2012, investment and derived revenue increased by more than US$20.7 million, and R&D costs fell by over US$2.3 million.

13.30. In the current era of the knowledge-based economy, with SMEs representing such an important part of the economy and their prosperity being so directly linked to growth of the economy, Chinese Taipei believed that increasing the capability and capacity of SMEs in the areas of IP creation and protection and application in particular, was one of the central ways of stimulating overall economic growth in the future.

13.31. The representative of Brazil thanked the delegations of Chile, Korea, Chinese Taipei and the United States for having proposed a debate on IP and innovation in relation to SMEs, and said that his delegation welcomed the opportunity to discuss that topic. SMEs were among the most affected by flaws in an IP system. Weak patents increased transaction costs and IP dispute settlement entailed high costs, both of which were especially burdensome for SMEs. Those woes took a toll on individual companies. That toll was ultimately paid by their national economies.

13.32. There was evidence that innovative SMEs were the bigger source of productivity gain and job creation in developed economies. In that process, IP was a useful tool not only to generate added value, but also to avoid other companies capturing the value of innovation. The two main IP tools used by SMEs were trademarks and patents. Trademarks were cost-effective tools used to differentiate companies and add value to products. Through trademarks, SMEs could promote the quality of their products and reach consumers, especially niche consumers. The patent system was, however, not always cost-effective. Weak patents with undisclosed patent data could eventually (a) mislead SMEs to invest in unnecessary research; (b) hide possible technologies already available for licensing; (c) hinder innovations that "invent around" other patents; or even (d) lead to violation of patent rights that were not clearly stated.

13.33. Brazil strongly believed that SMEs were necessary for the effective implementation of Article 7 of TRIPS, which provided that the IP system should be a tool that contributes "to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." To take full advantage of innovation in order to implement Article 7 of TRIPS Agreement, SMEs had to face the challenges of: (a) reducing costs of registration/application of IP to SMEs; (b) lowering costs of legal advice on IP strategy; (c) enhancing the quality of patents; (d) reducing backlog; (e) establishing effective exceptions and limitations to patent rights; (f) fighting anti-competitive practices; and (g) differentiating "non practicing entities" from "patent trolls". They needed to respond to those challenges to ensure that the patent system was not only cost effective, but also development-effective for SMEs.

13.34. The representative of the Plurinational State of Bolivia said that it was undeniable that innovation was important for development. However, IP was definitely not synonymous with

innovation, and if it was treated that way it would be sending out the wrong message. Innovation transcended merely promoting monopolistic rights for potential inventors. A country's capacity to innovate depended on many other factors, for instance its research infrastructure, its level of industrial development, its capacity to absorb professionals and scientists, as well as technology transfer, none of which was achievable by simply promoting IP.

13.35. History had shown that innovation preceded IP. Paradoxically, the current discussion appeared to be the opposite: first strict IP regulations were promoted in the hope that innovation would follow, in a context where access to information was limited or very costly, particularly for SMEs. Many of the developed countries began applying IP rules only after they had reached a certain level of development. For example, a well-known country that today advocated strict patent rules did not allow chemical or pharmaceutical patents until the middle of the 1970s; another country only adopted multilateral copyright rules in the 1980s; and there were plenty of other very interesting cases worth looking at.

13.36. Contrary to expectations, instead of improving over the past few years, innovation in developing countries had effectively deteriorated. One needed only look at the WIPO Global Innovation Index for 2012, as mentioned by the delegate of Egypt at the Council's last meeting. Among other things, the Index mentioned that the innovation gap between countries and regions and between different levels of development among them had widened rather than narrowed, and that had a negative impact on the SMEs in many developing countries.

13.37. In the field of health as well, it was apparent that, over the past few years IP, based on market mechanisms, had failed to meet the innovation needs of the developing countries, for example as regards medicines for what the WHO had described as the "neglected" diseases – diseases which predominantly affected developing countries and, because they were of no commercial interest, did not provide motivation for the kind of innovation promised by IP. To address that problem, Bolivia together with a group of developing countries had sponsored a WHO initiative to seek different incentives to motivate innovation where the IP system was unable to do so, and he hoped that it would be approved at the next world assembly in May 2013.

13.38. In his view, clarification of the impact of IP in developing countries was needed and above all, how the payment of royalties affected the balance of payments and, in particular, how much the SMEs in the developing countries paid in royalties and how much they received should be examined in order to determine the real economic impact of IP on their economies in the short and medium term and to see whether the overall result was positive. The IMF has produced some numbers for 2011 which would undoubtedly be useful in that respect.

13.39. He concluded that Bolivia considered it would be more useful to discuss how to narrow the innovation gaps and address the innovation problems attributable to IP, and examine the problems caused by IP for the SMEs in developing countries.

13.40. The representative of India said that he understood the agenda item to be a stand-alone item. At the last TRIPS Council meeting, his delegation had emphasized that, in the absence of a clear definition of innovation in the TRIPS Agreement, the empirical evidence on the role of IP protection in promoting innovation and growth remained inconclusive. For developing countries the path of innovation focused on incremental technological changes. Hence it was not in their interest to keep the threshold for IP protection so low that minor changes could qualify for it. Such IP would in turn be exploited by bigger companies on account of their financial and technological strength. The SMEs in developing countries therefore needed a flexible IP regime that could help drive technological progress.

13.41. To understand the correlation between IP, innovation and SMEs in India, it was essential to have an understanding of the SME sector. SMEs played a vital role in India's economic growth, with over 30 million units that accounted for 17% of the country's GDP in 2011. They currently employed around 60 million people and the investment in every unit varied from US$60,000 to $1 million. Almost two-thirds of the SMEs were involved in manufacturing with 17% in the services sector and 16% in maintenance and repair services. Almost 90% of the units in the manufacturing were mainly involved in low-end manufacturing activities and existed in clusters. Since these units were labour intensive and capital starved, hardly any investment was made in research or innovation. Their marginal innovation was mainly limited to technological adaptation and

absorption, and reverse engineering without any attempt to innovate in a real sense. For these units, the protection of their IP, even if it existed was not high on their agenda. This was because IPRs had a national jurisdiction and lacked the capacity to register in every market where their products were sold. Moreover they also lacked the financial capacity to fight the infringers of their IPRs in foreign countries. Thus, in essence, the use of IPRs as an instrument of protection for the inventions of SMEs was neither an immediate, nor a simple solution.

13.42. The capacity to invent was a function of available resources, technological capacity, highly skilled manpower and commitment to R&D work. Very few companies in developing countries in the SME sector had the size and capacity necessary for engaging in such work. For most of these industries R&D was not important as they operated in technologically developed areas, such as textiles, the food sector, and automobiles, or because the companies were involved in the production of goods, and also services that were not marketed on an international scale. The Indian pharmaceutical and IT sectors, which started as SMEs in the 1970s, in fact made greater progress during the pre-TRIPS era compared with the current IP climate. India in effect became the pharmacy of the world supplying low-cost affordable medicines to the developing world in the absence of any IP regime. For developing countries, and especially for the SMEs, IP had acted as an obstacle to adapt, absorb and reverse engineer existing technologies.

13.43. In conclusion, he said that there was no direct correlation between IP and innovation even for small and medium industries. Technological progress even in the developed world had been achieved not through IP protection but rather through focused governmental interventions such as compulsory licences, cross-licensing, government funding, and competition policy. It was unfortunate that some of the technologically developed countries would like to showcase the positive effect of IP on innovation, when historically those countries, including the proponents of the agenda item being discussed, had reached that stage of technological development by focussing solely on the development of their own domestic industry with little regard for foreigners' or right holders' IP rights. After achieving a high level of development, they were now attempting to perpetuate their hold on their technologies by promoting a TRIPS-plus regime. Their objective was not to create an environment where developing countries progressed technologically, but to block their progress through the stringent IP regime. It was therefore essential that the flexibilities embodied in the TRIPS Agreement needed to be secured at any cost, if developing countries were to enjoy the benefits of innovation.

13.44. The representative of Japan said that his delegation was of the view that the topic was a suitable one for discussion at the Council, enabling delegations to create a common understanding of how IP functioned in the business world and how its successful use could contribute to economic development.

13.45. He considered that the IP system was specifically interrelated with business and innovation. The so-called "linkage" was significant for achieving economic development through utilizing IP as well as reaffirming the importance of the TRIPS Agreement so as to enhance the IP environment. From that perspective, it would be helpful for Members to exchange experiences and ideas, including those relating to policies involving the linkage between IP and business, so as to share clues and solutions for achieving a successful relationship between IP and business. In that context, at the previous Council meeting, his delegation had presented the "WIPO IP Advantage", a database for conducting case studies and sharing case examples that utilize IP in business. Japan had made a significant contribution to the establishment of the "WIPO IP Advantage" and continued to support further development of that project through the WIPO Japan Funds-in-Trust.

13.46. As stated by some Members at the Council's last meeting, the utilization of IP by SMEs was crucial in the future. SMEs were the leading players in society, serving as the driving force in the economy. In Japan, 99.7% of all companies were SMEs and 62.8% of employees worked for SMEs, reflecting the key role that SMEs played in economic growth. There were many Japanese companies that used to be small entities but that now conducted business globally. Japan firmly believed that SMEs were the key sources of innovation. Their role in supporting economic growth would not change. Based on that perspective, his delegation considered it important to have discussions focusing on SMEs.

13.47. He cited the example of a Japanese SME that had been successful in expanding its business by skilfully applying a technique that was involved in drying tobacco. The same technique was used to sterilize and disinfect vegetables and fruits without diminishing their freshness. In that

particular case, the fact that the SME had realized the importance of obtaining a patent for its innovation made it possible for the company to apply its technique and thus facilitate its entry into a new business field.

13.48. In contrast to those successful cases, it was not always possible for SMEs to utilize IP effectively on their own. One of the biggest obstacles that SMEs faced in utilizing IP was the shortage of resources available to them, including the very basics such as the initial awareness and knowledge that they needed to have about the IP system itself. In addition, they needed funds and human resources. Thus, it was important to provide full support to eliminate those obstacles in order to enable SMEs to fully utilize IP. From that perspective, Japan had been providing SMEs with a full line of support in all stages of the IP process, ranging from raising awareness on IP, to R&D activities, and finally the acquisition and utilization of patent rights. Some SMEs did not even know where to go or whom to ask about IP. Japan provided one-stop services on IP matters in collaboration with various IP experts such as lawyers, patent attorneys, and support organizations. It had set up service counters all over Japan offering comprehensive advice on IP issues.

13.49. Citing another success story, he said that an SME had started with the idea of making round fruits square. It had developed a cultivation technique, obtained a patent for the technique, obtained its trademark rights within and outside Japan, and successfully commercialized the product. Throughout the process, the public sector had provided appropriate advice in the form of IP advisers as well as assistance that had led to finding a partner for the SME, which could share the expenses needed for obtaining patents and trademarks.

13.50. As illustrated by those cases, the IP system's role was also to ensure that existing techniques were applicable to other fields. Another role of the IP system was to support businesses through their innovations bringing high value-added agricultural products to the market. The IP system constituted an important source of support for SMEs. He indicated that Japan intended to continue providing comprehensive support to SMEs.

13.51. Japan intended to provide support not only to Japan-based SMEs but also to SMEs based in developing countries by proactively promoting the utilization of IP. It was, for example, working in cooperation with developing countries under the auspices of the WIPO Japan Funds-in-Trust. It had implemented a training programme designed to develop human resources, and to advise SMEs how to strategically use IP. This had involved information sharing on successful cases of SME activities, as well as actual initiatives and issues in supporting SMEs in developing countries. Efforts in supporting SMEs might vary country by country due to each county's particular circumstances. Nevertheless, some activities could be found to be quite useful for other countries. He believed that it would be beneficial in the medium and long term for each and every country to improve its ability to support SMEs by sharing information on what each one was doing in that regard.

13.52. Furthermore, the Economic Research Institute for ASEAN and East Asia (ERIA), an international organization for studying and suggesting policies to promote economic integration in East Asia, had been advancing a project to support the ASEAN region by researching cases in which IP was successfully utilized by Japanese SMEs, including the support and cooperation being given by the Government of Japan. The project also involved researching support activities targeting SMEs. Japan would like to continue providing cooperation and assistance, in order to promote the effective use of IP by SMEs in developing countries.

13.53. In conclusion, he said that the IP system was an important infrastructure designed to support all business entities, including large companies, SMEs and individuals. Furthermore, he believed that it would be advantageous for each Member to adopt useful measures suited to its own strategy and initiatives. That could surely be accomplished not only by deeply understanding the "linkage" between IP and business activities but also by sharing information provided by each Member about cases in which IP had successfully been utilized. He would welcome further discussions in the Council on those matters. Further, his delegation also wished to continue to contribute to that initiative by sharing valuable knowledge that it had gained based on its own experience.

13.54. The representative of Canada expressed his support for on-going discussions on the agenda item to further explore and share examples of how IP programmes and policies could

promote innovation, and how the TRIPS Agreement was a driver in that regard. For innovative SMEs to grow into larger, world-competitive companies, it was critical for SMEs to have in place processes that managed their innovations from development through to commercialization. The value of many Canadian firms increasingly depended on their intangible assets, including patents, trademarks, copyrights, and industrial designs. The speed, quality, efficiency and effectiveness of an IP administrative system could affect whether or not ideas were successfully commercialized and brought to market. In tomorrow's economy, ideas and their transformation into commercial innovations would be increasingly important.

13.55. Over the last year, the Canadian Intellectual Property Office had held a total of 32 roundtable discussions involving more than 150 Canadian SMEs. The feedback from SMEs reflected a need to raise awareness of IP among Canadian businesses. Canada was committed to specifically targeting businesses with its outreach and awareness programmes, including disseminating relevant IP information to SMEs to increase their IP awareness and enable them to make better informed decisions about where and when to file for IPRs and what options were available to them. A key element for any competitive business seeking to expand into new market places was the ability to easily protect, in multiple countries, the innovations they had created and the brands that they had established.

13.56. Canada had a number of programmes in place to help stimulate innovation, which both directly and indirectly affected SMEs. It had recently undertaken a review of Canadian innovation policy to help foster innovation and to ensure that business investment in R&D was effectively encouraged. In addition, the International Science and Technology Partnerships Programme aimed to promote international collaborative R&D. The programme promoted international competitiveness and prosperity by building stronger science and technology relationships with partner countries, including Brazil, China, India and Israel. More specifically, some objectives of the programme included encouraging competitiveness through knowledge resulting from international science and technology partnerships; fostering international science and technology partnerships and collaborative research; and stepping up the commercialization of R&D, through international partnerships with a focus on SMEs.

13.57. Another example in Canada was the College and Community Innovation Programme. The objective was to increase innovation at the community and/or regional level by enabling Canadian colleges to increase their capacity to work with local companies, particularly SMEs. The programme supported applied research and collaborations that facilitated the commercialization, and adaptation and adoption of new technologies. Over the long term, the programme aimed to increase the economic development of local communities and create new quality jobs based on know-how and technological innovation.

13.58. He concluded that IP and innovation were linked in such a way that effective IP regimes could foster more attractive investment environments that would contribute to future global growth and prosperity for all. Supporting SMEs to constantly innovate would remain an on-going priority for the Government of Canada.

13.59. The representative of China said that she understood the proponents of this and previous agenda items on innovation to state that the issue was not a standing item on the agenda and that they do not intend to formulate any rules in that regard. In her view, the introduction and discussion of any new issue should in no way divert Members' attention and focus from longstanding issues on the Council's agenda.

13.60. At the Council's last meeting, China had shared its views on IP and innovation in general. Innovation was the main impetus driving economic development and the IP system was the means of promoting innovation for the development and utilization of knowledge-based resources. Yet, if the protection level was not appropriate or IPRs were abused, the IP system might hinder the dissemination of knowledge, innovation and social progress. China believed that an effective IP system should be comprehensive and balanced and contribute to promoting innovation by ensuring an appropriate level of IP protection and enforcement.

13.61. SMEs were a major force that absorbed a large portion of employment in the national economy, and thus played a vital role in economic and social development. Promoting the development of SMEs provided an important foundation for ensuring the steady yet rapid

development of the national economy. Yet SMEs faced more challenges and difficulties concerning IP and innovation, as compared with large enterprises. For instance, many of them lacked capacity to create IP due to financial and human resource constraints with respect to their capabilities to use IP in the implementation of their projects. Furthermore, degrees of commercialization of IP rights for SMEs were also limited.

13.62. Many SMEs lacked awareness of IP protection and the infringement of their IP occurred from time to time. Some other SMEs failed to respect others' IP. With regard to the management of IP, the vast majority of SMEs lacked the ability to set up a specialized management agency and were lacking in professional management staff. SMEs might face more difficulties when innovation was related to creation and utilization in the field of IP rights. While some Members had previously shared some of their experiences, there still seemed to be a lack of empirical studies to show the genuine role of IP in promoting innovation in SMEs. For example, in a field that was full of patents that constituted barriers to any newcomers, it would be very difficult for SMEs to access existing technology covered by those patents as their position in negotiating a licensing agreement would be very weak, nor was it possible to create/foster their own innovations in such an environment.

13.63. On the other hand, if SMEs were lucky to hold their own patents, it would be beneficial for them, provided that they could overcome other difficulties, including financial and legal problems when commercializing and benefiting from those patents. She understood that in the first scenario the situation might not be rare and in the second scenario they did not have enough evidence to support the success of medium-sized companies in utilizing their own patents. Thus the issue was how to create a level field in the area of IP for SMEs to facilitate their innovation. That still presented a huge challenge for many WTO Members and she welcomed hearing more views from the Members of the Council.

13.64. The representative of Nepal said that defining the relationship between IP and innovation was challenging. There were places where industrial revolution, modernization and development had occurred long before the IP regime had reached the current standards. Moreover, there were places where despite the existence of a certain level of IP law, innovation was yet to make a visible impact, including with respect to SMEs. He said that the main concerns of a LDC like Nepal related to the growing technology and innovation divide since countries were at varying levels in the innovation index, with LDCs at the bottom of the index, where the challenge was most visible. SMEs were one of the most important components of LDC economies, and yet public funds were not available to support R&D and enhance innovation in SMEs as LDC governments faced more pressing needs such as health and education. Neither was the private sector sufficiently strong to invest in R&D as the yield from such investments came only in the long term. Such poor countries lacked human resources and institutional capability.

13.65. The kind of IP regime therefore that his delegation viewed as preferable was one that was flexible and facilitated access to knowledge, educational resources, technology and medicines. Exclusive rights of right holders should not constrain the larger public good and benefit, especially in the spheres of health and education. Article 8 of the TRIPS Agreement highlighted the need to promote the public interest in sectors of vital importance to socio-economic and technological development.

13.66. The representative of the European Union said that the European Union had developed the Europe 2020 Strategy with the aim of developing a smart, sustainable and inclusive economy within the European Union, delivering high levels of employment, productivity and social cohesion. Part of the rationale behind the strategy was the need to improve the framework conditions and support for research and innovation so that innovative ideas could be turned into goods and services that created growth and jobs. SMEs played a significant role in the EU economy, and faced challenges that larger corporations did not have to contend with such as access to finance, awareness of business opportunities and awareness of the value of IP in accompanying innovative ideas. Therefore the European Commission had put in place various policies and projects with a specific focus on SMEs.

13.67. Owing to the high cost of good business advice, such as the development of business plans and bringing new products to market, SMEs needed assistance. The European Union provided financial support to SMEs to improve access to finance for start-ups and expansion of SMEs, in particular those undertaking R&D and other innovative activities. The European Commission made early-stage investments in specialized venture capital funds focused on specific sectors,

technologies or research and technical development, such as funds linked to incubators. Those SMEs often focused on commercializing IP.

13.68. The European Commission research and innovation programme for the period 2014-2020 paid particular attention to the translation of research project results into innovative applications and provided support measures for promoting technology transfer and IP management. In addition, most European patent offices offered web-based information about patent law and guidelines for patent application and enforcement. Some of them recently had launched tools to help manage patents. Examples of such tools included the UK Intellectual Property Office's "IP Healthcheck", the provision of online models of Technology Transfer and R&D agreements by the Portuguese Patent Office, or "IPscore", which is the European Patent office's patent portfolio management tool.

13.69. In some Member States, SMEs and public research organizations that wished to avail themselves of the IP services of external consultants were given financial support. In Germany, SMEs that had not filed a patent in the last five years were eligible for partial funding for the services of a local consultant that could provide services ranging from top-quality investigation to national/international patent filing and preparation of market access. In Denmark, the possibility existed of having one hour of free consultation with a private advisor, and co-funding for a preliminary patent search with a view to obtaining a patent.

13.70. The European Commission also provided considerable support through grants and advisory and support services to those SMEs located in the most disadvantaged regions. Patent offices in EPO countries had created a network of patent information centres (PatLib centres). They were spread at regional level throughout Europe, offering services related primarily to patents. Together with some of the EU's IP Offices and innovation agencies, the EPO had developed a comprehensive set of IP training tools with the "ip4inno" project. The training material was also a useful resource for IP trainers who wished to improve the capacity of SMEs and intermediaries in that area and for schemes to "train the trainers".

13.71. The European IPR Helpdesk was also funded by the European Commission. It provided services to SMEs involved in transnational partnership agreements and to current and potential beneficiaries of European collaborative research projects. The Helpdesk's helpline service, backed up by a team of IP experts, answered individual IP inquiries within three working days, and offered different training and awareness-raising services. The China, India, and newly set up ASEAN IPR SME Helpdesks had a focus on issues specific to SMEs operating in those countries and regions. Another IP Helpdesk foreseen for the MERCOSUR region was planned to be operational at the end of 2013.

13.72. He said that "IPorta" was another initiative that provided advisory and support services to SMEs. IPorta was accessible to non-EU enterprises and hosted a database that grouped information on national IPR registration procedures and prices as well as links to national IPR helpdesks, and provided sets of 'Frequently Asked Questions' and hotlines for specific questions.

13.73. More than 99% of all European businesses were SMEs, providing two out of three private-sector jobs and contributing to more than half of the total value added created by businesses in the EU. Moreover, SMEs played a key role in innovation and R&D, which was why the EU had dedicated so many resources to making them aware of the importance of IP and had decided to increase support to SMEs in third countries.

13.74. He said that in his intervention on innovation at the Council's last meeting, he had described the commonalities that existed between EU policies and India's proposal for a national innovation plan. However, he did not find the same commonalities in India's intervention under the present agenda item. Nevertheless, he said it was important that there was a rich and contrasting domestic debate in India about the importance of IP innovation.

13.75. The representative of Australia said that some of Australia's most innovative and creative products were generated by SMEs. Having IP protection meant that a smaller business had a competitive advantage in the market place, including in relation to investment and employment. Previously, Brazil had noted the difficulty and cost for small businesses in accessing the patent system.

13.76. Some features of the Australian IP system were particularly suited to the needs of smaller businesses. For example, the innovation patent was particularly useful for the needs of smaller businesses because it was a relatively fast, cost-effective and flexible mechanism for protecting and commercializing IP. Because of its lower inventive threshold, it was suitable for smaller advances on existing technology, and helped businesses acquire IP rights to protect their incremental inventions.

13.77. Citing an example, he said that Australia had some of the world's best surfing beaches, and one surfer wanted an easier way to carry his surf board to the beach. He created the 'Boardsling' a simple, heavy duty strap that hooked around the surfboard and could be slung over a shoulder, and protected his invention with an 'innovation patent'.

13.78. He emphasized that Australia placed importance on educating smaller businesses about IP. Smart Start was a publication about what businesses should know about IP. In addition, extensive online information and support on IP for business was available, including an online service that could assist SMEs to determine the suitability of their proposed trademarks.

13.79. For Australian SMEs there was a positive link between innovation and exports, and smaller businesses were encouraged to think proactively and long term about their growth and export plans and about protecting their IP in overseas markets. Australia's domestic market was small compared to some other WTO Members and if they were to grow, particularly in niche markets, its businesses, big and small, needed to look to overseas markets to sell their innovative and creative products, but they needed to be sure that their original ideas and distinctive marks would be protected.

13.80. An effective international trading system, including consistent rules for the protection and enforcement of IP worldwide, was integral to the success of smaller businesses in their export markets. Such a system led to further innovation and creation, which not only benefited the small businesses, but also enriched the Australian economy and society. Equally, foreign companies and innovators could confidently conduct business in Australia, giving Australians access to their distinctive products.

13.81. The representative of Switzerland said that his delegation attached importance to a reliable IP system for SMEs and an enforceable IPR portfolio for innovative business development. At the November 2013 meeting of the Council, his delegation had referred to three studies commissioned by the Swiss IP Office in 2009 relating to IP and SMEs. Based on these studies, it had outlined several recommendations to the Government regarding how to put its services more proactively and usefully at the disposal of SMEs. Furthermore, the second study had focused on a number of recommendations to the SMEs themselves and how they could take better advantage of the IP system to enhance their business opportunities. The recommendations included drafting an IP management strategy specifically adapted to their needs, including the specifics of the technological sector in which the SME was conducting its business; making IP a priority for the company's management and raising the general awareness of IP among its employees; evaluating its existing IPR portfolio on a regular basis and taking action based on that analysis, questioning old IP strategies in order to remain up-to-date with the changing markets; and finally, exploring licensing out of the SME's IP portfolio where possible and licensing in of potential partner companies' IP to avoid waste of R&D costs in what was already state-of-the-art or where another company had a higher level of competence.

13.82. At the next TRIPS Council meeting, Switzerland intended to provide the Council with information and case examples of how IP could facilitate innovation and knowledge transfer between universities and SMEs. Appropriate use of IP helped to maximize the innovation potential by linking the expertise of basic research undertaken at universities, often government funded, and applied R&D of the private sector, which could result in public-private partnerships, working both for the benefit of the Government and the private sector.

13.83. The representative of Bangladesh said that he agreed that SMEs were important drivers of economic growth. However, SMEs, IP and innovation might not play the same role in all countries, especially in LDCs. Even the definition and capacity of SMEs in the developed countries were not the same as SMEs in LDCs.

13.84. Though IP and innovation were two distinct terms, both of them were associated with investment, economic growth, prosperity and social and cultural development. Unfortunately not every country was in a position to benefit equally from them due to various historical and systemic reasons. Developing countries and LDCs were not in a position to develop IP regimes according to their specific requirements and were unable to achieve sufficient innovation for development to occur. As a result, developing countries, and especially LDCs, lacked sufficient R&D facilities, institutional capability and human resources to utilize IP and innovation as tools for sustainable development. LDCs, in particular, faced greater challenges in developing and protecting their valuable IP assets and in developing their own IP regimes tailored to their needs particularly in areas such as agriculture, food security, rural development, human and social development, trade and technology.

13.85. Innovation was a continuous process and needed to move forward. However, the present IP regime failed to provide a level playing field and facilitate innovation in countries in the same way. It was seen that while the existing IP regime favoured innovation and commercial gains in some countries, it had a negative effect in developing countries. In most developing countries and in almost all the LDCs, the private sector lacked the capability to invest heavily in R&D. It was the public sector which filled the gaps of the private sector. Thus the IP regime in developing countries was supposed to be different from the IP regime of the developed countries. His delegation considered that IP was property with ownership rights, but also with privileges and obligations. Hence there should be a proper balance between rights and obligations for the effective use of both IP and innovation for SMEs. Developing countries and LDCs required special and differential treatment and different kinds of flexibilities together with transparent technical assistance that was development-oriented and demand-driven, as provided for in Articles 66 and 67 of the TRIPS Agreement.

13.86. The representative of Chile said that the delegations present had conducted an interesting exchange, which reflected the importance they attached to the issue of innovation and IP with regard to SMEs. The idea of co-sponsoring such an item was to engender discussion. Every Member had its own particular situation and it was therefore difficult to align and tailor the discussion for every country. Nonetheless, the discussion and exchange of experiences had been illuminating, and had helped Members identify common issues and highlight the difficulties encountered by SMEs in using the IP system. The discussion had touched on filing fees, quality of patents and backlogs, the need for limitations to IPRs, and anti-competitive practices, which he considered were all relevant for a properly functioning IP system. These aspects should be examined carefully as they could lead to high costs and unnecessary complications for both small businesses and other enterprises, and for the society. He said that without prejudice to the other items on the Council's agenda, Members should continue with their discussion and examine in greater depth some of the aspects that they had touched on.

13.87. The representative of WIPO said that, as he was from the Economics and Statistics Division, he would focus on what the economic literature had to say about firm size and innovation and firm size and the uptake of IP.

13.88. Given the strong share in growth and employment of SMEs, there was an on-going interest in their role in the economy. The debate on the contribution of small firms to innovation was as old as the economics of innovation itself. With R&D spending used as an imperfect proxy for measuring innovation, it was seen that, on average, large firms spent more on innovation and, by this measure, produced more innovation outputs than small firms.

13.89. The vast majority of small firms did not perform any R&D. Even among the largest firms, R&D was highly concentrated. Yet, in high-income countries, there was huge heterogeneity among small firms. Research showed that some SMEs were in fact highly research intensive. The literature also showed that small firms might have an advantage in inventions, especially at the earlier stage of inventive works, and with more radical innovations. Innovation projects with higher risks and returns often took place within research-intensive SMEs, which were often university spin-offs. Larger firms in turn had an advantage in later stages and in improvements and scaling up of breakthrough innovations.

13.90. Furthermore, significant differences existed across sectors. The chemical sector and other sectors with large capital intensity were dominated by large firms. However, in mechanical engineering, software, and the like, small firms contributed actively to innovation. In many low-

and medium-income countries, most R&D was performed in the public sector or in some state-owned large firms. While that was changing rapidly in some middle-income countries, in most countries spending on R&D was very little. Smaller firms were often part of the informal sector, which was most often disconnected from any formal innovation system or public research organizations.

13.91. Patents were often taken by economists to be a proxy for R&D and innovation outputs. A longstanding policy concern was whether SMEs were disadvantaged in comparison with larger firms in their use of the IP system. As discussed in more depth in the WIPO World IP Report 2011, different firms deployed diverse strategies to appropriate returns from innovation. Even in the formal sector of high-income countries, the use of formal appropriation mechanisms such as patents was not the norm. For instance, only a small fraction of all firms in all sectors in countries such as the United States considered IPRs as important for appropriating returns from R&D. Among firms that considered IPRs important, trademarks were considered most important, on average, followed by trade secrets, copyrights, industrial designs and patents.

13.92. For many firms, it did not make business sense to use IPRs. However, as firms' R&D intensity and collaboration with public research institutions increased, patent protection became relatively more important. In particular, sectors with "discrete" production technologies, such as pharmaceuticals and chemicals, relied heavily on patents.

13.93. It was hard to disentangle the use of IP by firm size based on available data. There was a need to match firm data to patent data. Some of that work was being carried out by WIPO's Chief Economist for the Committee on Development and Intellectual Property (CDIP). Based on available data, however, on average the propensity to patent seemed to rise with firm size, other things being equal. It was rare that small firms relied on patents as formal appropriation mechanisms. When small firms innovated, they often relied on secrecy, lead time, or confidentiality agreements. Specifically, SMEs that cooperated in innovation with other horizontal partners, or significantly depended on vertical partners, preferred speed and lead time to appropriate returns to R&D. Even where small firms did use patents, there were only a small number of patents taken out per year relative to R&D spending. They also relied less on patent information as a source of knowledge.

13.94. That did not mean, however, that small firms failed to use the patent system. Research-intensive SMEs that harboured specialized knowledge strongly relied on the patent system, in particular spin offs from universities or in partnership with universities, or firms in the business of supplying R&D services. IPRs provided such firms with a reputation effect and access to finance. Small firms also actively used other forms of IP such as trademarks. New research at the OECD also showed that 'young firms' relied more on IP. Most OECD countries for which data was available showed a significant share of patenting activity of young firms, as share of total patents. Also, firms that used patents and trademarks had a substantially lower probability to exit the market within the first few years.

13.95. Turning to low and medium-income countries, he said it was very difficult to obtain data by firm size. Evidence showed that the uptake of IP was low among firms in these countries in general and this was true particularly among small firms. Nonetheless, use of IP was increasing throughout the world and there was a need for more study. A study performed by the CDIP on the role of innovation and IP in the informal economy in Africa indeed found many instances of innovation in small, informal firms. The project also sought to document their potential to use IP.

13.96. Another representative of WIPO indicated that micro, small and medium-sized enterprises represented over 90% of enterprises in most countries worldwide, and contributed significantly to innovation, employment, exports and economic growth. However, the vast majority of SMEs did not use the IP system for protecting their IP assets due to a variety of reasons, including a lack of awareness of the IP system, perceived high cost, complexity, inadequacy, inefficiency of using the IP system, and insufficient skills and competence in exploiting its potential for competitive advantage. In a large number of countries, the absence of readily accessible IP information and an effective focal point at the national level for interacting with the large number of heterogeneous SME support institutions also created a communications challenge for WIPO in general and for its SMEs' programme in particular.

13.97. In line with the WIPO Development Agenda Recommendations, one of the aims of WIPO was to increase the number of SMEs successfully managing their IP assets to create value and increase their competitive advantage. That aim had been achieved by reaching individual SMEs through SME support institutions and other relevant government institutions and assisting them. This was done primarily through training of trainers programmes conducted in developing countries and LDCs and countries with economies in transition in understanding the value and role of IP asset management, with special focus on the exploitation of IP assets, including trademarks and other IP rights, in branding, marketing, innovation, business operations and access to finance.

13.98. In addition, WIPO disseminated information as widely as possible through the use of the Internet, mainly through the WIPO SMEs website which contained regularly updated material of relevance to SMEs on IP asset management, as well as a monthly electronic newsletter on issues of interest to SMEs and SME stakeholders. Moreover, WIPO continued to make its SME-specific publications available locally through translation and customization and, to make available upon request, the IP PANORAMA™ multimedia toolkit. More recently, it had funded eight national studies on SMEs and IP in developing and least developed countries and in countries with economies in transition as a support for IP and SME policy makers. The conclusions and recommendations, it was hoped, would be useful to policymakers in framing appropriate policies and support services on IP for SMEs.

13.99. WIPO's IP Services systems, such as the Patent Cooperation Treaty (patents), the Madrid system (trademarks) and the Hague system (industrial design), and the Global Infrastructure services, offered a higher value, more economical and less complex alternatives to enterprises of all sizes, including SMEs, to obtain IP protection internationally and to build collaborative networks and technical platforms to share knowledge and to simplify IP transactions, including free databases and tools for exchanging information.

13.100. The Council took note of the statements made.

14 INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

14.1. The Chairman said that, since the Council's meeting in November 2012, two new Members had joined the WTO. The Lao People's Democratic Republic became the 158th Member of the WTO on 2 February 2013,[2] and Tajikistan became the 159th Member of the WTO on 2 March 2013.[3]

14.2. The Council took note of the information provided.

15 OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

15.1. The Chairman recalled that at its meeting in November 2012 the Council had agreed to grant ad hoc observer status on a meeting-by-meeting basis to the Cooperation Council of the Arab States of the Gulf (GCC) and the European Free Trade Association (EFTA). The Council had also requested that he continue his consultations on the requests from the other five intergovernmental organizations (IGOs) that had recently provided updated information, as well as on the requests from the remaining eight organizations that had not yet updated their information.

15.2. The representative of the GCC thanked the Council for granting it observer status and the WTO Secretariat for inviting the GCC Secretariat to attend the meeting. He said that the GCC consisted of six countries (the United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait) and had been established in 1981 as a regional organization with headquarters in Riyadh, Saudi Arabia. The GCC's primary goal was to enhance effective coordination and integration between its members in all fields. Given the importance of the topics related to IPRs, an article entitled "Intellectual Property" had been included in the economic agreement between GCC members, paving the way for establishing the GCC Patent Office in 1992. One of the objectives of the GCC Patent Office was to implement the GCC's patent law by issuing patents that were valid in the whole GCC region. Other IPR fields, such as trademarks and trade secrets, were under consideration for future cooperation between GCC members.

[2] The Protocol on the Accession of the Lao PDR has been circulated in document WT/L/865 and the Report of the Working Party on the Accession of the Lao PDR in document WT/ACC/LAO/45.

[3] The Protocol on the Accession of Tajikistan has been circulated in document WT/L/872 and the Report of the Working Party on the Accession of Tajikistan in document WT/ACC/TJK/30.

15.3. The Chairman recalled that there were 13 requests for observer status submitted by IGOs pending at the TRIPS Council. The updated list could be found in document IP/C/W/52/Rev.13. In June 2011, the Council had requested the Secretariat to contact the IGOs with pending requests in order to update the information they had provided earlier, including the nature of their work and the reasons for their interest in being accorded observer status. As regards these 13 IGOs, the Secretariat had received updated information from the Conférence des Ministres de l'Agriculture de l'Afrique de l'Ouest et du Centre (CMA/AOC), the International Organization of Vine and Wine (OIV), the South Centre, and the United Nations Environment Programme (UNEP). Furthermore, the CBD Secretariat had informed the Secretariat that it felt that no update was necessary since it had renewed its request as recently as 24 November 2010 by means of a letter addressed to the WTO Director-General. This information was available on the Members' website.

15.4. He said that, as requested by the Council at its last meeting, he had continued his consultations on the issue of observer status, in particular in light of this updated information. Unfortunately, he was not in a position to report any new thinking in respect of these requests.

15.5. The representative of Nigeria, speaking on behalf of the African Group, expressed support for the request from the South Centre, which was an IGO comprising 52 developing countries including Nigeria. The Centre had a dedicated programme that contributed to the development, coordinated use and improvement of the capacity building of developing countries and their institutions, and that aimed to integrate the development dimension into policies on IP, innovation and access to knowledge. The activities of the Centre included research and policy analysis, policy and legislative advice, and capacity building for developing countries. The Centre regularly provided analyses of international treaties and negotiations in numerous publications on IP. He drew attention to the recent WHO-WIPO-WTO publication on "Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade", which recognized the South Centre as an international stakeholder in IP. In view of this, he was seeking observer status for the South Centre, at least on an ad hoc basis while the Council was reflecting on a comprehensive solution.

15.6. The representative of Egypt welcomed the participation of the GCC at the Council's meetings and looked forward to further updates on its related activities, and expressed support for the statement by Nigeria. He looked forward to an effective solution to the issue of observer status.

15.7. The representative of Tanzania, supporting the statement by Nigeria, said that she recognized the importance of the South Centre in assisting developing countries, specifically the LDCs, to build their capacity in areas of negotiations which they cannot understand or interpret, be it policy, technical or legal matters for decision making. There were many delegations from developing countries and LDCs which did not have enough capacity to negotiate due to limited human resources and hence sought assistance from that IGO, which played a crucial role for development. Thus the importance of granting observer status to the South Centre to allow it to be better informed and to adequately assist Member countries as and when requested.

15.8. The representative of Rwanda expressed support for Nigeria's statement, and hoped that the Council would consider positively the request from the South Centre.

15.9. The representative of the Kingdom of Saudi Arabia said that his country, as a member of the GCC, welcomed the delegation of the GCC. He expressed his gratitude to the whole Membership for granting observer status to it on an ad hoc basis. There was a need for further cooperation between the WTO and other IGOs in order to enhance the current and future work at the TRIPS Council and other WTO bodies, where their participation, interventions and statements to date represented the desired kind of co-operation. He expressed support for the request of the South Centre to be granted an observer status on an ad hoc basis.

15.10. The representative of India aligned his delegation with the statement made by Nigeria for granting observer status to the South Centre on an ad hoc basis.

15.11. The representative of Brazil expressed his support for the declarations supporting the request made by the South Centre. Brazil was part of that IGO, which could contribute much to the debate in the Council. Brazil also supported the request from the CBD and the participation of international organizations to enrich the debates.

15.12. The representative of Bangladesh supported the granting of observer status to the South Centre. He hoped that the Council would take a favourable decision in this field.

15.13. The representative of China said that she supported the South Centre being accepted as observer in the Council in view of its contributions to developing countries and work closely related to the subject-matter of the Council. She also supported granting observer status to the CBD as its subject-matter was also closely related to that of the Council. She requested that Members declining to support such requests explain their reasoning to the Council.

15.14. The representative of Cuba said that it was very important to grant observer status to the South Centre. This Centre brought together a large number of developing countries in a coordination forum that was vital for ensuring the participation of Southern countries in negotiations, particularly in the area of IP.

15.15. The representative of Nepal expressed his support for the South Centre's request for observer status in the Council.

15.16. The representative of Mali fully associated himself with those in favour of granting observer status in the Council to the South Centre, which played an extremely important role for Members, particularly LDCs.

15.17. The representative of Sri Lanka associated himself with the delegations who had expressed support for the request from the South Centre. His delegation recognized the importance of the South Centre in assisting developing countries, specifically LDCs, to build their capacity in areas of negotiations which they cannot understand or interpret, be it policy, technical or legal matters for decision making. There were many delegations from developing countries and LDCs which did not have enough capacity to negotiate due to limited human resources and hence sought assistance from that IGO, which played a crucial role for development. Thus the importance of granting observer status to the South Centre to allow it to be better informed and to adequately assist Member countries as and when requested.

15.18. The representative of the United States said that his delegation continued to support ad hoc observer status of those organizations that had been previously granted by the Council but was not in a position to support any of the remaining requests for observer status.

15.19. The representative of China requested that the Member declining to grant observer status to give some credible explanation to the Council, although if it needed time for further considering the issue China could wait for another time.

15.20. The representative of the United States said that his delegation had been participating actively in the Chair's consultations and fully intended to engage on that basis.

15.21. The representative of Nigeria thanked delegations who had expressed their support to the request from the South Centre. It had been at the forefront in assisting developing countries especially in the area of IP and the negotiation of the TRIPS and public health waiver. It was already an observer in the WTO Committee on Trade and Development, was an observer at WIPO, and many of its parties were also WTO Members. He requested the Chair to hold consultations aimed at finding a resolution to the issue.

15.22. The Chairman encouraged delegations to discuss the matter amongst themselves to find a solution. While his consultations had led to agreement on the requests from EFTA and the GCC, some delegations had, unfortunately, requested more time in respect of the other institutions. He suggested that the Council request the Chair to continue consultations on the requests for observer status from the five IGOs that had recently provided updated information, as well as on the requests from the eight other organizations that had not yet updated their information.

15.23. The Council so agreed.

16 OTHER BUSINESS

16.1 Dates of the Council's meetings in 2013

16.1. The Chairman recalled that, at its meeting in November 2012, the Council had agreed on the dates for its meetings in 2013. Since then a conflict had arisen with a meeting of the General Council scheduled for the same date as the end-of-year TRIPS Council meeting. He suggested that the Council agree to reschedule that meeting for Thursday and Friday, 10-11 October.

16.2. The Council so agreed.

16.2 Invitations to ARIPO, OAPI, GCC and EFTA

16.3. The Chairman recalled that, at its meetings in June 2010 and November 2012, the Council had agreed to grant ad hoc observer status on a meeting-to-meeting basis to the African Regional Intellectual Property Organization (ARIPO), the African Intellectual Property Organization (OAPI), the Cooperation Council of the Arab States of the Gulf (GCC), and the European Free Trade Association (EFTA). He suggested that the Council again invite these organizations to attend the Council's next formal meeting on an ad hoc basis.

16.4. The Council so agreed.

16.3 Intellectual property, climate change and development

16.5. The representative of Ecuador said that his delegation had circulated a document entitled "Contribution of IP to Facilitating the Transfer of Environmentally Rational Technology" (IP/C/W/585, dated 5 March 2013). Ecuador believed that transfer of technology was a fundamental element in fighting climate change as well as in adapting and mitigating the harmful effects of climate change. The issue of IPRs and the debate on cooperation and technology was becoming a fundamental element concerning the best way to adapt to and slow down the effects of climate change, particularly for developing countries. This had been indicated by Members such as India a few years ago, and more recently by Bolivia and Venezuela in a document submitted to the Committee on Trade and the Environment. Ecuador had requested that this item be placed as a regular item on the agenda of the Council's meeting in June so that Members would be able to express and reflect their positions, their views and suggestions on the subject.

16.6. The representative of Nicaragua said that the document introduced by Ecuador had been sent back to capital and that, on a preliminary basis, Nicaragua would be interested in participating in discussions on it. The document was of benefit for developing and least developed countries as it referred to transfer of technology in terms of climate change.

16.7. The representative of Cuba thanked Ecuador for its submission. Given that the document had only recently been circulated, she was still awaiting her capital's assessment, yet hoped to be given new opportunities to discuss the document within the Council framework.

17 ELECTION OF THE CHAIRPERSON

17.1. The Chairman said that, at its meeting of 25 February 2013, the General Council had noted the consensus on a slate of names of chairpersons for WTO bodies. On the basis of the understanding reached, he proposed that the Council for TRIPS elect H.E. Mr Alfredo Suescum from Panama as its Chairperson for the coming year by acclamation.

17.2. The Council so agreed.

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