



Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING HELD IN THE CENTRE WILLIAM RAPPARD ON 11-12 JUNE 2013

Chairperson: Ambassador Alfredo Suescum (Panama)

Addendum

The present document contains the statements made during the Council for TRIPS meeting held on 11-12 June 2013.

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AGENDA ITEM 3: REVIEW OF THE PROVISIONS OF ARTICLE 27.3(B)**AGENDA ITEM 4: RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY****AGENDA ITEM 5: PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE****5.1 Indonesia**

1. The relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge and folklore are highly important. All Member countries should take real actions to ensure that the TRIPS Agreement and the CBD can be implemented in a manner which is mutually supportive and does not run counter to their respective objectives.

2. In this regard, Indonesia would like to highlight the importance of a mandatory disclosure requirement which is now being extensively discussed in a text-based negotiation process within the WIPO IGC. To this end, the delegation of Indonesia would like to appeal to all delegates to reflect this important issue under this agenda item.

3. Indonesia considers that a legal obligation to establish a mandatory disclosure requirement in patent applications will contribute to prevent not only the grant of erroneous patents that are not novel or inventive with regard to genetic resources and associated traditional knowledge, but also to prevent misappropriation and misuse of genetic resources, and to enhance transparency about the utilization of genetic resources and/or associated traditional knowledge as recognised in the CBD and the Nagoya Protocol.

4. It is our view that a mandatory disclosure requirement can provide a greater legal certainty for the IP system itself as it will render a balance of rights and obligations between the providers and users of genetic resources as well as local communities who are the holder/beneficiaries of the associated traditional knowledge. In this form, the IP system will be consistent with its core objectives, which are to contribute to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare and to a balance of rights and obligations. These goals can only be achieved by amending the TRIPS Agreement to include a mandatory disclosure requirement.

5.2 Brazil

5. I would like to associate the position of Brazil to the ideas raised by the delegation of Indonesia. The position of Brazil on these three agenda items is well-known. Brazil supports the amendment of the TRIPS Agreement so as to introduce a legal obligation establishing a mandatory disclosure requirement in patent applications. We understand that such amendment will contribute to prevent not only the misappropriation of genetic resources but also the grant of erroneous patents.

6. I would like to recall that the tenth Conference of the Parties to the CBD, on 29 October 2010, adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. The Protocol supports the further implementation of the CBD's third objective: the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The entry into force of the Nagoya Protocol will ensure legal certainty and transparency for both providers and patent applicants that use genetic resources, creating a framework that promotes the use of genetic resources and associated traditional knowledge while strengthening the opportunities for fair and equitable sharing of benefits from their use.

7. As of today, more than 90 countries have signed the Nagoya Protocol. Eighteen countries have already ratified it. WTO Members have a key role to play in addressing misappropriation of genetic resources and traditional knowledge. In this regard, we urge member countries to engage in discussions on a decision to enhance mutual supportiveness between the TRIPS Agreement and the CBD, as proposed in document TN/C/W/59.

5.3 China

8. China would like to associate itself with the delegations of Indonesia and Brazil. As it has been well recognized, the TRIPS-CBD issue, which belongs to the single undertaking of the Doha Round negotiations, has been a long-standing issue at the TRIPS Council for over a decade. China believes the TRIPS Agreement, the CBD and the Nagoya Protocol should operate in a mutually supportive manner, and therefore endorses the proposal to amend of the TRIPS Agreement to introduce a mandatory disclosure requirement of the origin of genetic resources and/or traditional knowledge into patent applications. This amendment of the TRIPS Agreement will make it supportive of the provisions in the CBD and the Nagoya Protocol.

9. Once again, we would like to reiterate that the mandatory disclosure requirement is a necessary measure that can ensure that the rights related to genetic resources and traditional knowledge are safeguarded within the patent system. It will also contribute to improving the transparency of the utilization of genetic resources and traditional knowledge, and help to enhance legal certainty and achieve the goals. At the same time, China does not think it would be burdensome for the patent applicant to provide the information concerning prior informed consent and access and benefit sharing, especially considering the legitimate objective pursued by the system. The contractual arrangements solution proposed by some Members, in our view, is not enough for the protection of genetic resources, because the contractual arrangements depend on voluntary behaviour and can't impose restrictions on third party.

10. The majority of WTO Members has submitted the disclosure proposal in past years, including documents TN/C/W/52 and TN/C/W/59. These documents could be a good basis for future discussion. In accordance with the mandate given by Ministers, which had instructed the Council to examine, inter alia, the relationship between the TRIPS Agreement and the CBD, Members should work in the Council and take appropriate and effective measures in patent applications to prevent misappropriation of genetic resources and avoid erroneous patents. We would like to encourage the Director-General and Members to continue to engage in consultations on this issue in a timely manner. We also welcome the WIPO Secretariat, as an observer to the TRIPS Council, and Members to introduce the developments in the negotiations in the WIPO IGC. However, the ongoing discussions in the WIPO IGC do not prevent Members from seeking solutions in the WTO.

5.4 Plurinational State of Bolivia

11. As the Bolivian delegation has stated on several occasions, including in two official communications (documents IP/C/W/545 and IP/C/W/554), the review of Article 27.3(b) is part of the mandate of the Doha Work Programme under paragraph 19 of the Ministerial Declaration. It is also an outstanding implementation issue, within the meaning of paragraph 12 of the Doha Declaration, which states that implementation-related concerns shall be an integral part of the Work Programme (WT/MIN(01)/17).

12. The adoption of Article 27.3(b) established the Members' obligation to grant patents for micro-organisms and microbiological and non-biological processes. Article 27.3(b) also provided Members the possibility to grant patents on plants and animals as well as biological processes, thus promoting private and monopolistic appropriation of life forms in a way that had never been seen before.

13. As a result of this Article's entry into force, there has been a proliferation of patents and patent applications involving a wide range of life forms, including human life itself and parts thereof such as proteins, genes, gene sequences, cells, cell lines and tissues.

14. We wish to reiterate, once again, that the patentability of life forms promoted by Article 27.3(b) raises serious ethical and moral concerns for many cultures and populations around the world. The extension of patents to life forms is based on the idea that life forms and parts thereof are human inventions and, as such, patentable. That vision is not only skewed in favour of corporate mercantile interests but is also far removed from the culture, values and beliefs of many peoples and societies, for whom life is something sacred and special that cannot be considered a human invention and hence must not be treated as just another commodity.

15. Bolivia proposes that Article 27.3(b) be amended to prohibit the patenting of all life forms and parts thereof under the Doha Development Round. This will constitute the best contribution that the WTO could make to achieving the development objectives.

16. Lastly, we would be grateful if the Chair would pursue his consultations with a view to the participation of the CBD Secretariat in the TRIPS Council and if the Secretariat would update its concept notes with the proposals on Article 27.3(b) submitted by Members.

5.5 India

17. At the outset India likes to associate with the statements made by Indonesia, Brazil and China. The inadequacy in the TRIPS Agreement to combat biopiracy and misappropriation of genetic resources and traditional knowledge needs no further elaboration following the exhaustive technical discussions on the issue over the last decade. IPRs are granted as a *quid pro quo* for disclosure, and in accordance with the objectives and principles of the TRIPS Agreement contained in Articles 7 and 8 and other provisions of the TRIPS Agreement. The incomplete disclosure, as presently contained in Article 29, is leading to an imbalance in the Agreement and needs to be rectified. This concern has been voiced by a vast majority of WTO Membership including developed and developing countries.

18. The TRIPS Agreement continues to ignore the numerous IPR-related obligations in the CBD including obliging countries to cooperate to ensure that patents and other IP rights do not run counter to the objectives of the CBD (Article 16.5). This contradiction not only obstructs the proper implementation of the CBD but also causes an imbalance in the TRIPS Agreement. We are disappointed to note that while work in the CBD has been progressing steadily, there has been a lack of serious engagement in the TRIPS Council despite the broad consensus for the need to combat misappropriation and biopiracy of genetic resources and traditional knowledge.

19. As regards the way forward, while document TN/C/W/52 provides a sound basis for the work on substantive and procedural treatment of the issues of TRIPS-CBD, GI extension and GI register, document TN/C/W/59 could carry forward the issue of TRIPS-CBD as it also incorporates the provisions of the Nagoya Protocol. The two documents contain balanced proposals since they are an outcome of constructive engagement, flexibilities and accommodation of interests of a large number of Members and ensure that the rights of patent holders do not get affected. While my delegation appreciates the consultations by the Director-General on this issue on the basis of the mandate provided by paragraph 39 of the Hong Kong Ministerial Declaration, we feel that intensive consultations, especially after the Bali Ministerial, would be necessary.

20. Let me conclude by saying that a briefing by the CBD Secretariat would be helpful in having progress on this issue.

5.6 Bangladesh

21. My country had and continues to have a consistent position on this issue. We do not support the patenting of life forms on moral and ethical grounds. We believe the State has sovereign rights over genetic resources and traditional knowledge. We are deeply concerned at the misappropriation of genetic resources and traditional knowledge and therefore strictly adhere to the principal of disclosure requirements to reduce the biopiracy and erroneous patents and ensure sharing of the benefits with rightful owners. The TRIPS Agreement, the CBD and the Nagoya Protocol should be implemented in a mutually supportive and complementary manner, as such it is an obligation for a patent applicant to disclose genetic resources and the traditional knowledge and the disclosure requirement needs to be enforced.

5.7 Colombia

22. Colombia wishes to reiterate its view concerning the need to review the TRIPS Agreement and to incorporate mechanisms that would help address the monitoring and follow-up of 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. This will ensure that the regime covering access to genetic resources and benefit sharing is consistent with the objectives of both

protection systems and that these are thus mutually supportive, pursuant to Article 16.5 of the CBD and Article 4 of the Nagoya Protocol.

23. We therefore encourage the Chair to continue consultations aimed at extending an invitation to the CBD Secretariat.

5.8 Peru

24. I would like to support India, Brazil, Colombia, Indonesia and others in stressing the importance of these issues. Peru's position is reflected in documents TN/C/W/52 and TN/C/W/59. We have also expressed our position in the WIPO IGC where we, along with other Members, have been looking for legally binding instruments, which include mandatory disclosure requirements in dealing with misappropriation of traditional knowledge and folklore and genetic resources. The disclosure requirement will disclose the country of origin and provide evidence of compliance with prior informed consent and benefit sharing, and improve a well-balanced IP system. I support Bolivia and Colombia in their request for consultations aimed at extending an invitation to the CBD Secretariat.

5.9 South Africa

25. South Africa would like to associate itself with the statements made by Brazil, China, India and other like-minded countries. South Africa believes that there is a fundamental conflict between the spirit and objectives of the CBD and the TRIPS Agreement. We believe that there are three areas of conflict that are identifiable based on the objectives of the two Agreements. Firstly Article 3 of the CBD provides that States have sovereign rights over their biological resources and the TRIPS Agreement overlooks this sovereignty as it recognizes private IPRs over biological resources. Secondly the CBD provides States with an opportunity to demand benefit sharing for the commercial use of biological resources and the TRIPS Agreement negates this legal authority. Thirdly the CBD is aimed at reducing cases of biopiracy by requiring prior informed consent whereas the TRIPS Agreement does not. This means that patent applications can be submitted over biological resources or knowledge of a certain local community in any country. This is because the TRIPS Agreement recognizes rights on the basis of novelty which does not take into consideration traditional knowledge and cultural practices.

26. South Africa also believes that there is a need to avoid erroneous application of patents for inventions that involve the use of genetic resources and related traditional knowledge. There is a need to secure compliance with national access and benefit-sharing regimes. Having stated the above, it is therefore clear that the application of the TRIPS Agreement may threaten the preservation of biological resources and traditional knowledge. The noted conflicts are what the CBD under Article 16.5 advises against. It is stated that IPRs must not conflict with a sustainable use of biodiversity. What could aid in reconciling the two agreements is a proper legal review of both agreements with the aim of making amendments where necessary to ensure mutually supportive application. South Africa believes that under the current review of Article 27.3(b) of the TRIPS Agreement, amendments can be made to incorporate the CBD objectives in order to preserve biodiversity, prevent biopiracy and include protection of local community rights in accordance with the spirit and purport of the CBD.

5.10 Cuba

27. Cuba's position on these matters is well known, as are those of other Members, since they have been the subject of protracted negotiations over a number of years without any tangible, concrete results on issues of great interest to many developing countries.

28. Examination of the relationship between the TRIPS Agreement and the CBD, and the protection of traditional knowledge and folklore are negotiating issues expressly mandated under paragraph 19 of the Doha Declaration. These are, moreover, among the implementation issues or concerns for which we undertook to find a suitable solution.

29. Cuba attaches utmost importance to advancing work on these topics. One starting point for resuming our task might be to reinstate discussions on the proposals in documents IP/C/W/474 and WT/GC/W/590, of 2006 and 2008 respectively.

30. Cuba is also in favour of Ecuador's proposal, which is widely supported by Members, so that the Secretariat can provide an update of the latest discussions and developments in these areas.

31. In particular, we wish to emphasize our view that the introduction of a mandatory requirement on disclosure of origin can make a significant contribution to protecting resources against misuse and misappropriation, and can affect attainment of the objectives of the CBD, particularly those relating to requirements on biological resources and traditional knowledge. Furthermore, the proposed disclosure requirement would enable the operations of the traditional patent system to be carried out more efficiently.

32. We also reiterate the relevance of finding a solution to this matter in the WTO. Although we keep a close watch on developments in other forums such as WIPO and recognize their importance, any results achieved will be in addition to, and not instead of, an amendment to the TRIPS Agreement.

33. As regards Article 27.3(b) and the statement made by Bolivia, Cuba considers that the various practices applied by Members under Article 27.3(b) should be examined with a view to understanding the ways in which the flexibilities are used and the problems faced by developing countries in this respect.

5.11 Ecuador

34. We agree with many of the statements that have been made this morning, such as those by India, China, Brazil, Bolivia, South Africa and Peru. We need to have legal instruments to strengthen transparency and improve the use of genetic resources and associated traditional knowledge, including enforcement of the principals established by the CBD. We would like to refer to document TN/C/W/59 which we believe establishes legal modalities with regard to binding requirements to disclose the origin of genetic resources and associated traditional knowledge, prior informed consent and benefit sharing. It is very important to establish legal mechanisms to enable the effective and adequate protection of genetic resources and traditional knowledge at a multilateral level. Any solutions that we will agree upon as a result of discussions should include these elements.

35. We reiterate our intention to maintain the proposal to request the WTO Secretariat to update three documents, since we believe that the updates would enable us to better understand the issues and to have more fruitful discussions. Similar updates have been done on non-violation issues with the support of all Members. With regard to Bolivia's statement, it is very important to consider its concern over the relationship between IPRs and the patenting of life forms.

5.12 Nepal (for the LDC Group)

36. Protection of traditional knowledge and genetic resources is a vital issue for developing countries and LDCs. Inclusion of appropriate provisions to this effect would make the TRIPS Agreement more balanced.

37. Nepal reiterates its previous statements on the importance of harmonization and mutually supportive relationship between the TRIPS Agreement and the CBD and calls for advancement of negotiations on the TRIPS-CBD issue, including on the issue of disclosure requirements. The CBD underlines, in its Article 3 and elsewhere, the sovereign right of States over their genetic resources as well as requirement of prior informed consent on the use of such resources and equitable sharing of benefits arising from their commercial use. As delegations have already highlighted, a mandatory disclosure requirement would help establish legal certainty in the utilization of traditional knowledge and genetic resources.

5.13 Switzerland

38. Switzerland, as is well known to this Council, is of the view that the CBD and the TRIPS Agreement can be implemented in a mutually supportive manner. At the same time, Switzerland has always taken into account many Members' concerns about misappropriation of genetic resources and traditional knowledge in patent applications. Therefore, Switzerland co-sponsored document TN/C/W/52 which proposes modalities language on the issues of TRIPS-CBD,

GI extension and GI register. I would like to associate my delegation with the interventions made by China and India in that context. We believe that with these modalities proposals supported by a large majority of the WTO Membership, we have a very good basis for our work on these issues. I would also like to thank India for recalling to the Council the mandate of the TNC Chair to consult on these three issues with the Membership with a view to finding an appropriate solution. We also support India in the view that this work should be resumed at the latest after the Bali Ministerial Conference.

5.14 El Salvador

39. We would like to support the request from Ecuador concerning the compilation and updating of the three summary notes. We need to continue to reach an agreement on this issue. We would also like to support China's proposal that the WIPO Secretariat be invited to inform the Council of negotiations in WIPO, especially in the WIPO IGC.

5.15 United States

40. The United States is not in a position to support the proposals of intervention by the CBD Secretariat or an update of the three information documents.

41. Regarding patent disclosure requirements, we continue to oppose this proposal for the reasons we have previously explained. We take up the Chair's guidance here to avoid repetition of positions, and therefore refer Members to our intervention as reflected in the minutes of the March 2013 meeting of the TRIPS Council, in paragraphs 5.33-5.36 in document IP/C/M/72.

42. We would welcome an understanding, including any data, empirical or otherwise, from the supporters of a patent disclosure requirement of how such a proposal addresses our concerns expressed in those paragraphs.

43. Turning to the WIPO IGC negotiations, in April 2013, the WIPO IGC continued text-based negotiations related to the protection of traditional knowledge, and considered a document "The Protection of Traditional Knowledge: Draft Articles."

44. As was done previously for traditional knowledge, as well as genetic resources and traditional cultural expressions, an informal expert group, including representatives of WIPO Member States and indigenous peoples, worked to identify the core issues, reduce the number of options and streamline the text.

45. In order to advance the work of the IGC, the United States, together with a number of other WIPO Members, has submitted a number of documents, which we believe address in concrete ways the issues raised by some Members here today, including with respect to introducing more data into the discussion.

46. For example, the United States, together with Canada, Japan, Norway, and Korea have submitted a "Joint Recommendation on Genetic Resources and Associated Traditional Knowledge".

47. Since the IGC began its work, some actions have been taken to address the concerns that gave rise to the creation of the IGC. For example, the International Patent Classification System was revised to include new subclasses for traditional knowledge, and the Patent Cooperation Treaty system added a new mechanism for third parties to submit prior art.

48. In this same vein, the Joint Recommendation could serve as another step to address the goals of the IGC.

49. In addition, the United States, together with Canada, Japan, Korea, and the Russian Federation requested further consideration of a "Proposal for the Terms Of Reference for the 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".

50. Lastly, the delegations of Canada, Japan, the Republic of Korea and the United States have submitted a "Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources."

51. This Joint Recommendation proposes a one-click database search system which would be hosted by WIPO and help patent examiners conduct searches more efficiently for prior art concerned with genetic resources and traditional knowledge associated with genetic resources, while preventing inappropriate access to its contents by third parties.

52. The establishment of such a database search system would also advance the work of the IGC, helping patent examiners to make the correct patentability decisions, as the text based negotiations on the draft texts on traditional knowledge, traditional cultural expressions and genetic resources continue.

53. In July 2013, the WIPO IGC will review and take stock of the texts of the draft International Legal Instruments on Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources and make a recommendation to the General Assembly on whether to convene a Diplomatic Conference.

54. The United States, like many WTO Members, has been actively participating in the negotiations of the WIPO IGC, and we look forward to working to advance the WIPO IGC's discussions.

5.16 Japan

55. We would like to associate ourselves with the statement made by the United States. This delegation has recognized the importance of these agenda items and, thus, it has been actively engaged in the discussion in the Council. This delegation would like to recall that active discussions on the same issues are on-going in the WIPO IGC, which, we believe, is the most appropriate forum for having technical discussions on them. In April 2013, Japan actively participated in the IGC that was dedicated to traditional knowledge. Although the progress achieved there should be given due recognition, this delegation feels that further work still remains to be done.

56. The Council has also been engaged in a constructive and mutually beneficial exchange of views on these issues. We believe that discussion at this Council will lead us to finding a common understanding of the fundamental issues.

57. This delegation would like to reiterate that, in order to achieve sustainable economic growth, it is crucial to seek appropriate ways to deal with matters concerning genetic resources, traditional knowledge, and folklore, bearing in mind that any initiatives addressing these matters must never adversely affect existing IP systems.

58. From this point of view, this delegation is not in a position to support amending the TRIPS Agreement to address these issues, because we do not believe that doing so would be the most effective way to address the concerns raised by other Members.

59. With the view to preventing granting of erroneous patents, we have proposed establishing one-click database systems, which has obtained broad support from Members. We wish to further pursue discussions aimed at implementing the system.

60. Regarding the introduction of a mandatory disclosure requirement, this delegation still does not see any needs for introducing such a requirement.

5.17 Korea

61. Korea's position on these three agenda items is well known and remains unchanged. We would like to highlight that the TRIPS Agreement and the CBD are mutually supportive and do not conflict with each other. They have different objectives, deal with different subject matters, and have different legal nature. Therefore, there is no need to revise the TRIPS Agreement.

62. Regarding the proposal of mandatory disclosure requirements, Korea remains concerned about this proposal. From our previous experience with databases of generic resources which was shared with Members at the Council's meeting of March 2013, the requirement would place great burdens on IP offices as well as on genetic resource holders. Furthermore, it would create undesirable legal uncertainty which would lead to a tendency of avoiding inventions and utilization of IP systems.

63. Like many other Members, Korea has been actively participating in systematic discussions in the WIPO IGC, which is an appropriate forum for technical discussions.

5.18 New Zealand

64. New Zealand agrees with the views expressed by many Members about the importance of preventing misappropriation of genetic resources and associated traditional knowledge.

65. And at a broader level, we have a systemic interest in preventing the granting of erroneous patents. Measures that contribute to high quality patent examination are important to ensure the health and integrity of the patent system.

66. New Zealand considers there is a significant degree of common understanding amongst Members over these high level objectives. But there is still much disagreement over the appropriate policy responses that would best achieve these objectives.

67. New Zealand's domestic policy is still evolving in this area. But we are committed to engaging constructively in relevant international forums to address these important issues.

68. The WIPO IGC is undertaking a detailed consideration of the relationship between IP and genetic resources, as well as traditional knowledge and traditional cultural expressions. As noted by other Members, the WIPO IGC is currently working on the text of an international instrument or instruments on the protection of these three subject matters.

69. New Zealand considers that the WIPO IGC is an appropriate forum to discuss in detail issues relating to the protection of traditional knowledge and genetic resources because it is able to look at these issues in a holistic and coordinated way. New Zealand is an active and constructive participant in the IGC, and is committed to the fulfillment of the IGC mandate.

5.19 Canada

70. Canada would like to reiterate its well-known position that the TRIPS Agreement and the CBD are mutually supportive, and that we believe WIPO remains the best forum for technical discussions – and, indeed, negotiations – on genetic resources, traditional knowledge and traditional cultural expressions as they relate to IP.

71. Canada participated actively in the recent sessions of the WIPO IGC. We welcome the more detailed, legal and policy oriented discussions held at those meetings, as well as the progress achieved in more clearly identifying the core options for the protection of genetic resources and traditional knowledge. Canada looks forward to participating in the July 2013 session on traditional cultural expressions.

72. Canada is fully committed to the IGC and looks forward to continuing to work with all Members toward bridging our differences in hope of reaching agreement on a quality outcome that can garner the consensus it needs to be successful.

AGENDA ITEM 6: NON-VIOLATION AND SITUATION COMPLAINTS

6.1 United States

73. The position of the United States is well known, and we refer delegations to paragraphs 6.3-6.7 and 6.17-6.20 of the minutes of the March meeting of this Council¹ for a detailed explanation of our position. To summarize, we continue to maintain that non-violation complaints are fully appropriate in the context of the TRIPS Agreement.

74. There are several reasons supporting this conviction. Non-violation disputes have long been a part of the WTO and its predecessor the GATT. Such disputes are part of a long tradition of this institution. This is not new.

75. Moreover, non-violation complaints serve an interest all WTO Members share, which is to assist Members in preserving the balance of concessions and to protect them against measures that frustrate legitimate expectations. These standards have been developed within the WTO and adopted by its membership through the Dispute Settlement Body.

76. We note that without a consensus, the moratorium will expire at the upcoming Ministerial Conference.

6.2 India

77. The application of non-violation and situation complaints to the TRIPS Agreement raises fundamental concerns.

78. In our view, the TRIPS Agreement, unlike other WTO agreements, is a sui-generis agreement which is not designed to protect market access or the balance of tariff concessions but rather to establish minimum standards of intellectual property protection.

79. Further, the non-violation complaint, which is currently inapplicable to the TRIPS-related disputes, will potentially function as a tool to circumscribe the developing country Member from effectively using flexibility concerning public health in the TRIPS Agreement. The application of non-violation complaints may further unbalance the TRIPS Agreement by elevating private rights over the interests of the users of intellectual property – both within and between countries – and over other public policy considerations.

80. If we are to make a recommendation to the Bali Ministerial Conference, then we would favour a recommendation banning non-violation complaints in TRIPS completely.

6.3 China

81. China's position is reflected in the minutes of the previous TRIPS Council meetings. The TRIPS Agreement is different from GATT 1994 by its nature. If non-violation and situation complaints are permitted under the TRIPS Agreement, it would cause fundamental concerns, destroy the delicate balance of rights and obligations in the TRIPS Agreement, and limit the use of policy space and flexibilities provided under the TRIPS Agreement. China believes that the application of non-violation and situation complaints under the TRIPS Agreement is not appropriate. In this regard, we would like to refer to the *India – Protection for Pharmaceutical and Agricultural Chemical Products* case. The Appellate Body found that whether or not "non-violation" complaints should be available for disputes under the TRIPS Agreement is a matter that remains to be determined by the Council for TRIPS pursuant to Article 64.3 of the TRIPS Agreement. It is not a matter to be resolved through interpretation by panels or by the Appellate Body.² We would therefore welcome the Chair's suggestion that intensified consultations be conducted before the October Council meeting.

¹ Document IP/C/M/72

² Document WT/DS/50/AB/R, paragraph 42.

6.4 Brazil

82. Brazil's position is well known. We second the elements raised by India and China. Brazil believes that introducing non-violation and situation complaints into the TRIPS Agreement is unnecessary and inconsistent with the interests of the WTO Members. Any benefits arising from the Agreement can be adequately protected by applying the text of the Agreement in accordance with accepted principles of international law without introducing the legally uncertain notion of non-violation situation complaints. We understand that non-violation complaints are inapplicable to the TRIPS Agreement.

6.5 Plurinational State of Bolivia

83. Bolivia considers that the concept of non-violation complaints is neither relevant nor applicable in the context of intellectual property.

84. The TRIPS Agreement is of a wholly different nature from the agreements on goods regulated by the GATT. The GATT establishes a system of rules aimed at removing obstacles to trade in goods, under which the benefits derive not from a monopolistic right but from a product-by-product tariff reduction process. Conversely, the TRIPS Agreement promotes an artificial monopoly which runs completely counter to this idea and which, at the time, was introduced into the WTO framework on the basis of a fragile equilibrium that proved detrimental to the developing countries in the long run. Forcing the applicability of non-violation complaints in the context of the TRIPS Agreement would make this imbalance even more damaging to the developing countries.

85. The adoption at national level of a concept of this kind would prejudge certain measures taken by States as possible infringements, which is not acceptable. States cannot be constrained in their ability to lay down intellectual property regulations or standards based on the TRIPS flexibilities, and the latter should not come under scrutiny on grounds of alleged impairment. As we stated on an earlier occasion, the mere fact of recognizing that exception would be unlawful in the case of Bolivia, where human rights standards take precedence over other norms; and it is common knowledge that many IPRs are under close scrutiny in various fora because of their negative implications for food security and access to medicines, for example.

86. Lastly, Bolivia endorses India's proposal to prohibit non-violation complaints in the TRIPS context.

6.6 South Africa

87. South Africa would like to associate itself with the statements made by India and China. As a Member of the WTO, it is fully committed to upholding its obligations and commitments as set out in the different WTO laws and regulations with specific reference to the TRIPS Agreement. The purpose and aim of Article XXIII is to ensure compliance with the GATT rules and principles by providing the Members with an opportunity to make representations should the situation provided for in sub-paragraphs 1(b) and 1(c) arise. The TRIPS Agreement is different. It is a *sui generis* agreement which does not aim at promoting market access or harmonizing the standards of Members with regards to protection and enforcement of IPRs. It is there to provide the minimum standards for the protection and enforcement of IPRs. The application of subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 under the TRIPS Agreement would undermine the sovereign rights of the respective Member states when they adopt laws to protect IPRs within their borders. This application would furthermore restrict the flexibilities provided to the Members and befit the balance that has been maintained under the TRIPS Agreement. South Africa recognises the need for protection and enforcement of IPRs. However we believe that the application of non-violation and situation complaints would not be practical under the TRIPS Agreement.

6.7 Ecuador

88. We would like to state our full agreement with the statements made by India, China, Brazil, Bolivia and South Africa. Regarding your decision to hold consultations, we welcome this and are happy to see that this will be taking place. We would also like to say that any discussion that you may hold should begin on the basis of certain actions by one of your predecessors, that is by summing up the various positions in this area. We would also request that in the course of your

consultations you include Ecuador, enabling us to participate in any solutions or proposals to be sent to the Ministerial.

6.8 Chairman

89. I took due note of your request to be involved in the consultation. As you suggested, it would be possible to base the consultations on the four main options for a recommendation as outlined by my predecessor.

6.9 Cuba

90. Cuba endorses the statements made by India, China, Brazil, Bolivia, South Africa and Ecuador. It agrees that non-violation complaints are not applicable to intellectual property, insofar as this would affect the ability of Members to make use of the flexibilities in the TRIPS Agreement by limiting the scope for implementation of intellectual property policies consistent with their national interests. We regard this as inappropriate and improper. We therefore request that the moratorium be maintained, because the flexibilities provided by the Agreement would be undermined by the application of such complaints, as Members would expose themselves to potential complaints without having committed any violation. We argue in favour of complete elimination of the option of this type of complaint being raised in the context of intellectual property.

91. As regards one Member's suggestion that there may be a consensus on the issue, the truth of the matter is clearly the reverse. In addition to recalling the number of delegations that have argued at every Council meeting against the applicability of the recommendations in question, Cuba considers it appropriate to emphasize the relevance of document IP/C/W/385 of 30 October 2002. This document explains the grounds for the inapplicability of this type of complaint and was co-sponsored by a large number of Members who maintain their position of rejecting the application of non-violation in the TRIPS context.

6.10 Switzerland

92. The position of my delegation is also quite well known and I can point Members for details to earlier interventions as transcribed in the minutes of Council meetings. I can also associate my delegation fully to the intervention by the delegate of the United States. Switzerland has a clear understanding and reading of Article 64 and of the reason why Members in the Uruguay Round included a five-year moratorium. The reason was that Members should have time to discuss whether additional modalities would be necessary for such complaints in the TRIPS context. The moratorium has been extended several times. In the last two years since the last Ministerial Conference, we have not had proposals for specific additional modalities that would be needed beyond those provided in the Dispute Settlement Understanding. Accordingly we consider there is no use for further extending the moratorium and thus clearly our recommendation would be that the TRIPS Council recommend that the moratorium expire by the Ministerial Conference in December. If you are going to hold consultations on this, my delegation would like to be associated.

6.11 Nigeria (for the African Group)

93. The position of the African Group is well known and we do agree with the earlier speakers who stated that the TRIPS Agreement is *sui generis* and that the application of non-violation and situation complaints in the TRIPS context would further imbalance the TRIPS Agreement and would limit the policy space that is already contained in the TRIPS Agreement. So we urge you to recommend to the next Ministerial Conference that the non-violation and situation complaints shall not apply to the TRIPS Agreement. We would also encourage you to hold parallel consultations to see if we could reach a consensus to recommend that non-violation and situation complaints should not apply to the TRIPS Agreement.

6.12 European Union

94. I find myself at a three-times-a-year moment of *déjà-vu*. The WTO Secretariat organised a workshop on this issue on 29 October 2012. This very useful briefing described the substantive and historical aspects of this topic. We still stand to be convinced, since so far we find it difficult to

apply the GATT non-violation complaints concept in the TRIPS Agreement. The TRIPS Agreement obliges Members to put in place clearly described legislation and then to enforce it. Any failure to comply with these obligations can be directly addressed as a violation of the TRIPS Agreement. On the other hand, any behaviour that restricts market access or reduces benefits under tariff concessions could be addressed under GATT or GATS. As a matter of consequence, we feel that there is little practical scope for non-violation and situation complaints under the TRIPS Agreement. This being said, we still hope and look forward to hear from the proponents of the application of non-violation complaints, namely the United States and Switzerland, about reasons to support their request with concrete implementation examples.

6.13 United States

95. We wanted to respond to the reference made to the India – Protection for Pharmaceutical and Agricultural Chemical Products dispute. I would like to raise two points.

96. First, the Appellate Body decision cites Article 64 of the TRIPS Agreement, which provides for a five-year moratorium. This Appellate Body report was adopted in 1997, which was during the five-year moratorium period. Article 64 provides unambiguously, however, that any extension of the five-year period must be agreed by consensus.

97. Second, the Appellate Body was quite clear about the standard on NVNI as adopted in panel and Appellate Body reports by the WTO membership through the DSB. Specifically, the Appellate Body notes in paragraph 41 of its report that "the rules and procedures concerning non-violation cases have been codified in Article 26.1 of the DSU." Therefore, the Appellate Body confirms that NVNI complaints are an integral part of this institution.

AGENDA ITEM 9: TECHNICAL COOPERATION AND CAPACITY-BUILDING

9.1 Arrangements for the annual review

9.1 Secretariat

98. As the Chair has mentioned, the Council is responsible for a great deal of factual information in the area of technical co-operation. Overall, the documentation produced by the Council is voluminous. Of all of the documentation processed by the Secretariat, both for meetings, councils, committees and other material, we come in on 10% of the entire Secretariat's workload and well over double any other council or committee. It is therefore also a practical matter to work effectively with this information to collect in a more efficient manner and above all to process and disseminate it in a way that is much more useful for delegations.

99. In the area of technical co-operation in particular, there is a number of parallel reporting processes that we have been looking at so as to ensure that material is as consistent as possible and that reporting procedures and obligations are streamlined while not reducing in any way the detail, the content, the usefulness of the information reported. That work is continuing and we would like to invite those delegations with a particular interest in this area to an informal briefing tomorrow, for a first discussion and presentation of suggested prototype for a reporting tool. As with our other steps, to improve the capture and the flow of information the Council is responsible for, this prototype reporting tool does not effect in any way the notification reporting obligations of Members or seek to define those, but rather is established to create a more user-friendly interface for that material to be provided and for it to be managed and disseminated for the benefit of all those seeking to use the information.

9.2 Other matters

9.2 European Union

100. In our discussions on the extension of the transition period for LDCs under Article 66.1 TRIPS, which shall be discussed separately under our next agenda item, we have agreed, following the request of LDCs, to not maintain any language or provisions on technical cooperation.

101. However, I don't think anyone would disagree that technical cooperation remains an important tool for helping LDCs facilitate the implementation of the TRIPS Agreement. As we are ready to support the extension of the transition period under the next agenda item, the European Union would also like to re-confirm its commitment to continuing to provide such technical cooperation, pursuant to Article 67 TRIPS.

102. As we seek to continue honouring that commitment, we would like Members to consider how we can have the information that is needed to work effectively together in this demand-driven activity. Indeed, for a donor, it is important to be able to effectively consider demands arising from outstanding challenges in implementing the TRIPS Agreement.

103. In the Council decision IP/C/40 of 30 November 2005, LDC Members had been invited to provide to the TRIPS Council 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.

104. We understand from the countries that have produced such information that it can be a challenge and sometimes even a burden to put together such information. Against this background, we should certainly be ready to evaluate and improve this practice, whilst maintaining also the value that we associate with information that speaks to situation on the ground in LDC Members.

105. In order to minimise the burden on LDCs, the European Union would therefore like to propose that the Secretariat starts work towards producing a report which considers the progress LDC Members have made in implementing the TRIPS Agreement and that considers any outstanding difficulties in this regard.

106. Such a report, for consideration by the TRIPS Council in 2014, could use available information and beyond, including from the WTO's own assistance and monitoring work as well as that of other organisations, in particular WIPO pursuant to the Agreement between WIPO and WTO.

9.3 Nepal (for the LDC Group)

107. The new decision on the transition period does not have the provisions related to needs assessment and technical cooperation for two reasons. First, we decided not to associate elements of Article 67 with the provision of Article 66.1. Second, the needs assessment and technical assistance measures specified in the 2005 decision did not work well. Some LDCs participated in the process, but no response was received from the partners. The LDC Group is yet to discuss on how the issue of technical assistance can be advanced in future. On the European Union's suggestion of a Secretariat report, let us be clear that LDCs have not agreed and do not agree on having such a report.

9.4 Uganda

108. You recall that Uganda responded to the November 2005 decision with submissions to the TRIPS Council in documents IP/C/W/500 and IP/C/W/510. These two documents outlined Uganda's priority in the area of intellectual property that needed technical and capacity building.

109. Uganda is of the view that countries that responded to the TRIPS Council request to carry out the needs assessment would have been the first to be rewarded by their efforts. This would send strong signals that developed country Members are committed to fulfilling their obligations. LDCs would have also been encouraged to undertake the needs assessment, anticipating that they would receive technical and capacity building.

110. Uganda has had great challenges in implementing the program that was developed after the needs assessment. The Ministry of Trade, Industry and Cooperatives could not secure funding to implement all the activities as identified in the project document including the establishment of the secretariat. Funding received has been ad-hoc and often not coordinated as expected.

111. Despite the challenges Uganda has had, we have made strides by updating some of the laws. However, the legislative process is lengthy, costly and time consuming. It also requires capacity building to enable the drafting team come up with laws that include the different flexibilities as provided for in the TRIPS Agreement. The IP administration institution is still facing financial and capacity challenges. At the moment they have only four registrars and recently recruited three patent examiners. These are too few to make much impact.

112. My delegation would also like to reiterate that implementation of the TRIPS Agreement should not focus on updating legislation and enforcement only. We would also like to focus on using IP for development through enhancement of creativity, science, innovation and commercialisation as specified in the different policy documents.

113. Uganda would like to develop programs that are aimed at improving market access of Uganda's unique products and we believe that this will eventually make producers appreciate the importance of IP as a valuable tool for market access.

114. In conclusion, we would like to state that, since 2005, Uganda has made great achievements in making legal reforms including updating some IP laws and regulations and my delegation appreciates those development partners that have provided assistance to some of the programs. However, there are several activities that had been identified in the program which are yet to be funded, we still have weak institutions, awareness is low, some laws and regulations are yet to be enacted, new laws and regulations have financial implications and we still have to develop the capacity and ability to use IP for development. For this reason, we request that developed countries and multilateral agencies devise means to support our IP program.

9.5 India

115. India appreciates the proposal that has been made by the European Union regarding the technical assistance under Article 67. I have also heard concerns raised by Nepal, on behalf of the LDC Group, and Uganda. I am not aware if Nepal made a statement on behalf of the LDC Group, because its delegate did clarify that the issue has not been discussed. We feel that since Article 66.1, through which the LDCs had obtained the transition, has no linkages with the implementation of the TRIPS Agreement, the priority needs or the priority needs assessments and all these issues, we cannot understand why the European Union wants to have an update on this through the Secretariat. On the second issue, when Ecuador made a proposal for updating of the statements made by the Members on the issue of TRIPS/CBD, a few Members said that the WTO Secretariat should not be burdened on this simple issue. So I would appreciate it if the Secretariat is also not burdened on having to produce a report relating to implementation of TRIPS by the LDCs.

9.6 Brazil

116. Regarding the proposal of work for the Secretariat, Brazil would like to align itself with the statement made by Nepal. Brazil supports the idea that under this agenda item we should not be concerned with the implementation of the TRIPS Agreement by LDCs, at least not in these sessions, since we have the next standing item to discuss this issue. I align myself also with the concerns raised by India that we have other standing items that are of need, especially regarding the participation of the CBD Secretariat in providing information on the implementation of the CBD to Members, and we do not see a reason why we should follow the track that is suggested by the European Union.

9.7 Japan

117. This delegation would like to support in principle the suggestion made by the European Union since reports by the Secretariat on what and where the gaps are in implementing TRIPS are highly useful for us as a donor Member country when providing technical cooperation. Japan is interested in having a better understanding of the state of play of TRIPS implementation. Such information will help us to provide technical cooperation and financial cooperation in favor of developing and least-developed country Members. We remain committed to fully discharge our obligation under Article 67.

9.8 European Union

118. We did not make a mistake in raising this point under this agenda item, and not the next one. We did it precisely because there is no link between the two. What happens is that we are certainly the biggest provider of technical assistance in this area in the framework of the WTO, and it is for us essential, as mentioned also by Japan, to have some information about the needs. We have a previous process that was considered too burdensome and that was not put in place. We need, in order to continue providing assistance, to have that replaced by some kind of mechanism that allows us to know what are the needs of recipient countries and what is this aid being used for. That is our proposal - it is a constructive proposal, made by someone who actually joins its acts to its words and provides assistance and replies to all the priority needs assessments that were put under the previous mechanism. What we submit to you is that we need to discuss how for the future we can target this assistance and that hopefully should be on the basis of information that is available so that we do not have to reinvent the wheel and start from scratch.

9.9 South Africa

119. We are of a different view. We do think that items 9 and 10 are linked, and on that basis, we support the position put forward by Uganda and Nepal, and India and Brazil.

9.10 Nepal (for the LDC Group)

120. LDCs have not said "no" to technical assistance and capacity building support. We are not against it. As Uganda highlighted, it is important for us, and we are thankful for the support that we have received in the areas that we have identified. What we have said in the course of negotiations is that we will discuss how technical co-operation and capacity building can be

advanced in the days ahead under an appropriate agenda item. It is on the proposal of a report where our concern lies. You can propose just like any other Member can propose any suggestions that they have in their mind. However, LDCs have not agreed to any reporting by the Secretariat on these issues. Having said that, we have not denied the possibility of advancing discussions on technical co-operation and capacity building, as our colleague from Uganda said, in the days ahead.

9.11 Rwanda

121. As for the report suggested, my delegation supports Nepal who has spoken on behalf of the LDCs and we still do not understand its relevance and its scope.

AGENDA ITEM 10: REQUEST FOR AN EXTENSION OF THE TRANSITIONAL PERIOD UNDER ARTICLE 66.1 OF THE TRIPS AGREEMENT**10.1 Nepal (for the LDC Group)**

122. The transition period provided under TRIPS Article 66.1 is a critical S&D element for LDCs. This special flexibility has been provided in recognition of the particular situation of LDCs, especially in terms of their capacity constraints and their need to develop a sound and viable technological base. We sought an extension of this transition period, through our formal request to this Council contained in document IP/C/W/583, as LDCs' situation remains the same in terms of their poor technological base and capacity constraints.

123. This Council in its March session had held discussion on the request we submitted for the extension of the transition period. Our request received a huge support from Members of this Council, for which we are thankful. Beyond this house, LDCs' duly motivated request enjoyed great support from lawmakers, UN development agencies, civil society and academicians. We are thankful to them as well.

124. Guided by the wisdom of this house, we engaged in informal consultations, to find an outcome. We engaged in direct talks with developed country Members as well as worked through Chair-led consultations. We were engaged in talks with other Members of the Council as well. What the Chair has presented today as a draft decision is an accomplishment of months-long, intense negotiations. As we said at the informal meeting of the Council last week, it is a compromise outcome we can live with.

125. Our Group is thankful to all those who have contributed to reach this outcome. We thank Members who supported our cause and encouraged us to find a solution. We thank our partners for their engagements to reach an outcome. We thank you, Chair, for your leadership in the course of informal consultations and for helping to advance the process. We thank your predecessor, Ambassador Castillo, who facilitated the process before you took up the role. We thank the Secretariat for the excellent support we received during the process.

126. Now LDCs will have eight more years of transition period. The years ahead are going to be challenging for them as they aim to advance on the path of development. The Istanbul Programme of Action has set the timeline of 2020 for at least half the number of LDCs to reach the graduation threshold. We sincerely hope that our partners will be forthcoming in providing enhanced support measures to LDCs, including in the areas of trade and transfer of technology. As LDCs' situation improves and as they advance from marginalization to greater participation in global trade and multilateral trading system, they will find greater incentives, and capacity, for participation in TRIPS provisions.

10.2 Haiti

127. On behalf of my delegation, I would firstly like to congratulate you for having brought the negotiations to a good conclusion, as expected; and in this I cannot ignore the key role played by your predecessor, Ambassador Castillo. I must also acknowledge the dedication, patience and collaboration of the Secretariat. Having formed part of the negotiating group, I must also thank and applaud my colleagues (LDCs and developed countries). I therefore support the declaration made by the LDCs coordinator.

128. On behalf of the LDCs, last November my country submitted the duly justified request IP/C/W/583 for an extension of the TRIPS Agreement transition period for LDCs. Our proposal clearly contained no notion of conditionality, and the requested extension was intended to last until our countries ceased to be LDCs. I must say, however, that my delegation joins the consensus and welcomes the compromise text proposed to us by the Chair and adopted today (JOB/IP/8).

129. We have succeeded in striking a fair balance that eases and addresses everyone's concerns. This active transition period will enable us, with support from our partners, to develop a viable technological base and reach a certain level of socio-economic development that will make it possible to implement the TRIPS Agreement.

130. Demonstrating our broad flexibility and desire to be one of the groups facilitating progress towards Bali, it was important for us to be dynamic and evolutionary. We have not only succeeded in this, but have also been able to reaffirm the fact that our Group is vital, indeed essential, for the Organization's continuity.

10.3 Dominican Republic (for the Informal Group of Developing Countries)

131. On behalf of the Informal Group of Developing Countries we would like to thank you for your efforts and those of Ambassador Castillo and for the leadership that you have shown in achieving an agreement on an extension of the transition period for LDCs. We also thank the Secretariat for their support and co-operation, enabling us to have this satisfactory outcome today.

10.4 India

132. India has consistently supported the LDCs' request for an extension of the transition period under Article 66.1 of the TRIPS Agreement without any conditionalities. The compromise decision reached today, to grant an extension of eight years, is far removed from the legitimate request of the LDCs for a transition period for as long as they remain LDCs. This would have allowed the LDCs much needed time to address the extensive development and technological challenges facing them. Regrettably, despite overwhelming support from developing countries and a few developed countries, an outcome has been negotiated which is a derogation from the provisions of Article 66.1. Nevertheless, since the compromise decision represented a step forward from the 2005 Decision, India joined the consensus on adopting the decision to grant an extension to LDCs under Article 66.1 of the TRIPS Agreement.

133. We would, however, like to point out our systemic concern about the process adopted in reaching this decision which was negotiated between a small group of countries, to the exclusion of the larger membership. This would no doubt have broader implications for negotiations in other areas as well and is something that is best avoided in the interest of the system and its membership.

134. We hope that any future request by the LDCs for extending the transition period for pharmaceuticals, which will expire in 2016, would be looked at in a positive manner without any conditionalities being imposed on them.

10.5 Morocco (for the African Group)

135. I am taking the floor on behalf of the African Group to express our thanks and also our satisfaction at the outcome achieved today. This is the result of your untiring efforts as well as of the work accomplished by your predecessor. The African Group expresses its thanks also to all the members of the Secretariat and the dedication they have shown. I would also like to extend my thanks to all Members who were involved in achieving this satisfactory outcome.

10.6 El Salvador

136. I would like to begin by thanking you and the Secretariat for all of your efforts, particularly our thanks for all the informal meetings held where we were able to participate. We would like to stress the high degree of transparency shown and highlight your efforts and those of your predecessor, the Ambassador of Honduras, in this respect. We are very pleased to see reflected in this Council the fact that the Decision has been endorsed to extend the transition period and we are also welcoming the contents of this agreement.

10.7 Lesotho

137. Lesotho associates itself with the statements delivered by Nepal on behalf of the LDC Group and Morocco on behalf of the African Group. Lesotho takes this opportunity to extend the word of gratitude to you for a very crucial role that you played in steering the consultations between the LDCs and the partners to their successful conclusion. Your intellectual prowess and the ability to push delegations to the end of their limits and also to tweak out flexibility from their entrenched positions are highly admired, at least by the Lesotho delegation.

138. Turning to the outcome of the consultations, we believe that there are some clear messages that Members can take home from the Decision that has just been adopted by the Council. Firstly, the LDC Members of the WTO have expressly declared their determination to move towards TRIPS compliance. This determination is importantly hinged on the acquirement of capacity by these LDCs to meet their developmental needs which include economic, financial and administrative needs and the creation of a viable technological basis as Nepal et al. have said. It is this needs-based approach that is key to ensuring that LDCs are integrated into the multilateral trading system in a true sense.

139. Secondly, while a much longer timeframe would have been desirable, the Lesotho delegation nonetheless welcomes the eight-year extension in the Decision we have just adopted. Arriving at the eight years' timeframe is a decisive expression by Members that the needs of the LDCs are key determinants of the extension timeframe, and I hope that this will be so in subsequent extensions.

140. Lastly, the Decision that has just been adopted highlights the centrality of preserving the flexibilities of the LDCs, be they in the TRIPS Agreement itself or in other WTO agreements. The reference to LDCs' flexibilities is a resounding reassurance that quells any doubt concerning the ability of the LDCs to use to available policy space provided by such flexibilities.

141. Let me conclude by extending a word of gratitude to the Secretariat for a work well done, and also the colleagues in the LDC Group and other partners for their fruitful consultations resulting in the Decision we have just adopted.

10.8 Brazil

142. Brazil would like to congratulate LDC countries, the Secretariat and other Members that took part in negotiations for the final result of the process that led to a draft decision of an extension to LDCs under Article 66.1 of the TRIPS. Brazil is ready to join the consensus on adopting this Decision to grant an extension to LDCs, expressed in the document JOB/IP/8.

143. Although Brazil welcomes the result of the negotiation process, we share the systemic concern voiced by India. Brazil shares the view that in future consultations we should aim at including a broader membership in the negotiation process

10.9 South Africa

144. South Africa would like to align itself with the statements made by India, Brazil, Lesotho and Morocco on behalf of the African Group. South Africa has always supported the LDCs' request for an extension of their transition period under Article 66.1 of the TRIPS Agreement without any conditionalities. South Africa is not satisfied with the compromise outcome of the extension period. However, we can live with it. The compromise decision to grant an extension of eight years is far removed from the legitimate original request that the LDCs had made. Regrettably, despite overwhelming support from developing countries and a few developed countries, an outcome has been negotiated which is a derogation from the provisions of Article 66.1. Nevertheless, since the compromise decision represents a step forward from the 2005 Decision, South Africa is also ready to join the consensus on adopting the Decision to grant an extension to LDCs under Article 66.1 of the TRIPS Agreement.

10.10 China

145. China warmly welcomes and fully supports the adoption of the Decision on Extension of the Transition Period under Article 66.1 at today's meeting. We understand this is not an easy outcome. We thank the Chair of the TRIPS Council, the Secretariat and all the Members who had actively engaged in the intensified process and had been able to provide the draft decision which converge the divergent views into a consensus based outcome.

146. This is good news that this Organization had long been waiting for, and this could also constitute a good example for other negotiating forums. So we would like to encourage Members to engage on the negotiation on other important issues both within the TRIPS Council and at other forums within WTO, and to work more efficiently before the 9th Ministerial Conference. We hope

that we can report more on behalf of this Organization to the world at the end of this year, so in this regard we truly welcome this compromise decision.

147. We recognize that there is no-rollback in this Decision and it recognizes the right of LDCs to make full use of the flexibilities under the TRIPS Agreement, and there are also other important provisions contained in it. We would also like to share the views indicated by India, South Africa and Brazil encouraging more inclusiveness in future negotiations in this regard and no conditionalities should be attached in matters related to LDCs as far as the treaty languages do not so require.

10.11 Australia

148. Australia extends its thanks to the Chair, Ambassador Suescum, and the Secretariat, for their effort in managing intensive consultations on the TRIPS transitional period for least developed countries.

149. Australia supports the extension of the transition period for LDCs and welcomes the outcome of the consultations and its endorsement by the Council. This is an important outcome which should provide LDC Members with sufficient flexibility and incentives as they work towards the development of effective and sustainable intellectual property systems.

10.12 Norway

150. Norway would like to thank all those who have worked very hard and for long hours to prepare the draft decision for an extension of the transition period under Article 66.1 for least developed countries. Thank you, Mr Chairman, for your able leadership and determination. And thanks to members of the Secretariat staff for their support. Like El Salvador, we also appreciate the open-ended informal meetings which you organized and the transparency provided about the process. We would also like to thank the delegations who were involved in the informal consultations for the flexibility they have shown, and congratulate them with the result.

151. Norway fully supports the decision and welcomes its adoption today. This is an important decision for many reasons, not least because it proves that Members of this Organization still know how to negotiate and can achieve positive outcomes. We hope we can build on this in the work that lies ahead of us.

10.13 Mexico

152. On behalf of the delegation of Mexico, I would like to congratulate you on your appointment to the chairmanship of this Council. Indeed, the Membership is very pleased to have you in charge. Your abilities and leadership skills are well known, and were confirmed today by your presentation of the outcome of your consultations on the extension of the transition period under Article 66.1 of the TRIPS Agreement for the least developed countries.

153. Mexico has supported the LDCs' request in this regard from the very outset. We consider that the compromise reached, which was not easy to achieve, is balanced and satisfactory, and we therefore welcome and support the decision that has just been adopted by consensus.

154. We thank you, Mr Chairman, the Secretariat and the Members who worked so hard to achieve this outcome, which paves the way towards the Ninth Ministerial Conference.

10.14 Argentina

155. The delegation of Argentina wishes to extend its thanks to you for the way in which the consultations were conducted, making it possible to reach a satisfactory solution on this matter which is of vital importance to the LDCs. My delegation also expresses its thanks to the Secretariat for the support provided in this process, and to all those Members who participated directly in the process. Argentina welcomes the fact that it was possible to reach an agreement on the extension of the transition period under Article 66.1 of the TRIPS Agreement. We believe that this will make it possible for the LDCs to have the necessary room to manoeuvre to adopt IP-related policies that are the most appropriate and favourable for their development.

10.15 Uruguay

156. Thank you for the report you gave us this morning on the agreement which has been reached for the extension of the transition period under Article 66.1, and for your and the Secretariat's efforts on this matter. For Uruguay it is very important to reach tangible results when we come across an issue such as this one supporting the poorest Members of the WTO. We support the Decision to extend the transition period requested by the LDCs and join the consensus. The report that you gave us on the outcome of your consultations is very encouraging. This may not have been the initial outcome wanted by the LDCs but it is an important step in the right direction.

10.16 New Zealand

157. New Zealand joins other delegations in thanking you, Mr Chairman, for your leadership and determination, and the Secretariat for its efforts, over the past few weeks that have led to the presentation of this Decision for adoption by the Council today.

158. New Zealand considers that this Decision is in keeping with the spirit of the TRIPS Agreement. It acknowledges the special needs of LDCs and recognises the flexibilities available to them under the TRIPS Agreement, while also addressing the interests of some other WTO Members. We are grateful to all Members who have shown the necessary flexibility to arrive at this Decision today.

159. As we have indicated in the past, New Zealand has always supported a meaningful extension of the transition period for LDCs under the TRIPS agreement. We believe that this Decision achieves its stated objectives. We support this Decision and welcome its adoption here today.

160. This is an important outcome for LDCs and a positive outcome for the Organization as a whole. We hope that the positive and constructive spirit can continue across the rest of the year.

10.17 Chile

161. Chile would like to express its support for the Decision under this agenda item. We would also like to congratulate and thank delegations who took part in the negotiations on this matter, which have enabled us to reach a solution concerning the extension of the transition period under Article 66.1. We think the outcome is a very balanced one and is satisfactory. We would also like to underscore the flexibility seen in reaching this very welcome outcome, which is something we have pointed out in the informal sessions. I think it was very important that WTO Members could find a solution to this issue at this meeting of the Council, prior to the Bali Conference. I think it is very important to underscore the fact that we can reach common solutions where necessary.

10.18 Japan

162. Japan welcomes the decision and the cooperative work by Members to reach this decision, and would voice its appreciation for the outstanding guidance provided by the Chair and your predecessor, Ambassador Castillo.

163. This delegation believes this decision addresses the needs of the LDC Members and it would help to sustain the confidence by the private sector, which is a key element for creating and developing a viable technological base, and for sustainable development.

164. This year, the Japan Patent Office launched an initiative to support LDC Members to develop their IP laws and regulations. Through such initiatives, Japan will continue contributing to the sustainable development of LDC Members.

10.19 United States

165. We support the adoption of this decision, which is the result of many months of intensive negotiations among a number of delegations. We would like to recognize your hard work and leadership and that of the Secretariat, without whom we would not have this draft decision before

us today. Of course, we also would like to thank all of those involved in the negotiations for their tireless efforts.

10.20 Canada

166. Canada would like to thank you for your leadership and the work of the Secretariat in guiding Members towards a successful outcome on this important issue.

167. Our participation in the consultations leading up to this outcome reflects the importance that Canada places on the continued integrity of the TRIPS Agreement as well as the successful integration of LDCs into the global trading system to our mutual advantage.

168. In line with the objective of enabling LDCs to become part of the global trading system, Canada expressed an interest in finding an appropriate timeframe that would permit the development of infrastructure and human capital in LDCs as well as the opportunity to foster dialogue between relevant institutions. In addition, Canada supported the recognition in the Decision of LDCs' determination to continue and preserve their efforts at implementation to date as well as their ability to take advantage of TRIPs flexibilities to address their needs.

169. With these principles in mind, Canada is pleased to join the consensus and looks forward to working with all Members to further the objectives reflected in today's decision.

10.21 European Union

170. The European Union welcomes the decision made by the TRIPS Council in extending the TRIPS transition period for least developed countries.

171. From the outset of discussions, the European Union has recognised the importance of flexibility and policy space for LDCs' needs, and has always supported an extension to the transition period.

172. The European Union recognises that LDCs remain confronted with critical challenges in their economic development. This actually underscores the importance and potential of trade and innovation in aiding socio-economic progress.

173. LDCs have themselves emphasised at the WTO and in other international fora the importance they attach to intellectual property and innovation as tools for development, and significant work has already been achieved in the development of their IP systems. The EU has strived to do its part in providing assistance to requests in achieving this goal.

174. We welcome their commitment to continue to build upon their protection of intellectual property, following from the WTO decision to extend the transition period in 2005.

175. It is important that this decision not only recognised the utility of intellectual property for development, but also gave policy space to LDCs in their implementation of the TRIPS Agreement, and this was achieved.

176. Therefore, WTO Members are to be congratulated for the cooperation and hard work they have engaged in achieving this decision before the expiration of the current transition period on 1 July 2013. As well as being a strong signal of intent in the pursuit of the Istanbul LDC Plan of Action, it also sends a positive signal ahead of the Doha Ministerial in December this year on what can be achieved through open dialogue and discussion.

10.22 Hong Kong, China

177. My delegation would like to thank you for your very strong leadership and the Secretariat for their hard work in this very important matter. We would also like to thank the Members that have participated in the negotiations; their commitment and dedication are highly appreciated. We believe that this decision provides the flexibility for the LDC Members and it also addresses the concerns of many other Members. Hong Kong, China supports the consensus today and welcomes the adoption of the Decision at this Council meeting.

10.23 Korea

178. Korea is very happy to join the consensus reached on the draft decision on a further extension of the transitional period under Article 66.1 of the TRIPS Agreement.

179. Korea would like to extend special thanks to you, Mr. Chairman, for your able leadership, the WTO Secretariat for their full support and assistance, those Members who have directly been involved in the negotiations for their hard work and finally, and equally importantly, other Members having been ready to support the outcome resulting from the negotiations.

180. We hope and expect that the positive momentum created by this outcome would continue to exist also in other areas on the road to Bali.

10.24 Switzerland

181. Thank you for your leadership and the Secretariat for the consultation process over the last few weeks, facilitating a consensus among the membership which we welcome and which has our full support.

10.25 Tanzania

182. My delegation would like to associate itself with the statement given by Nepal on behalf of the LDCs. It is known that the LDC Members of the WTO continue to face serious economic and financial administrative constraints and they need maximum flexibility to create sound and viable technological base, capacity building in the process of development. Due to the situation faced by the LDCs, the extension of the transition period under Article 66.1 is still needed for the same reasons. Unless extended, the expiry of the transition period granted to LDCs under the TRIPS Agreement would narrow their policy space to access various technologies, educational resources and other tools necessary for development.

183. Article 66.1 explicitly permits the granting of an extension of the transition period after a duly motivated request that was tabled by the LDCs last year. In the process of requesting the extension, the LDCs engaged in formal and informal consultations with Members of the WTO and many stakeholders expressed support for the LDCs' extension request, which was a sign of the need for such an extension. We thank all of them for the energy they put to the outcome which we have reached today, of the eight years extension agreed upon during the negotiations and which has been granted upon by the TRIPs Council today. We welcome the decision.

184. Finally we would like to extend our sincere thanks to you for the job well done for reaching the compromise solution. We appreciate also the willingness of other partners who engaged in the negotiations day and night and the developing countries for supporting us.

10.26 Rwanda

185. Rwanda would like to associate itself with the statement made by Nepal, and to thank you for your leadership, partners for their compromise spirit, and also all stakeholders that massively supported the LDCs in this process, particularly the developing countries present in this room. Article 66.1 provides for a rationale for this extension, namely special needs and requirements of the LDCs with economic constraints and their need for flexibility to create a viable technological base. It sets a precondition: a duly motivated request. This was submitted and the Council for TRIPS was under the obligation to authorize the extension without a condition.

186. We hope that during this eight-year extension period, LDCs will take advantage, with the support of their partners, to build a sound and viable technological base to overcome structural constraints towards a sustainable development to be able to implement the TRIPS Agreement.

10.27 Holy See (speaking as an Observer)

187. I join previous speakers to congratulate you on your election and for the positive outcome just reached on the extension until 1 July 2021 of the transitional period under Article 66.1 of the

TRIPS Agreement. The Observer Delegation of the Holy See to the WTO appreciates the humanitarian and ethical dimensions taken into account in these negotiations.

188. The least developed countries represent the poorest and weakest segment of the international community. They are populated by more than 880 million people (approximately 12% of world population), but account for less than 2% of world GDP and approximately 1% of global trade in goods³.

189. The low level of socio-economic development in such countries is characterized by weak level of technical expertise and of institutional capacity, low and unequally distributed income and scarcity of domestic financial resources. In past years, the development paradigm implemented in these LDCs has proven ineffective. Since the early 2000s, the continued growth in many LDCs (7% per year between 2002 and 2007) has not translated into an improved quality of life for the people. The number of very poor people actually has increased (more than 3 million per year from 2002 to 2007). In 2007, 59% of the population in African LDCs was living on less than USD 1.25 per day.

190. LDCs continue to be characterized by multiple structural constraints that include low per capita income, low level of human development and extreme vulnerabilities to external shocks. LDCs are home to more than 50% of the one billion people who live in extreme poverty. According to the 2012 UNCTAD report on LCDs, these countries should prepare for a relatively prolonged period of uncertainty, with possible escalation of financial tensions and real economic downturn.⁴

191. As underlined in the Istanbul Program of Action, least developed countries are most "off-track" in the achievement of the internationally agreed development goals. Their productive capacity is limited, and they have severe infrastructure deficits⁵. In 2011, of the 34 million people living with HIV worldwide, some 9.7 million lived in LDCs. Of these, 4.6 million were in need of antiretroviral treatment; however only 2.5 million were receiving it.⁶ Up to one-half of those deprived of treatment were expected to die within 24 months⁷. In the 49 countries designated as LDCs by the United Nations, non-communicable disease burdens are rising much faster than in higher income countries.

192. The flexibility agreed in TRIPS Article 66.1 was accepted in recognition of the economic, financial, and administrative constraints preventing LDCs from immediate observance of all the obligations set out in the TRIPS Agreement. This was an acknowledgement that LDCs have special needs and requirements, including the need for flexibility to create a viable technological base. Besides, the 2005 extension experience shows the impossibility to predict when LDCs will be classified as developing countries.

193. The extension of the transition period under Article 66.1 to 1 July 2021 is in line with the overarching goal of the Istanbul Programme of Action (IPoA). The latter plans "to overcome the structural challenges faced by least developed countries in order to eradicate poverty, achieve internationally agreed development goals and enable graduation from the least developed country category"⁸

194. This goal is expected to be achieved through national policy actions and international support. Graduation from the category of LDCs has always been among the ultimate objectives of the previous three decennial Programmes of Action for LDCs. However, the IPoA was the first to include a clearly articulated, time-bound and concrete objective of enabling LDCs to meet the

³ http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2013/JC2474_TRIPS-transition-period-extensions_en.pdf (last consultation 6 June 2013).

⁴ http://unctad.org/en/PublicationsLibrary/ldc2012overview_en.pdf

⁵ Istanbul Plan of Action (par.4) doc. A/CONF.219/3. <http://ldc4istanbul.org/uploads/IPoA.pdf>

⁶ *TRIPS transition period extensions for least-developed countries*, UNDP and UNAIDS Issues Brief/ 13 February 2013.

⁷ Mr. Michel Sidibé, UNAIDS Executive Director, Report to 31st UNAIDS Programme Coordinating Board, December 2012,

http://www.unaids.org/en/media/unaids/contentassets/documents/speech/2012/12/20121211_SP_EXD_31st_PCB.pdf

⁸ Istanbul Plan of Action (par.27) doc. A/CONF.219/3. <http://ldc4istanbul.org/uploads/IPoA.pdf>

criteria for graduation⁹. The Program set the highly ambitious target that half of the LDCs should be able to meet graduation criteria by the end of the decade.

195. A well-designed intellectual property system must balance the private rights of inventors with the public needs of society. International intellectual property rules reflect this premise: the stated objectives of TRIPS include the assertion that: "The protection and enforcement of intellectual property rights should contribute 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".¹⁰

196. The Delegation of the Holy See urges all Member States, therefore, to bear in mind that the main goal of the international community in developing a fair regime of intellectual property rights should aim toward the good of all and the pursuit of more equitable international relations, especially with regard to poorer and more vulnerable people. This goal reminds us of the Pope's words: " ... in the context of immaterial or cultural causes of development and underdevelopment, we find these same patterns of responsibility reproduced. On the part of rich countries there is excessive zeal for protecting knowledge through an unduly rigid assertion of the right to intellectual property, especially in the field of health care. At the same time, in some poor countries, cultural models and social norms of behaviour persist which hinder the process of development."¹¹

197. In conclusion, Mr. President, the consensus reached on the proposal of extension represents an important sign by the WTO, especially in anticipation of the next Ministerial Conference in Bali. The Holy See delegation hopes that a sense of common responsibility, as shown in the decision adopted, will bring us all to support such extension as an accelerated step toward the human and economic progress of least developed countries.

⁹ Graduation from the list of LDCs is based on a systematic review and assessment of socioeconomic progress of least developed countries based on three criteria: per capita income and two composite indices (Human Asset Index and Economic Vulnerability Index).

¹⁰ Article 7 TRIPS Agreement

¹¹ Pope Benedict XVI, Encyclical Letter *Caritas in veritate*, n.22.

AGENDA ITEM 11: INTELLECTUAL PROPERTY, CLIMATE CHANGE AND DEVELOPMENT**11.1 Ecuador**

198. In March 2013 we informed the Council of Ecuador's intention to hold a discussion on this issue at the present meeting. The proposal that you just mentioned is based on the opening paragraph of the preamble to the Marrakesh Agreement, which lists among its guiding principles, the objective of sustainable development and the protection and preservation of the environment. This is followed up in the Doha Ministerial Declaration of 2001, paragraphs 6, 31 and 33, which reiterate Members' commitment to achieving those objectives and principles, and the need to ensure appropriate coordination between the WTO Agreements and multilateral environmental agreements (MEAs).

199. In fact, in the Preamble to the TRIPS Agreement, there is recognition of the importance of technology transfer to developing countries, which is then confirmed in Articles 7 and 8 of the Agreement. These Articles refer to the need for the development and transfer of technology, in order to create sound and viable foundations for protecting public health, nutrition, and here I stress, to promote the public interest in sectors of vital importance to their social, economic and technological development.

200. Thus, these provisions and principles are an attempt to prevent the abuse of IPRs and indeed limit or restrict practices that unjustifiably go against the international transfer of technology. This use of technology and transfer thereof are a fundamental aspect, in Ecuador's view, of the fight against climate change and adaptation to and mitigation of its harmful effects. Hence the timely dissemination and transfer of technology are essential for achieving that objective and constitute in our view one of the major challenges facing the international community in its response to this very serious issue. Indeed, discussions in forums concerned with environmental protection and preservation highlight the fact that lack of information, excessive protection, inappropriate enforcement and abuse in many instances of IPRs, particularly patents, are factors which may constitute a barrier to accessing environmentally friendly technology, particularly for developing countries. We believe that this is a valid argument and therefore we would like to share some ideas on the options concerning IPRs and their link to climate change in the context of the multilateral trading system, such as automatic granting of rights to voluntary licensing, use of TRIPS flexibilities, and regulating licensing costs, *inter alia*.

201. Specifically, as is well known, the debate on efforts focusing on mitigation and adaptation to climate change has been and continues to be discussed within the United Nations Framework Convention on Climate Change (UNFCCC) and the key thrust of the negotiations is and has been the principle of common but differentiated responsibility. In addition, it has been agreed that countries should promote and cooperate in the development, application and dissemination, including transfer of technologies, of practices and processes that aim to control, reduce or prevent emissions of greenhouse gases. At the same time, the UN General Assembly has adopted several resolutions on the protection of the global climate for present and future generations, and the promotion of new and renewable sources of energy.

202. In spite of these principled commitments, it has not been possible to adopt any specific resolution concerning the role of IP and in this discussion on climate change, mitigation and adaptation.

203. In view of this, and in what could be a very useful contribution in our view to the multilateral trading system, to global strategies to enhance access to environmentally friendly energies, to improve energy efficiency and to speed up at global level the dissemination of renewable energy technologies from an IP standpoint, Ecuador is submitting this communication to raise a number of concerns about the relationship between IP, climate change and indeed development. In this context, we urge Members to review possible restrictions and barriers to accessing environmentally friendly technologies within this organization. This is nothing new but we would like to remind you of two submissions from the delegations of India and China in the regular and special sessions of the WTO Committee on Trade and Environment, at the end of the 1990s and more recently in 2011, stating that IPRs should not to become a barrier to technology transfer to developing countries.

204. At the same time, Bolivia and Venezuela, in a formal submission to the special session of the Committee on Trade and Development, introduced the issue of IP and access to environmentally safe technologies. It is clear that such an issue raises concern among Members. Accordingly, and with a view to achieving concrete international cooperation, reflecting fair and balanced trade between countries, we believe that it is of vital importance that these technologies, in particular relating to the use and implementation of environmentally safe technologies for the adaptation or mitigation of climate change, produced by CO₂ emissions, should be considered as public goods, since because of their nature and objectives they are intended to promote overall global social welfare through the adaptation and mitigation of the harmful effects of climate change.

205. The current submission is an attempt to underscore the existing flexibilities in the TRIPS Agreement relating to environmentally sound technologies (ESTs) and initiate a review process to consider making more flexible some disciplines concerning their patentability. Such technologies could have environmental benefits for all and could become effective tools to implement public policies, enabling governments and states to adapt and mitigate the harmful effects of climate change, in particular with regard to developing countries. We raised a number of examples that could be assessed by the Council, for instance, a reaffirmation of the existing flexibilities in the TRIPS Agreement, a review of Article 31 of the TRIPS Agreement to determine which of its provisions may excessively restrict access to and dissemination of ESTs, particularly paragraph (f) of Article 31, evaluation of the regulation of voluntary licensing and the conditions thereof related to such technologies; consideration on the basis of the concept of public interest on a case-by-case basis; the exemption from patentability of inventions the exploitation of which is vital for the dissemination of ESTs. We could also evaluate Article 33 of the TRIPS Agreement to establish a special reduction in the term of protection for a patent in order to facilitate free access to environmentally sound technologies.

206. And finally, the possible inclusion of a mechanism in the TRIPS Agreement to promote open and adaptable technology licensing for results obtained from research into climate change financed through public funds and related to ESTs.

207. We believe that IPRs are a *conditio sine qua non* for the promotion of innovation and promoting broad use of industrial applications. But it is very clear that for many countries, in particular for developing countries where ESTs are most needed for the adaptation and mitigation of harmful effects of climate change, the patent system as it is at the moment could restrict the dissemination of such technologies, either through the creation of monopolies or the abuse of rights by rights holders or the excessive additional costs from paying royalties for voluntary licensing of ESTs.

208. In terms of future steps, we believe that this submission sketches out a framework for sparking a discussion, which will provide Members with the opportunity to debate the issue of the relationships between IP, climate change and development. Such an issue should not be limited to discussions and negotiations in a single forum such as the UNFCCC, but because of its very nature, it should be discussed in other forums such as the WTO and this Council.

209. Finally, in emulating the positive practices that Members have agreed upon in the past, Ecuador believes that achieving a declaration concerning climate change in the context of the forthcoming Bali Conference is feasible. In this context, we refer delegations once more to the document cited at the beginning of the meeting and we are fully available should Members have any questions or doubts on this issue.

11.2 Cuba

210. Cuba welcomes the presentation of Ecuador's document, which we consider highly relevant since Article 7 of the TRIPS Agreement under "Objectives" states that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology.

211. However, it has been noted that, at times, IPRs have become an obstacle to accessing technology, thus seriously undermining the appropriate balance that should exist between the interests of IP right holders and the public interest.

212. Cuba is thus of the view that a discussion on the transfer of ESTs should be welcomed within this Council, in order to be able to propose solutions, which will from a perspective of WTO rules and without interfering in the mandates for climate change of other international agencies, this with a view to making a contribution to the general international efforts aimed at ensuring access to ESTs.

213. As regards patented ESTs, developing and least developed countries need to make use of all the flexibilities available in the TRIPS Agreement, without restrictions. One particularly advisable option would be to use compulsory licensing otherwise than as an exceptional policy in the event of a country facing a health emergency.

214. It would be desirable to reach consensus on a declaration concerning the flexibilities in the TRIPS Agreement and access to ESTs. We could also look into options such as the regulation of voluntary licensing and specific exemptions from patentability.

215. Cuba fully supports the pursuit of discussions on the basis of the elements introduced by Ecuador.

11.3 Indonesia

216. Indonesia would like to thank Ecuador for submitting its communication on IP, Climate Change and Development (document IP/C/W/585) to be discussed by Members at this meeting.

217. The world is now facing great challenges. As we can see and feel it around the globe, temperatures and sea levels are rising, and seasons are shifting. These natural phenomena show the changing of our world which, according to many reliable sources, may adversely affect our planet, environmentally as well as economically.

218. This situation has become a common concern, and it should draw necessary attention of the international community to respond. We believe everybody should give its contribution to what we, as the citizens of the globe, are facing now. Countries should be open to discuss and find any appropriate solutions, from general to even more specific, to support necessary actions to counter or combat the challenges.

219. From IP standpoints, we believe IP can and should positively contribute in being responsive to these challenges, rather than function as a barrier. Technology and its transfer may play an essential role for countries, especially developing countries, which generally lack access to ESTs, in performing adaptation and mitigation actions. This communication should be perceived as an invitation for this Council to start a discussion on how IP can contribute supportively and positively in combating the adverse effect of climate change.

220. To conclude, Indonesia welcomes Ecuador's submission and is open to discussion on this important issue. Lastly, Indonesia welcomes any positive decisions or declarations, subject to consensus by all Members, to be delivered at MC9 in Bali, that reflect the common needs and interests of all WTO Members.

11.4 China

221. China thanks Ecuador for circulating the document and its introduction of the document today.

222. Global climate change has had a profound impact on the existence and development of mankind, and is a major challenge facing all members. It is the common interests of the whole world and it is absolutely an urgent and long-term task for us all to fight against climate change. UNFCCC and its Kyoto Protocol have been universally recognized as the primary channel to address climate change, and the principle of common but differentiated responsibilities has been established as the basis for closer international cooperation.

223. In combatting the climate change challenge, ESTs are an important tool and should better serve the common interests of human beings. In this regard, developed and developing countries are deeply interdependent with each other in order to better combat rising temperature, extreme

weather of all kind, and all other abnormal situations which seem to be a non-exhaustive list currently. We need to enable the developing countries to have access to climate-friendly technologies. IP law and policy should provide a better environment and enough policy space for the transfer and dissemination of environment-friendly technologies from developed countries to developing countries.

224. China welcomes the Ecuador's proposal to discuss this issue at this Council in this context. In our view, nothing in the TRIPS Agreement prevents its existing general flexibilities from its application to the environment-friendly technologies. With respect to the new flexibilities proposed in the communication, without prejudice to our final position on the points in the communication, China would like to engage in the further evaluation and discussion among Members.

11.5 India

225. My delegation welcomes the inclusion of this Agenda Item and also appreciates the submission made in this respect. We feel that the issue is of critical importance in reconciling the TRIPS Agreement with the demands made to implement Multilateral Environmental Agreements, mandatory national standards and voluntary international standards, where such implementation involves the use of environmentally sound technologies and products covered by IPRs. Since we have not been able to analyse the proposal in detail, our comments would be preliminary.

226. The central role of technology transfer to developing countries as well as the development of endogenous technology in these countries were recognized at the 1992 Rio Summit, as well as in its related conventions including the UNFCCC. It was recognized that technology transfer had to be undertaken beyond the commercial arena, and that a pro-active role of public policy at national and international levels is required to enable developing countries to obtain access to environmentally sound technologies and products. Although technological innovation is only part of the overall solution to climate change, it is in fact an essential aspect of it. For moving towards a green economy and to serve the objective of restricting global warming, it is necessary to overcome the dilemma between the need for widespread and rapid diffusion of knowledge and climate technologies to developing countries; and the need for incentives for technological developments and innovations.

227. In this regard let me point out two important contributions made by India, namely WT/CTE/W/82 and TN/TE/W/79, to the discussions in the Committee on Trade and Environment as a part of the issues relating to market access. Through these contributions, India has highlighted the fact that although the TRIPS Agreement provides a good framework for protecting innovation including ESTs, it creates monopolies resulting in high prices for green technologies and acts as a barrier to their diffusion in developing countries. India therefore proposed the need for reducing the patent duration for these technological innovations or to have a relook over the provisions of Article 31, so it does not become a barrier in issuing compulsory licences in exceptional cases. It also talked of innovative mechanisms such as the Doha Declaration on the TRIPS Agreement and Public Health or cooperative R & D to delink the cost of R&D, so that there are no barriers in the diffusion of these technologies.

228. On any principle of equity, industrialized countries have to bear a large share of the burden. They are historically responsible for the bulk of the accumulated greenhouse gas emissions and this alone suggests a greater responsibility. They also have high per capita incomes, which give them the highest capacity to bear the burden. They are technically the most advanced, and to that extent best placed to provide environmentally sound technology to developing countries at fair and favourable terms and conditions.

229. Let me conclude by saying that it is high time that global efforts towards a cleaner world do not get hindered because of the barriers posed by multilateral agreements such as the TRIPS Agreement or by efforts by some Members to protect narrow commercial interests. We therefore welcome the contribution by Ecuador as a starting point for discussions and possible future solutions.

11.6 Plurinational State of Bolivia

230. Firstly, I would like to begin by thanking the delegation of Ecuador for having put forward this proposal for this meeting.

231. Bolivia shares the concerns and the views expressed in document IP/C/W/585 submitted by Ecuador. Indeed, in 2011 Bolivia also made a proposal along the same lines in the Committee on Trade and Environment.

232. A fundamental principle of the Rio Declaration on Environment and Development is Principle 7, which reaffirms that "in view of the different contributions to environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." This is a critical principle that should guide all our negotiations related to sustainable development and any results achieved in the TRIPS Council on this issue. The Rio Declaration forms part of the treaty context within which the reference to the objective of sustainable development in the first preamble of the WTO Agreement was formulated.

233. Patents limit the possibility for developing countries to adopt ESTs and produce environmental goods themselves since patent holders, mainly concentrated in developed countries, are able to raise the costs of access or deny it altogether. Given the unprecedented mobilization of technologies required to address the environmental crisis – in every sector and every country and in short time-frames than ever before– the existing flexibilities in relation to patents and other IPRs must be reinforced and further expanded to ensure that the technology needs of developing countries are met, making it possible to achieve sustainable development while checking the environmental crisis.

234. We therefore welcome the proposal made by Ecuador to produce a Ministerial Statement declaring environmental technologies to be public goods, and urging the world community to take full advantage of the flexibilities envisaged in the TRIPS Agreement to enable countries to adopt the measures needed to address the current environmental crisis. This should be part of the WTO's contribution to the fight against the effects of climate change.

11.7 Bangladesh

235. We appreciate the delegation of Ecuador having put forward its proposal and for putting a very pertinent issue of the time on the table. We recognize the evolving challenges emanating from multiple environments and difficulties. At the same time we also understand and strongly believe that the TRIPS Agreement has a critical role to play in combatting these challenges. Bangladesh considers positively the underlying rationale and objective as laid out in the document and believes that this Council has ample scope to contribute. We welcome further consultation on this issue and express our readiness to constructively engage towards finding an appropriate solution of such an important issue.

11.8 Nepal (for the LDC Group)

236. Needless to say that climate change has become a serious issue and its adverse impact needs no more explanation. The poor and the least developed suffer most as they lack capacity and technology to adapt. Those who do not have technology do expect and need support from those who do have, and technology transfer is therefore crucial in the fight against the adverse impacts of climate change. The submission from the delegation of Ecuador does have appeal in this sense. It explores how flexibilities in the IP framework can be best used and can be further broadened so that IP does not become a barrier, but rather facilitates access to technology. Nepal welcomes the discussion the proposal from Ecuador has generated.

11.9 Rwanda

237. Rwanda would like to welcome the presentation made by Ecuador of document IP/C/W/585. Indeed access to ESTs by all, rich and poor, in order to collectively address global climate change

is very important for the planet. There is a need for an IP regime that is appropriate to address this important issue, hence the relevance to bring this debate into this Council. I would like to welcome the suggestions made by the proponent on pages 4 and 5 of the paper as to how to address this issue. And we hope that Members will be open to engage in this debate.

11.10 Brazil

238. Brazil would like to thank the delegation of Ecuador for raising this important debate on climate change in the context of the IP system contribution to adaptation and mitigation efforts.

239. Brazil would like to recall the principle of common but differentiated responsibilities that has led the international community in the debates on UNFCCC in their efforts to curb the effects of climate change. We also understand that developing countries have an important role to play in their efforts for adaptation and mitigation objectives in fighting climate change.

240. Brazil has compromised in an effort of reduction of between 36% and 38% of reduction of greenhouse gas emissions until the year 2020. This is reflective of the role that we understand countries, not only developed countries; have in tackling the climate change challenge.

241. The TRIPS Agreement is the result of negotiations that struck a delicate balance between the objectives of fostering innovation and promoting public interest in sectors of vital importance to socioeconomic and technological development. One basic principle embodied in this Agreement is that the protection of IP should contribute not only to technological innovation, but also to the transfer and dissemination of technology, to the mutual benefit of producers and users of technological knowledge and in a manner conducive to social and economic well-being;

242. In this sense, the use of flexibilities provided for in the TRIPS Agreement is essential to ensuring that the objectives relating to social and economic well-being will be met. This has a special meaning in the context of potential impacts of climate change in all societies.

243. Many countries have used flexibilities in a way to foster the development of ESTs. Brazil's Institute of Industrial Property is also taking steps in this direction, promoting a pilot project to accelerate the examination of EST patents, in order to allow the swift introduction of patented products in the market.

244. An accelerated examination can play an important role to make ESTs available; nonetheless the quality of patent examination is even more relevant to this debate. In this regard, low quality examination hinders innovation and generates unnecessary costs to users of the patent system, limiting the resources at disposal for the development of environmentally sound technologies

245. Brazil supports in general the discussion of these themes in the TRIPS Council and we would like to share more of our views in future discussions on this subject.

11.11 Saudi Arabia, Kingdom of

246. Saudi Arabia would like to thank Ecuador for its proposal. Saudi Arabia shares Ecuador's view that technology transfer is a pertinent issue, especially for developing and least-developed countries. However, discussions relating to climate-change measures and related technologies should be undertaken under the UNFCCC, which is the relevant expert forum. Moreover, Saudi Arabia would like to highlight the following two points: firstly, the commercialization and dissemination of key technologies for the environment is an important issue for both developed and developing countries. This issue is currently under discussion in the Committee on Trade and Environment under the first part of paragraph 32 of the Doha Declaration, the effect of environmental measures on market access. Secondly, we note that the negotiations under paragraph 31(1) of the Doha Declaration on the relationship between existing WTO roles and specific trade obligations set out in multilateral environmental agreements are taking place in the CTE Special Session. Therefore related issues should be discussed in that negotiating body.

11.12 United States

247. The United States welcomes the opportunity to exchange views on this critically important issue. We agree with Ecuador that addressing climate change is a global challenge of the highest order, and that green technology innovation is essential to the response. Where our views diverge is with respect to the nature of that response. In our view, the global community faces an innovation imperative, and IPR is an indispensable catalyst in driving innovation addressing greenhouse gas emissions and climate change adaptation and mitigation efforts.

248. IPR not only incentivizes that innovation, it promotes technology transfer in these goods and services. This view is supported by a significant body of research, economic analysis and other data, which demonstrates that green technology innovation is happening, that voluntary technology transfer is occurring and that IPR plays a significant and positive role in promoting both activities.

249. We not only question the premise of Ecuador's recommendations and the limited data on which they rely, but also believe those recommendations would undermine, rather than advance, Ecuador's intended objective of promoting green technology innovation and technology transfer.

250. Turning first to the innovation imperative, there is little debate that the global community faces a monumental challenge and that innovation is critically important to surmount it. Technological change is paramount in the quest to find alternatives to fossil fuels. For example, as the Harvard Project on International Climate Agreements concluded, the development and transition to fossil fuel alternatives "... necessitates a suite of policies to provide the proper incentives for technological change. These policies will drive invention, innovation, commercialization, diffusion, and utilization of climate-friendly technologies."¹²

251. In addition, innovation is an economic necessity to overcome the costs of the climate change response. Studies have demonstrated that innovation will achieve substantial cost reductions in adapting to and mitigating the effects of climate change. For example, researchers in a paper entitled "Global Energy Technology Strategy: Addressing Climate Change", concluded that the cost of using currently available technologies to stabilize current CO₂ levels would be over \$20 trillion greater than with expected developments in energy efficiency, hydrogen energy technologies, advanced bio-energy, wind and solar technologies.¹³

252. Another report from the Brookings Institution finds that technological innovation presents the potential to reduce costs of CO₂ stabilization by over 50%.¹⁴ For these and other reasons, it is time to unleash a tide of innovation, rather than risk turning off the tap. Indeed, as we heard today at the side event, IP is an important driver of social innovation and promotes low-cost green technology solutions. Where there are divergent views in this room, however, is with respect to who is innovating and how to promote that innovation.

253. In terms of the origin of innovation, there are many sources, including the public and private sectors and universities in both developed and developing countries, contrary to the claims made earlier in this item.

254. To begin, the private sector is the engine for innovation, which is particularly true with respect to green technologies. The United Nations Environment Program reports, for example, that 60% of the clean energy technology financing in 2009 came from private sources.¹⁵ Another report on "International Climate Technology Strategies" confirms that 60% of the financing and 70% of the global R&D comes from private sources.¹⁶ Likewise, the OECD has found that the private sector

¹² Aldy, Joseph, and Stavins, Robert, "The Role of Technology Policies in an International Climate Agreement", The Harvard Project on International Climate Agreements, 2008, p. 1.

¹³ Edmonds, JA; Wise, MA; Dooley, JJ; Kim, SH; Smith SJ; Runci, PJ; Clarke LE; Malone EL; Stokes GM, "Global Energy Technology Strategy: Addressing Climate Change," Global Energy Technology Strategy Program, May 2007, p. 39.

¹⁴ Newell, Richard "A U.S. Innovation Strategy for Climate Change Mitigation" Discussion Paper 2008-15. Hamilton Project, Brookings Institution, Washington D.C., p. 14-15.

¹⁵ UNEP, "Global trends in Sustainable Energy Investment 2010." 2010, p. 25.

¹⁶ Newell, Richard, "International Climate Technology Strategies", The Harvard Project on International Climate Agreements, October 2008, Discussion Paper 08-12, p. 6.

is responsible for nearly two-thirds of R&D funding in OECD countries.¹⁷ It is notable that the percentage of private sector R&D funding in China is now almost 75%, according to UNEP.¹⁸

255. The second largest funding source is governments at roughly 30%. One study suggests that half of that funding is transferred to universities, other non-profit research institutions and industry.¹⁹ Universities, of course, play a critical role in the innovation pipeline, not only in terms of research, but also in terms of producing researchers and scientists that will drive tomorrow's green technology discoveries. And it is important to note here that the different sources of innovation do not work in isolation. Public-private cooperation, including industry-university collaboration, is a key feature of the innovation landscape.

256. Finally, green technology innovation is not limited to the developed world, as Ecuador suggests. Many developing countries have robust R&D policies for green technology innovation. According to the 2013 Global R&D Funding Forecast, the Asia region drives global R&D funding spending at US\$554.6 billion. This is a US\$36 billion increase over 2012 and a US\$67.5 billion increase over 2011. Latin America accounts for the second largest R&D spending, followed by the United States, Europe, China and Japan.²⁰ R&D spending is, therefore, diverse, decentralized and global.

257. Growing patent registrations also provide an important indicator demonstrating the growing intensity of green technology innovation occurring around the world in the area of climate change adaptation and mitigation. For instance, a Copenhagen Economics study entitled "Are IPR a Barrier to the Transfer of Climate Change Technology" concludes that the growth rate of patent registration for carbon abatement technologies in emerging market economies (up by 545%) far outpaces that in the developed world. At this pace, emerging market economies will soon equal the patenting activity found in developed countries.²¹

258. WIPO Patent Cooperation Treaty (PCT) applications confirm this trend. For example, in 2011 the highest volume of those applications came from East Asia.²² This is notable given that only five years ago North America was the main region of origin of PCT applications. Regarding individual company applicants, the first and third ranked applicants, in terms of total PCT applications filed in 2011, are headquartered in developing countries.²³ Moreover, individual developing countries are specializing in specific green technology sectors. According to a joint report of UNEP, the European Patent Office and ICTSD, India is among the top five countries for solar photovoltaic technologies, while Brazil and Mexico share the top two positions in hydro-marine technologies.²⁴

259. In an in-depth analysis of the solar photovoltaic, biofuel and wind sectors, John Barton demonstrates significant developing country leadership in green technology innovation, including Brazil, Malaysia and South Africa for biofuels, and China and India for solar PV and wind.²⁵ Ecuadorian innovation should also be acknowledged here. We note that Ecuadorian inventors have filed 50 patent applications in the United States, including several relevant to today's discussion, such as an energy-saving LED-based lighting devices and a solar radiator. Likewise, entities from Ecuador filed 27 PCT applications in 2011 and 31 such applications in 2010, an increase of 29 applications from 2009.²⁶

¹⁷ OECD, "Main Science and Technology Indicators, 2010/2", 2011, p. 18.

¹⁸ UNEP, "Global trends in Sustainable Energy Investment 2010." 2010, p. 18.

¹⁹ Newell, Richard, "International Climate Technology Strategies", The Harvard Project on International Climate Agreements, October 2008, Discussion Paper 08-12, p. 6.

²⁰ Battelle, "2013 Global R&D Funding Forecast", R&D Magazine, p. 3.

²¹ Copenhagen Economics, "Are IPR a Barrier to the Transfer of Climate Change Technology?", January 2009, p. 18

²² WIPO, "PCT: The International Patent System: 2012 Yearly Review." 2012, p. 10.

²³ WIPO, "PCT: The International Patent System: 2012 Yearly Review." 2012, p. 10.

²⁴ UNEP, EPO, ICTSD, "Patents and Clean Energy: Bridging the Gap Between Evidence and Policy", 2010, p. 4.

²⁵ Barton, John, "Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuel and Wind Technologies", ICTSD, Issue Paper No. 2, December 2007, p. viii.

²⁶ WIPO, "PCT: The International Patent System: 2012 Yearly Review." 2010, p. 29. WIPO, "International Patent Filings Set New Record in 2011," *Annex 5: PCT International Applications by Country*, 5 March 2012, available at: http://www.wipo.int/pressroom/en/articles/2012/article_0001.html.

260. So, given the realities of this dynamic and complex innovation environment, the fundamental question becomes how do we best promote continued advances in green technology by all innovators, including the private sector, universities and others in developed, developing and least developed countries? As we will discuss, the literature to date strongly suggests that IPR protection and enforcement remain a key tool to promoting such innovation.

261. Rather than repeating the US position today, which is well known to Members, our intervention focuses on the wealth of data supporting our position. Specifically, the literature cites numerous positive and necessary contributions of IPR, including incentivizing innovation, attracting foreign direct investment, increasing wages, retaining and cultivating a high-skilled work force, stimulating university research, and promoting technology transfer. Likewise, the literature largely concludes that, in the context of green technology, IPR does not have negative implications with respect to the cost or transfer of such technology. We will take these seven examples of the contributions of IPR to green technology innovation in turn.

262. First, IPR protection incentivizes innovation. In their OECD paper entitled "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries", Park and Lippoldt use regression analysis to address this question and conclude that "IPRs can directly stimulate local innovation [in developing countries] as well as indirectly by stimulating the transfer of technologies that foster local innovation."²⁷ Park and Lippoldt further conclude that "[d]eveloping country patent applications (by both residents and non-residents) and expenditure on R&D (as a percentage of GDP) tend to have a positive and significant relationship to the strength of patent rights". Likewise, Richard Newell explains in his paper entitled "International Climate Technology Strategies", that that patents and other forms of IPR "... can thereby stimulate innovative activity that might not otherwise take place or at least not as intensely."²⁸ Notably, in their economic analysis of IPR, foreign direct investment, and industrial development, Branstetter and Saggi conclude that strengthening IPR protection in developing countries increases the rate of innovation.²⁹

263. Conversely, weakening IPR protection negatively impacts innovation. For example, the World Energy Council paper on environmental innovation, IPR and sound environmental policy for climate change concludes that companies will simply not invest R&D resources into markets without effective IPR protection.³⁰ Aldy and Stavins concur, stressing that the fear of patent infringement and other IPR violations may seriously discourage private sector R&D in countries with weak IPR protection and enforcement.³¹ This is echoed by the WTO Working Group on Trade and Technology Transfer Secretariat, which concludes that a weak IPR regime could hinder FDI.³²

264. Second, IPR protection also attracts critical investment needed for innovation. Here, the data overwhelming confirms that IPR is a key determinant in FDI related to green technology. As the World Energy Council explains, IPR protection generally is a pre-requisite for investment in technology.³³ In a Background Note for the WTO Working Group on Trade and Technology Transfer, the Secretariat cites several studies and concludes that "... a strong IPR regime is an important factor in attract [sic] of investment by high technology firms." The Note goes on to find that the nature of such FDI also evolves as countries continue to improve their IPR regimes, moving from exports to FDI and finally to licensing.³⁴ Lee and Mansfield³⁵, Nunnenkamp and

²⁷ Park, Walter and Lippoldt, Douglas, "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries", OECD Trade Policy Papers No. 62, OECD, 2007, p. 4-5.

²⁸ Newell, Richard, "International Climate Technology Strategies", The Harvard Project on International Climate Agreements, October 2008, Discussion Paper 08-12, p. 25.

²⁹ Branstetter, Lee and Kamal, Saggi, "Intellectual Property Rights, Foreign Direct Investment, and Industrial Development", Working Paper 15393, National Bureau of Economic Research Working Paper Series, October 2009, p. 4.

³⁰ World Energy Council, "Energy Sector Environmental Innovation: Understanding the Roles of Technology Diffusion, Intellectual Property Rights, and Sound Environmental Policy for Climate Change", p. 9.

³¹ Aldy, Joseph, and Stavins, Robert, "The Role of Technology Policies in an International Climate Agreement", The Harvard Project on International Climate Agreements, 2008, p. 6.

³² "Trade and Transfer of Technology", Background Note by the Secretariat, WTO Working Group on Trade and Technology Transfer, WT/WGTTT/W/1, April 2, 2002, p. 21.

³³ World Energy Council, "Energy Sector Environmental Innovation: Understanding the Roles of Technology Diffusion, Intellectual Property Rights, and Sound Environmental Policy for Climate Change", p. 9.

³⁴ "Trade and Transfer of Technology", Background Note by the Secretariat, WTO Working Group on Trade and Technology Transfer, WT/WGTTT/W/1, April 2, 2002, pp. 22-23.

Spatz³⁶, and Branstetter et al³⁷, all reach similar conclusions. It is important to note here that FDI is not only essential for innovation, it is also critical for economic development, including in developing countries. One study concludes that such FDI accounts for over 25% of GDP in those countries.³⁸

265. Third, IPR protection can raise real wages for innovative companies in developing countries. In their economic analysis, Branstetter and Saggi incorporate labor market effects of IPR reform into their model. According to their calculations, strengthening IPR protection in developing countries raises real wages. In addition, they conclude that the purchasing power of those employed in such developing countries actually increases.³⁹

266. Fourth, IPR facilitates retention and training of a high-skilled work force. On this point, one of the most notable conclusions of the Secretariat Note for the Working Group on Trade and Technology Transfer addresses an additional positive labor market effect of IPR reform, involving the retention of high-skilled workers. Citing McGrath, the Secretariat explains that FDI decision makers evaluate the IPR landscape in a given market in determining whether and how to invest in a particular country. Stronger IPR protection may counsel in favor of R&D rather than assembly, for example, which in turn enhances that country's access to green technology. With access comes diffusion "... as a strong IPR regime alleviates the brain drain problem for developing countries by giving high qualified individuals the possibility to work in their home country."⁴⁰

267. Fifth, IPR protection stimulates university innovation. The World Energy Council explains, for instance, that academic and research institutions use patents as assets to transform their inventions into licensing income and then to invest in further research.⁴¹ WIPO's SME Division confirms the crucial role of patents and licensing for university research in providing incentives to researchers and universities to seek ways of exploiting their inventions and to actively seek industry partners to commercialize their inventions.⁴² Another study concludes that "university technology transfer is mainly a system of disclosure, patenting, licensing, and enforcement of patents and licences."⁴³

268. And this leads us to the sixth positive contribution of IPR protection, which is that it fosters green technology transfer and diffusion. Here, there is a diverse and immense amount of data supporting this conclusion. Indeed, member countries of UN Framework Convention on Climate Change, concluded in 2002 at the Marrakesh Conference of the Parties, that protecting IPR is part of the enabling environment for green technology transfer.⁴⁴ World Bank and WTO Secretariat⁴⁵ publications have drawn the same conclusion. For example, a World Bank study on trade and climate change finds that encouraging technology transfer "needs" IPR protection, and notes a

³⁵ Lee, Jeong-Yeon and Mansfield, Edwin, "Intellectual Property Protection and U.S. Foreign Direct Investment", *Review of Economics and Statistics*, Vol. 78, 1996, pp. 181-186.

³⁶ Nunnenkamp, Peter and Spatz, Julius, "Intellectual Property Rights and Foreign Direct Investment: A Disaggregated Analysis," *Weltwirtschaftliches Archiv* Vol. 140, No. 3, 2004, p 393-414.

³⁷ Branstetter, Lee; Fisman, Raymond; Foley, C. Fritz; and Saggi, Kamal, "Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Panel Data", *Quarterly Journal of Economics*, Vol. 121, No. 1, pp. 321-349.

³⁸ World Energy Council, "Energy Sector Environmental Innovation: Understanding the Roles of Technology Diffusion, Intellectual Property Rights, and Sound Environmental Policy for Climate Change", p. 9.

³⁹ Branstetter, Lee and Kamal, Saggi, "Intellectual Property Rights, Foreign Direct Investment, and Industrial Development", Working Paper 15393, National Bureau of Economic Research Working Paper Series, October 2009, p. 4.

⁴⁰ "Trade and Transfer of Technology", Background Note by the Secretariat, WTO Working Group on Trade and Technology Transfer, WT/WGTTT/W/1, April 2, 2002, p. 25.

⁴¹ World Energy Council, "Energy Sector Environmental Innovation: Understanding the Roles of Technology Diffusion, Intellectual Property Rights, and Sound Environmental Policy for Climate Change", p. 11, citing Idris, K; and Arai, H., "The Intellectual Property-Conscious Nation: Mapping the Path from Developing to Developed", WIPO, p. 28.

⁴² SME Division, "Research and Innovation Issues in University-Industry Relations", Background Information Document, WIPO, p. 4.

⁴³ Allen, M., "A Review of Best Practices in University Technology Licensing Offices", *The Journal of the Association of University Technology Managers*, Vol. XIII, 2001.

⁴⁴ Decision 4/CP.7, "Development and Transfer of Technologies; Annex: Framework for Meaningful and Effective Actions to Enhance the Implementation of Article 4, Paragraph 5 of the Convention", FCCC/CP/2001/13/Add.1, November 2001.

⁴⁵ "Trade and Transfer of Technology", Background Note by the Secretariat, WTO Working Group on Trade and Technology Transfer, WT/WGTTT/W/1, April 2, 2002, p. 25.

case study in which a country's weak IPR regime acts as an impediment to the expansion of clean technology markets within its borders.⁴⁶ And a wealth of economic literature concurs as well. Citing over 220 studies, Johnson and Lybecker's literature review on environmental technology dissemination shows that stronger IPR protection enhances technology transfer.⁴⁷ Park and Lippoldt's regression analysis for the OECD demonstrates the same conclusions,⁴⁸ as does Branstetter et al.'s empirical study of technology transfer within multinational enterprises.⁴⁹

269. Conversely, IPR does not impede technology transfer as has been suggested. Here again, there is considerable supporting data. Johnson and Lybecker's literature review confirms this conclusion, relying on a wealth of analysis involving green technology transfer.⁵⁰ Regarding that literature, another report concludes that the "... criticism of IPRs as a barrier to technology not only lacks economic and analytical foundation and rigor, but ignore the essential character of IPR protection in promoting innovation and enabling technology uptake, both generally and specifically in the case of clean energy technology."⁵¹

270. Finally, IPR does not inherently make green technologies more expensive⁵², as has also been asserted. This is because of the nature of the sectors involved, which are highly competitive, competing not only within the sector, but also between alternative sectors as well as with incumbent non-green technologies. With respect to solar PV, biofuels and wind, for instance, Barton concludes that competition between patented products results in price points being brought down and significantly limiting the extent to which royalties and prices can increase.⁵³ In a separate study, he finds that costs assignable to IPR are likely to be very small, because of competitive structures in those sectors. Moreover, manufacturing costs account for a large part of the total cost of such products, with R&D accounting for only a small portion.⁵⁴

271. In summary, our review of the literature raises serious questions regarding the premise on which the paper we are discussing today is based. The paper's contentions that green technology innovation is limited to developed countries and that IPR increases costs and is a barrier to technology transfer are not supported by the evidence. In fact, a wealth of data shows that the opposite is true – that innovation has diverse origins, including developing countries, and that IPR protection promotes innovation and transfer, without substantially raising costs. For these reasons, we have serious reservations regarding the paper's proposals, and are not in a position to support its recommendations.

272. We continue to view strong IPR protection as an environmental as well as an economic imperative, providing critical developmental benefits for developing and least developed countries

⁴⁶ Environment Department, "Warming Up to Trade? Harnessing International Trade to Support Climate Change Objectives", Economic and Sector Work, Sustainable Development Network, the World Bank, 2007, pp. 11 and 56.

⁴⁷ Johnson, Daniel; and Lybecker, Kristina, "Challenge to Technology Transfer: A literature Review of the Constraints on Environmental Technology Dissemination", Colorado College Working Paper 2009-07, July 2009, pp. 3-4.

⁴⁸ Park, Walter; and Lippoldt, Douglas, "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries", OECD Trade Policy Papers No. 62, OECD, 2007, p. 4-5.

⁴⁹ Branstetter, Lee; Fisman, Raymond; Foley, C. Fritz; and Saggi, Kamal, "Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Panel Data", Quarterly Journal of Economics, Vol. 121, No. 1, p. 323.

⁵⁰ Johnson, Daniel; and Lybecker, Kristina, "Challenge to Technology Transfer: A literature Review of the Constraints on Environmental Technology Dissemination", Colorado College Working Paper 2009-07, July 2009, pp. 3-4.

⁵¹ World Energy Council, "Energy Sector Environmental Innovation: Understanding the Roles of Technology Diffusion, Intellectual Property Rights, and Sound Environmental Policy for Climate Change", p. 11, citing Idris, K; and Arai, H., "The Intellectual Property-Conscious Nation: Mapping the Path from Developing to Developed", WIPO, p. 28.

⁵² See Johnson, Daniel; and Lybecker, Kristina, "Challenge to Technology Transfer: A literature Review of the Constraints on Environmental Technology Dissemination", Colorado College Working Paper 2009-07, July 2009, p. 4.

⁵³ Barton, John, "Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuel and Wind Technologies", ICTSD, Issue Paper No. 2, December 2007, pp. viii and x.

⁵⁴ Barton, John, "Mitigating Climate Change Through Technology Transfer: Addressing the Needs of Developing Countries", Energy, Environment and Development Programme, Programme Paper 08/02, Chatham House, October 2008, p. 9.

in particular. Such protection is essential to facilitate access to, and transfer of, today's technologies and to promote tomorrow's innovation.

11.13 Japan

273. This delegation welcomes the opportunity to discuss the topic of IP in terms of how it facilitates the transfer of environmentally rational technology.

274. To start with, this delegation does not consider the existing IP protection system to be a barrier to technology transfer. Rather, we firmly believe that adequate IP protection forms a solid and stable foundation that leads to direct investment and technology transfer. This, in turn, is expected to lead to the development and dissemination of environmentally sound technology.

275. We think that the current international frameworks set up for IPRs are basically well-balanced in terms of the goals of both stimulating technological innovation and facilitating technology transfer. In particular, further technological innovation is necessary focusing on mid- and long-term solutions to reducing green-house-effect gas emission.

276. However, the proposal by the delegation of Ecuador contained in document (IP/C/W/585) includes initiatives and assertions that would undermine the current IP protection system, for example, reorienting the world IP regime (paragraph 14), considering environmentally sound technologies as "public goods" (paragraph 15), revision of the framework for the protection of IPRs (paragraph 16), adoption of a provision authorizing exemption from patentability (paragraph 17d), asserting that patent system as currently designed can restrict the dissemination (paragraph 19). We cannot support such initiatives and assertions that may deter development, dissemination and transfer of technology, including environmentally sound technology, because they would lower the incentive for innovation.

277. Under these circumstances, this delegation is not in a position to support adopting the declaration at the Bali Ministerial Conference as mentioned in paragraph 23 of Ecuador's proposal.

11.14 European Union

278. In response to Ecuador's intervention on the contribution of IP to facilitating the transfer of environmentally rational technology, the European Union would like to contribute to the debate with the following comments:

279. IP may not play as important a role as some seem to think in the transfer of technology in the climate change alleviation context. Other factors have to be taken into consideration, especially as Ecuador refers to LDCs and the most vulnerable developing countries.

280. In LDCs, patents are not protected because they are not filed in these countries (no obligation to do so via TRIPS) and there is small market value for private business which is the proprietor of the technology. Therefore, companies are free to use these inventions in these countries. A considerable quantity of key technology is already in the public domain. Moreover, very recent, sophisticated technology would not necessarily be suitable for their specific country context as regards basic infrastructures and organization.

281. Other important elements to take into consideration are the lack of financial resources, high investment costs, subsidies and tariffs, all of which are considered greater barriers to accessing technology than IP protection.

282. Similarly, "There are a number of characteristics and circumstances of developing nations that hinder innovation: a lack of scientists and researchers, brain drain, small market size, the lack of infrastructure, importantly telecommunications infrastructure, the quality the business environment and governance conditions, bureaucratic climate and the formal/informal regulations regarding economic transactions, cash-strapped governments and inability to make public investments in research and infrastructure." (Colorado College Working Paper, 2009 – see below in list of quotes)

283. As the report on patenting and climate change mitigation technology from EPO, UNEP and ICTSD show, the main factors impeding technology transfer are access to the real know-how from the source companies (including access to trade secrets), access to suitably skilled staff, scientific infrastructure, and favourable market conditions. The patent system can therefore support technology transfer as without patents to protect their products and processes the source companies may be reluctant to engage in technology transfer and associated investments.

284. I would like to quote from a study carried out by DG TRADE in 2009 entitled "Are IPR a barrier to the transfer of climate change technology". This study is available and I will also provide the links. Some excerpts:

- "The study finds no argument in favour of extending the use of TRIPS provisions on compulsory licensing to climate change technologies."
- "IPR protection is not the main barrier preventing the transfer of environmental technologies to developing countries."
- "dismantling or weakening the IPRs system would not only hinder the access of developing countries to costly technology, it would also hinder the access to low cost technology as IPR protected technology is also to be found among the low abatement cost technologies."

285. Another study entitled "Intellectual Property Rights: The Catalyst to Deliver Low Carbon Technologies", carried out by The Climate Group in 2008, indicates that:

- "Intellectual Property Rights (IPRs), particularly patents, will be a catalyst, not a barrier, to creating and deploying low-carbon technologies."
- "Objections to IPRs are usually caused by a lack of understanding of their role."
- "Threats to strong IPRs, such as easily-obtained compulsory licensing, are likely to be a strong disincentive to invest."

286. Another study by the Centre d'Economie Industrielle (CERNA) entitled "Invention and Transfer of Climate Change Mitigation Technologies on a Global Scale: A Study Drawing on Patent Data" (also from 2008 reports) found that:

- "Innovation in climate change technologies is highly concentrated in three countries — Japan, Germany and the USA — which account for two-thirds of total innovations in the thirteen technologies. [...] Surprisingly, the innovation performance of emerging economies is far from being negligible as China, South Korea and Russia are respectively the fourth, fifth and sixth largest innovators."
- "Do these new technologies cross national borders? The export rate—measured by the share of inventions that are patented in at least two countries—is around 25%. This sounds small, but it is only a few per cent below the rate for all technologies. International transfers mostly occur between developed countries (75% of exported inventions). Exports from developed countries to emerging economies are still limited (18%) but are growing rapidly. This suggests a huge potential for the development of North-South transfers. Although China, Russia and South Korea are major innovators, flows between emerging economies are almost non-existent. Accordingly, there also exists a huge potential for South-South exchanges — particularly given that these countries may have developed technologies that are better tailored to the needs of developing countries."

287. The Colorado College Working Paper "Challenges to technology transfer: A literature review of the constraints on environmental technology dissemination" from 2009 says:

- "While developing nations frequently claim that strong intellectual property rights on carbon abatement technologies hinder developing countries' greenhouse gas abatement efforts, it has been shown that IPRs do not constitute as significant a barrier as claimed since a variety of technologies exist for reducing emissions. In many cases, IPR protected technologies are not necessarily more costly than those not covered."

- "There are a number of characteristics and circumstances of developing nations that hinder innovation: a lack of scientists and researchers, brain drain, small market size, the lack of infrastructure, importantly telecommunications infrastructure, the quality the business environment and governance conditions, bureaucratic climate and the formal/informal regulations regarding economic transactions, cash-strapped governments and inability to make public investments in research and infrastructure."
- "Technology transfer is enhanced by stronger levels of patent protection, while acknowledging the necessity of complementary factors such as infrastructure, effective government policies and regulations, knowledge institutions, access to credit and venture capital, skilled human capital, and networks for research collaboration. Economic studies have found that while IP protection facilitates trade flows of patented goods into large and middle-income nations, but has no impact on poor countries."

288. A final study I would like to quote again from the International Centre for Trade and Sustainable Development, from a paper entitled "Innovation and Technology Transfer to Address Climate Change: Lessons from the Global Debate on Intellectual Property and Public Health" from 2009. According to this study:

- "It is generally assumed that the originator pharmaceutical sector is highly dependent on strong patent protection, mainly because of the high cost involved in developing novel drug therapies and the low cost of reverse engineering these new drugs. Preliminary research suggests that most AERs/MTs industries may be less dependent on strong patent protection, and/or that patents are less likely to cause significant bottlenecks in the development and transfer of these green technologies. While it is premature to come to a definitive conclusion because researchers are only now focusing on the evidence, there is some basis for anticipating that IPRs will present fewer risks for developing countries in the context of climate change than for public health."
- "Assuming that TRIPS Agreement flexibilities are well understood among experts, negotiations regarding a Declaration on IPRs and Climate Change arguably would be time-consuming and disruptive in the absence of significant foreseeable "payoff". Some have argued that the Doha Declaration was the product of a specific set of concrete circumstances requiring redress, and that there is no comparable set of circumstances evident in the climate change arena."

289. To conclude, we do not believe that a change to the IPR system is required, such as exclusions from patentability or systematic compulsory licensing. The TRIPS Agreement provides for flexibilities that offer possibilities to the countries seeking to use technology.

290. The EU and its Member States spend huge amounts of money in projects entailing cooperation and elements of technology transfer to LDCs and developing countries, as can be seen in its annual reports to this forum.

291. Therefore, instead of considering changes in IPR legislation, it is far more useful to focus efforts on more operational initiatives, aiming for instance at facilitating technology transfer, disseminating information on relevant (off-patent) technologies, developing mechanisms such as patent pools (to be operated on a voluntary basis), etc.⁵⁵

⁵⁵ Web links to the studies quoted:

DG Trade study: "Are IPR a barrier to the transfer of climate change technology?" (2009):

http://trade.ec.europa.eu/doclib/docs/2009/february/tradoc_142371.pdf

The "Climate Group's paper "Intellectual Property Rights: The Catalyst to Deliver Low Carbon Technologies" (2008): <http://www.theclimategroup.org/assets/files/Intellectual-Property-Rights.pdf>

CERNA study "Invention and Transfer of Climate Change Mitigation Technologies on a Global Scale: A Study Drawing on Patent Data" (2008):

http://www.cerna.ensmp.fr/images/stories/file/Poznan/final_report_090112.pdf

Colorado College Working Paper "Challenges to technology transfer: A literature review of the constraints on environmental technology dissemination" (2009):

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456222

11.15 Canada

292. Canada would like to thank Ecuador for its communication on the contribution of IP to facilitating the transfer of clean technologies.

293. In the view of this delegation, concerted and cooperative action to develop and deploy clean technologies, in a way that respects IPRs, is critical to achieving long-term, low-carbon growth and sustainable development. We point, for example, to the ongoing productive work under the UNFCCC, including the Technology Mechanism, which is aimed at facilitating the acceleration of technology development, cooperation, and transfer in support of mitigation and adaptation actions.

294. With regard to the TRIPS Agreement, Canada notes that a fundamental objective of the IP system and rights is to provide an incentive to support the private-sector innovation which is critical to ensuring the continued development of technologies. For instance, the cleantech sector continues to develop innovative solutions to deal with climate change-associated problems. Such innovative solutions are rewarded through the commercialization of their products, which can in turn foster additional innovation and contribute to the knowledge base that can be built upon for developing environmentally sound technologies.

295. Patents have an important role to play in the dissemination of technology. For example, as patent applicants are obliged to publish the details of their inventions in exchange for patent protection, published patents are a rich resource in technical and scientific information accessible to all via patent office databases, stimulating further research and development.

296. Canada believes that addressing the challenge of climate change must respect IPRs that allow innovative clean technologies to emerge in the first place. In our view, the wide array of studies as well as the numerous successful initiatives and mechanisms addressing climate change-related capacity building and technology transfer, for example in the UNFCCC and elsewhere, help to demonstrate that balanced IP regimes are not an obstacle to the transfer of environmental technologies, rather they are an incentive. It must be recognized as well that access to technology is also heavily dependent on other external factors outside of the IP realm such as access to a skilled workforce, adequate infrastructure, and favourable market conditions.

297. Canada has appreciated hearing the views of other Members at today's TRIPS Council meeting and looks forward to continued dialogue on these issues.

11.16 Switzerland

298. Switzerland shares the concerns of Ecuador regarding the harmful effects of climate change. Switzerland agrees that the utilization of new and also yet to be developed technologies will play an important role in the fight against climate change as well as the use and transfer of such technology between developed and developing countries and vice versa.

299. At this stage, Switzerland has a few initial remarks on the communication by Ecuador and a number of questions. In paragraph 4 of its communication, Ecuador mentions a concern of a "lack of information" which constitutes "a kind of barrier" to access to the relevant technology. In Switzerland's view, the patent system contributes to the sharing of information about innovative technology. Patent applicants are required to disclose their invention at an early stage in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The process of patenting a new technology thus results in a sharing of information that would not happen if the inventor instead chose to keep his invention as a trade secret. Could Ecuador elaborate on its concern about lack of information and indicate specific cases where the existing tools and procedures of the IP system, as also provided in the TRIPS Agreement, have actually posed a problem?

300. We would like to refer to the report "Patents and clean energy technologies in Africa", which was recently published by the UN Environment Programme (UNEP) and the European Patent Organization (EPO). It summarises a number of recent studies and sheds light on many of the questions raised in Ecuador's paper. For example it shows and provides detailed data on the

information function of the patent. According to the report, the patent system "allows the creation of powerful search tools that facilitate the retrieval of technological information in areas such as environmentally sound technologies." (page 31 of the report).

301. In the same paragraph 4 of its submission, Ecuador mentions cases of "excessive protection" which are said to "constitute a kind of barrier" to access to the relevant technology. What does Ecuador understand under "excessive protection"? My delegation agrees that IP needs adequate and not excessive protection. In terms of protection of inventions and patents, Switzerland is in favour of high quality patent examination and also supports relevant efforts undertaken currently in WIPO. Does Ecuador have specific examples in which this so called "excessive protection" created a barrier to access to the relevant technologies in environmentally sound technologies and where the existing tools and procedures to remedy an abuse of IP rights – as also foreseen in the TRIPS Agreement – have failed?

302. As clearly indicated in the UNEP/EPO report, quality-oriented patent systems with state of the art searches on technology and substantive examination of the invention on its compliance with the patent law produce appropriate results. For example, only half of the patent applications filed with the EPO are actually granted, and the majority of those granted have their scope of protection reduced during the substantive examination process. International cooperation in the IP area, not only at the multilateral level such as in WIPO, but also at regional IP agency level (participation e.g. of African agencies/patent offices in the EPO's validation scheme for patents; report page 11), including the sharing of best practices (page 14), helps to achieve high quality patents.

303. Still with regard to paragraph 4 of Ecuador's submission, it is further mentioned that problems exist with "inappropriate enforcement" of IPRs which constitute a kind of barrier" to access to the relevant technology. It is not clear to my delegation what is exactly meant by the term "inappropriate enforcement". The question of how courts should deal with baseless litigation essentially needs to be answered by the national law. Under Swiss law, any party against whom an unnecessary litigation case is brought can claim full damages and all costs of such litigation have to be borne by the plaintiff who illegitimately initiated such an action. This has a clear deterrent effect. Could Ecuador elaborate on what it means in its communication when referring to "inappropriate enforcement" and give examples where the existing tools and procedures to prevent such abuse, whether national or international, have actually failed?

304. In paragraph 6 of Ecuador's submission, it is proposed that a system of "automatic granting of rights through voluntary licensing" should be put in place. While to Switzerland, a tension - if not a contradiction - seems to exist between voluntary licensing and automatic grant of rights. Having said that, Switzerland certainly agrees with Ecuador that the advantages of cooperative, voluntary licensing are evident: a voluntary licence can be obtained faster than a compulsory licence; it is cheaper and more effective, since through the partnership with the licensor important know-how may also be transferred. Accordingly, a voluntary licence offers an efficient, solid and sustainable basis for technology transfer, whether in the domain of environmentally sound technologies or any other field of technology.

305. In short, the role of innovation is thus key, now and in the future, to addressing the challenge of developing better environmentally rational technology. Such innovation must be incentivised – and that is where patent protection plays a crucial role. In the field of environmentally rational technology as in other fields of technology, patent protection also for incremental innovation is important, as it is the first step towards and thus often a prerequisite for breakthrough inventions.

306. The UNEP/EPO report on Patents and Clean Technology in Africa explicitly confirms on page 14 that the patent system is designed to support technology transfer: "The patent system provides a legal framework to support technology transfer through licensing agreements, and without patents to protect their products and processes, the source [innovator] companies may be reluctant to engage in technology transfer and associated investments."

11.17 Australia

307. Australia would like to thank Ecuador for placing this item on the agenda. We welcome the opportunity to talk about IP, climate change and development.

308. Australia is making a direct contribution to global efforts to tackle climate change by partnering with other countries bilaterally and multilaterally to support them to build capacity to reduce emissions and take action towards adapting to the impact of climate change. As detailed in our most recent report under Article 66.2 of the TRIPS Agreement, many of the initiatives by the Australian government to support technology transfer are related to climate change. I would like to draw your attention to a couple of examples from that report.

309. Australia's International Climate Change Adaptation Initiative provides \$A328.2 million over five years (2008-2013) to fund programmes and activities that assist vulnerable countries, particularly small island States and developing and least developed countries, adapt to the unavoidable impacts of climate change. One of the objectives of the initiative is to "improve scientific information and understanding, including where appropriate, through technology transfer". The funding has supported a number of projects involving scientific training, capacity building and knowledge transfer to least developed countries. For example the A\$A32 million Pacific-Australia Climate Change Science and Adaptation Planning aims to develop the capacity of scientists, decision-makers and planners from 14 Pacific island countries and Timor-Leste to access and apply climate information and tools to identify and develop in-country adaptation responses.

310. Australia is providing approximately A\$A34 million to Australian and international non-government organisations in the Pacific, Timor-Leste, the Philippines and Vietnam under the Community-based Climate Change Action Grants Programme. The programme is helping to build the resilience of communities to the impacts of climate change through community-based disaster risk reduction, food and water security, agricultural productivity and ecosystem-based adaptation activities. Support has been provided for projects in least-developed countries in the Pacific and South-East Asia, including Timor-Leste, Kiribati, the Solomon Islands, Tuvalu and Vanuatu.

311. Most projects have a component dedicated to the transfer of small-scale technologies, such as climate resilient agricultural technologies to improve long-term food security.

312. Australia firmly believes that a strong and balanced IP system is a fundamental ingredient in the development and proliferation of climate-change technologies. A strong and balanced IP system is the key to development of climate change technologies because it provides investors an opportunity to recoup the investments necessary to bring ideas to the marketplace. It ensures innovators can obtain the rewards from their research and development, and can fund further research. It promotes further innovation through access to information, new technologies and content.

313. A strong and balanced IP system is also the key to the proliferation of climate change technologies because in this increasingly linked and competitive world, innovative firms and foreign investors generally opt for locations with relatively strong IP laws and this can have a long term beneficial economic impact.

314. Australia recognizes that there are divergent views on the role of IP in the development and proliferation of climate change technologies. Australia is willing to work with Members in this forum or perhaps more appropriately building on the work underway in WIPO, on concrete, practical suggestions that could contribute to the dissemination of climate-change technologies without distorting the IP system. Ideas may include:

- establishing a central repository or searchable data base of climate change technology prior art and patent and design information to promote and disseminate climate-change technology information; or
- development of international model licensing arrangements that are mutually beneficial to the licensors and licensees;

- Australia is supportive of recent WIPO initiatives that promote the sharing of knowledge on environmentally sound technologies. Initiatives such as WIPO's International Patent Classification Green Inventory and WIPO GREEN allow stakeholders to determine which green technologies exist – an important first step in initiating technology transfer.

315. We do not share the view that IP is a barrier to the transfer of climate-change technologies or that the solution to increasing technology transfer is to reduce IP protection. Removing the prospect of material reward from research and development initiatives, could discourage investment in climate-change technology development in the first place.

316. Therefore, more specifically in relation to Ecuador's proposal, we thank Ecuador for the proposal. We would like the opportunity to consider further the proposal in more detail before providing more specific comments.

11.18 New Zealand

317. New Zealand joins others in thanking the delegation of Ecuador for the addition of this agenda item. We welcome the chance to engage in a robust policy discussion on this important issue.

318. We note the concerns raised by Ecuador that the current IP framework as established by TRIPS can hinder the ability of vulnerable and least developed countries to access certain environmentally sound technologies for purposes of climate change mitigation and adaptation.

319. However, in the area of environmentally sound technologies, most patents do not provide their owners with exclusive market power due to the presence in the market of close substitutes, many of which may be off-patent. Even where an environmentally sound technology is a "breakthrough" invention with no close substitutes, there will likely still be alternative technologies available.

320. New Zealand considers that IPRs can play an important role in fostering innovation, including in relation to incentivising the development of new environmentally sound technologies. Likewise, however, the TRIPS Agreement already contains a number of important flexibilities that can be used by Members in appropriate circumstances to address potential abuses of IP rights.

321. Existing mechanisms consistent with the TRIPS Agreement are likely to be sufficient to deal with any problems arising from the abuse of patent rights. For example, a failure to supply an invention on reasonable terms and conditions within a reasonable time period, or outright abuses of patent rights, could be remedied by the issue of a compulsory licence, as permitted by Article 31 of TRIPS.

322. In light of this, New Zealand's view is that tinkering with the TRIPS Agreement is neither necessary nor desirable to facilitate the transfer of climate change-related technologies.

11.19 Ecuador

323. I would like to express thanks for the extensive statements made by a number of Members. This has been very interesting. We see that they have done some detailed and serious homework following a course of logical reasoning. There is so much information that it is hard to know how to react. But there are studies on all sides and we think this is a debate that will enable us to take these studies even further. For the next session, I shall be making a much more detailed presentation.

324. Just a few points and specific reactions to some of the elements that we have heard around the room. Perhaps my information is not the most up-to-date, but what does strike me is that over a period of six or seven years, the balance in the development of technology has changed so much. With regard to environment-related technology, some countries have become the greatest producers or creators of technology, while others have slipped back in a short period of time. This is a striking development. My information says, for example, that renewable energies technology is concentrated - in percentage terms of the patents - in some very specific countries. I would say that roughly more than 70% of these patents are primarily concentrated in four or five countries.

The information we have heard seems to be the opposite of the information that I have. And therefore it is worth discussing. We need to have an in-depth debate about these issues.

325. On wind and solar technologies, some very specific countries have an extremely large number of patents, and their companies are amongst the main producers of these technologies. I am not saying there are not developing countries that do not also have this technology and they are not developing it. My information, however, would indicate that the majority of these businesses are from countries that have a longstanding history of technological development, which we do not have in Ecuador. I am very pleased to see that there are 59 patents registered by Ecuadorian innovators/inventors, and if that is true that would mean that they have managed to overcome all the economic obstacles that they encounter in such registration. Surely, this has been done in the United States, but we could go into greater detail to see which innovators have actually succeeded in patenting their technology in the United States.

326. In terms of air pollution, I understand that this is an area where the technology is handled by a very limited number of countries, which are not developing countries, and not even the so-called emerging countries. I think we could delve much further into these subjects. I think we need more detailed studies regarding statistics, indicating who is patenting more, which technologies are the object of more patents, and on the hypothesis that the balance has changed so radically over the past six or seven years.

327. There may have been a misunderstanding. We are not saying that an IP regime is an obstacle. But it could be - and this is an important semantic distinction. I am not asserting this. There are certain elements that could, in a specific area of technology, constitute a hindrance. As we said in our paper, we are talking about public goods. The fact is that climate change is a problem affecting us all alike, and that if technologies developed to address this harmful phenomenon are concentrated in high-technology countries, those of us with fewer resources cannot have easy access. I am not saying that we do not have access. I am talking about ease of access, as we have limitations in accessing these technologies. Once again this is an issue of semantics that needs to be borne in mind, and I think this is a reaction to some of the points raised by my colleague from Switzerland. We could go into what is implied in each assertion in these paragraphs, but this already referred to in our discussions in the UNFCCC.

328. Ecuador's communication is seeking to encourage discussion of the subject at this and future meetings. For example, in reference to high royalties, one example I have at hand is that in 2010 India had to pay US\$2.3 billion in royalties linked to climate change technologies. I wonder if Ecuador would end up paying this level of royalties at some time in the future in an attempt to purchase or to produce these technologies. I am not sure that we have the financial resources. We have considerable limitations on our resources and we have to deal with this. I am sure this is also been debated in the climate change negotiations in the United Nations.

329. There are cases where the patent right holder refuses to licence the patent. Of course a right holder is entitled to refuse. That is what an exclusive right means. But if licensing is refused, what can we as countries do in the face of such a situation. An obligatory licensing system would be the response, but there may be other options that we need to consider. We also have some unreasonable conditions when licences are requested, although it is hard to obtain details of such cases. Further issues are the ever greening of patents for different uses which often comes up on environmental technologies and the increase in legal disputes such as the smart phone court cases around the world. I do not know whether we need to address all these issues as well, but these are some of the points which we feel should be taken up.

330. We had initially proposed a declaration but what I do draw from today's discussion is that further debate is necessary. Ecuador would like to make the proposal here that on the post-Bali programme there be the continuation of a wide-ranging debate amongst Members on the implications of climate change, the results of which should be sent to the General Council to be considered between now and the next Ministerial Conference. I think this is something that we can all agree could be part of the post-Bali programme as something for the Ministers to decide. I would be grateful to all Members for their support and you can count on Ecuador's contribution in that regard.

11.20 Plurinational State of Bolivia

331. I do not want this discussion to go on for too long. But in the light of the excellent discussion that I have heard this afternoon, I wanted to take the floor. I have heard all the bibliographic references that a number of colleagues from different countries mentioned, but unfortunately I could not see any reference to the Special Rapporteur on the Right to Food for the Human Rights Council, for example, or to the special rapporteur on access to medicines. Those are references that are very interesting, and I am going to read something that the Special Rapporteur, Olivier de Schutter has said on the right of food: "The protection of IPRs in agriculture is an obstacle rather than an incentive for innovation". That type of reference should be looked at as well because that is a very neutral type of information, which may be more neutral and objective than some of the references that have been cited, which sometimes have a specific interest at heart. With regard to royalties and the effect on trade, you can see, as a result of the trade balance of countries from Africa and Latin America, how much they pay in royalties and how much they receive from royalties. And you see if IP is so successful, then we should really all be benefiting from it and not just a few who are benefiting from the existence of monopolies from these royalties. So these are statistics that are very important to look at and the IMF probably has quite a lot of publications on that. Each country will have its own idea about its trade balance in this respect. I would like to support what has been said by my distinguished colleague. I think it is very important to consider for post-Bali this particular issue and the focus of the negotiation is of course taking place within the UNFCCC.

11.21 United States

332. First, with respect to Ecuador's preliminary responses to some of the information that we and others have identified today. I think we have obviously many unanswered and open questions and so we are looking forward to hearing citations and some data to support many of these assertions. As to references to special rapporteurs' reports, we would welcome looking at those, particularly those addressing climate change issues. With respect to the suggestion about a work programme post-Bali, we are not in a position to support that at this time. I think Ecuador is perfectly within its rights to suggest agenda items and we look forward to having further discussions on this issue in this Council. We would be happy to continue to engage on that basis. But we cannot support a decision of today, particularly in light of the real questions we have about the basis on which recommendations have been proposed.

AGENDA ITEM 12: INTELLECTUAL PROPERTY AND INNOVATION: COST-EFFECTIVE INNOVATION**12.1 United States**

333. In suggesting today's agenda item, we wanted to build upon our previous interventions on Intellectual Property and Innovation, especially the theme of small and medium-sized entities.

334. Cost-effective innovation starts with a problem to be solved and a consumer need. For a customer who needs clean water, for example, the water treatment system needs to be affordable. An affordable water treatment system has a low initial cost, as well as a low cost to maintain the product. But affordability is not enough. Water filtration systems need to produce clean drinking water that tastes good. The product also needs to be durable, easy and enjoyable to use, easy to clean, energy efficient, portable, if necessary, as well as adaptable and attractive. Just because the product is inexpensive, does not mean that style doesn't matter.

335. Cost-effective innovation addresses all of these needs. For example, the United Nations has defined the related concept of "frugal innovation" as "a distinctive approach to innovation, which minimizes the use of resources in the development, production and delivery of innovative products, thus resulting in low-cost innovation that can become a driver of growth especially in developing countries. The four main features of frugal innovation are:

- not just cost-reduction: the focus is on making better things, not just cheaper things;
- not just products, but also services;
- not just down-grading existing innovation; rather remodelling goods and services;
- not just low cost, but also high tech.⁵⁶

336. Some examples of cost-effective innovation are products that have had features removed or made with lower-cost inputs, so that they are less expensive to produce and maintain. A cell phone that is very inexpensive because it has few features is an example of cost-effective innovation. It provides the necessary service, without requiring the consumer to pay for unnecessary features.

337. In our TRIPS Council intervention in March 2013, we provided the example of Simpa Networks, which is a pay-as-you-go system for accessing solar energy, whereby a solar system is installed on a home, its resident purchases time and receives a code to unlock the system, similar in some ways to a prepaid phone. Simpa Networks has a patent application pending, which it credits as an important contributor to the company's full capitalization, under the WIPO Patent Cooperation Treaty. Great solar technologies already exist, but financing is critical for mass market adaptation and adoption in emerging markets. Simpa's IP assets play a big part. For Simpa, its IP assets are being leveraged to increase the flow of capital into the sector, including by reducing the risk to investors who provide much needed financing to make it all work.

338. Another example of cost-effective innovation that we provided in March was Wonderbag, a South African SME that developed a clean, heat-retention cooking solution that helps prevent smoke inhalation. It is produced locally in South Africa from recycled materials, which generates local employment. For Wonderbag, IP protection provides a way to share its technology, so that others can benefit from it.

339. As we heard at today's cost-effective innovation side event, social entrepreneurs like those at Liter of Light and Sarvajal use IP to deliver light and clean water at low cost to impoverished communities. The water purification device developed by Tata, an Indian company, is another example of cost-effective innovation in purifying technologies. It uses no electricity and costs only nine Euros.

340. In January 2013, the World Health Organization's (WHO) bulletin described a number of cost-effective inventions, such as the Lullaby baby warmer, a device used to help new-born babies adjust to room temperature. It is a low-cost medical device launched in India in 2009, and is now

⁵⁶United Nations Economic and Social Commission of Western Asia, "Competitiveness of the ICT Sector in the Arab Region: Innovation and Investment Imperatives," Draft Report, available at <http://css.escwa.org.lb/ICTD/2118/md1.pdf>, 2013, p. 51.

sold in 62 countries, including Switzerland, at one quarter of the price of a conventional baby warmer. Features that demonstrate its effectiveness are that it is able to function despite power outages, voltage fluctuations, high levels of dust and pollution, and intensive equipment use.

341. Another example the WHO recognized is the result of a joint project of engineering students and their faculty at Rice University, physicians from the University of Malawi and the Texas Children's Hospital, and a Californian-based industrial design firm 3rd Stone Design. They have developed a bubble continuous positive airway pressure machine – known as a "bubble CPAP" – to help babies breathe. Bubble CPAP devices can cost as much as US\$6,000 per unit, but the Rice bCPAP can be built for only US\$160, and does not require any consumable parts, thereby lowering both the purchase price, and the cost of use and maintenance.

342. Cost-effective innovation goes beyond the world of consumer products and medical devices, and extends into agriculture. For example, in Rwanda, oyster mushroom farmers are learning new techniques to allow the mushrooms to be grown on a substrate of materials that is readily accessible in Rwanda. Products that are low cost and use local materials are at the heart of cost-effective innovation.

343. The United States Patent and Trademark Office's (USPTO) awards competition, Patents for Humanity, included at least two examples of cost-effective innovation. Kerosene lamps are used in many places to illuminate homes, even though it can cost up to 20% of the family's income and be very dirty to burn. One Patents for Humanity award winner, "Nokero" (for no kerosene) solar lights, will not only save these families money, but improve their health and safety.

344. I could go on, and describe additional examples of cost-effective innovation. Cost-effective innovators are a creative group. They are interested in solving the world's problems, so the list, however long, would be interesting.

345. I would also like to briefly discuss how cost-effective innovation is being integrated into the educational system in the United States. Many universities have begun to focus on cost-effective innovation. For example, Santa Clara University, which is in California, has a Frugal Innovation Laboratory. Other engineering schools promote similar learning and application of learning opportunities. For example, the Massachusetts Institute of Technology (MIT) D-Lab "stimulates economically viable solutions through developmental entrepreneurship, facilitates South-to-South transfer of technology and continually explores new models for scaling-up innovation and facilitating technology access."⁵⁷ At Stanford University, students can study "Design for Extreme Affordability". These are merely three examples, but "cost-effective technology", "frugal innovation", and "appropriate technology" are terms that are well understood by engineering and design students from the East to the West of the United States, and around the world.

346. What does this have to do with IP? IP is often the vehicle that innovators use to get financing to get their products to market. Even at 9 euros a water filtration system, companies such as India's Tata need (and have) patent protection. And they rely upon this patent protection to stop others from copying their hard work.

347. Part II, Section 5 of the TRIPS Agreement establishes minimum standards for the protection of inventions, so as to create an environment for inventors such as the inventors at Tata to protect their inventions.

348. Part II, Section 4 of the TRIPS Agreement establishes minimum standards for the protection of industrial designs, so that designers who seek protection can be protected from those who would copy their designs. Both industrial design and patents help inventors obtain the financing they need to commercialize a product, and especially to start up a new company.

349. Innovators of cost-effective innovation also rely upon trademark protection. A company cannot build up name recognition for its product, if many different producers use the same name, with different quality (and cost-effectiveness). Part II, Section 2 of the TRIPS Agreement

⁵⁷ Massachusetts Institute of Technology, "D-Lab: Development through Dialogue, Design and Dissemination," available at: <http://d-lab.mit.edu/about>.

establishes minimum standards for the protection of trademarks. Trademark protection enables a company to build its name recognition.

350. Of course, the TRIPS Agreement has many other important sections, and we look forward to continuing our discussion of the use of the TRIPS Agreement by the creators in our communities in future TRIPS Council meetings.

351. I began our intervention today by citing a UN study addressing frugal innovation. The authors note that "emerging economies can capitalize on a smart combination of open and frugal innovation ... if countries foster the participation of local entrepreneurs" in globally interconnected technology platforms.⁵⁸ The study identifies IPRs as a critical part of such innovation platforms.⁵⁹

352. This reflects the national strategies in emerging innovation markets in developed and least developed countries, as reflected by the statement of the President of Tanzania at the "African Conference on the Strategic Importance of Intellectual Property Policies to Foster Innovation, Value Creation, and Competitiveness", held in Dar es Salaam on 12 March 2013. As he explained, "Putting in place appropriate IP policies and measures are critical factors in promoting innovation and competitiveness, which play key roles in economic growth and sustainable development. It is for this reason that many African countries have been taking serious steps to embrace, anchor and nurture IP."

353. Similarly, the Office of the Advisor to the Prime Minister of India issued a strategy paper entitled "Towards a More Inclusive and Innovative India", which recognizes the important role IP has in stimulating innovation, and promoting the development and commercialization of public-funded research.⁶⁰

354. We look forward to hearing from delegations about their existing IPR policies to promote such cost-effective innovation.

12.2 Canada

355. Innovation is crucial for increasing productivity and solving problems that emerge in society. Innovation comes in many forms and its nature is unpredictable. While innovation can be a large-scale venture, where a new product or service such as a Blackberry, has fundamentally changed the way we do business; it can also be a low-cost internal innovation such as improving a process in a small business that can lead to dramatic savings in the way the business operates, or as we saw at the side event today – dramatically enhances the lives of people.

356. Innovation is about responding to change in a creative way. It is about generating new ideas through research and development, improving processes or revamping products and services. At another level, it's also about a mindset, focused on continuous improvement, increasing productivity and growth, by constantly thinking outside of the box. Governments can help foster an environment that encourages innovation and we hope that this dialogue in the TRIPS Council is useful for sharing ideas.

357. This innovative mindset does not depend on large financial backing. While low-cost innovation occurs on a regular basis, the path from initial ideas to commercialization can be complex and difficult to navigate at times. Governments can help maximize opportunities to bridge the gap between innovation and commercialization, enabling the development of products and processes with the least amount of time, resources and costs expended that will help generate results.

⁵⁸ United Nations Economic and Social Commission of Western Asia, "Competitiveness of the ICT Sector in the Arab Region: Innovation and Investment Imperatives," Draft Report, 2013, p. 51, available at <http://css.escwa.org.lb/ICTD/2118/md1.pdf>.

⁵⁹ United Nations Economic and Social Commission of Western Asia, "Competitiveness of the ICT Sector in the Arab Region: Innovation and Investment Imperatives," Draft Report, 2013, pp. 65, 72-3., available at <http://css.escwa.org.lb/ICTD/2118/md1.pdf>.

⁶⁰ Office of Advisor to the Prime Minister, Public Information Infrastructure and Innovations, "Towards a More Innovative and Inclusive India: Creating a Roadmap for a Decade of Innovation", Strategy Paper, March 2011, p. 20, available at: http://www.iii.gov.in/images/stories/innovation/Innovation_Strategy.pdf.

358. Canada recognizes the importance of low-cost innovation and has in place programmes encouraging partnerships that leverage public and private S&T resources. For example, the National Research Council of Canada administers a medical devices programme that helps companies to grow with new sources of productivity and competitive advantage, by providing customized research and technology solutions. This helps their clients develop compact, innovative medical technologies that provide rapid, sensitive, accurate and low-cost solutions. This programme further serves to foster low-cost innovative solutions, as it provides coordination support through all levels of government and healthcare stakeholders.

359. Another example is the Canadian Natural Sciences and Engineering Research Council's Engage programme. The Engage programme provides companies with access to the knowledge and expertise available at Canada's universities to support short-term, R&D projects that solve a problem specific to the company's needs. This flexible programme provides access to specialized facilities and equipment and highly qualified people, who can rapidly deliver creative ideas and practical solutions.

360. As low-cost innovation solutions are brought to the market and adopted, we encourage Members to consider how they might play a role in providing IP advice and commercialization support to develop technologies that will have beneficial economic and social impacts around the globe.

12.3 Korea

361. The international IP community can achieve greater things by working together for the mutual benefit of its members, especially by sharing IP with each other and by working towards sustainable economic development.

362. At this meeting, we wish to share our experience by putting forward our "IP-Sharing Project" for developing countries. Most developing countries need technological information that is not necessarily advanced but is rather useful in solving basic issues such as shortages in clean water, energy, food and housing. This technology, which we often call "Appropriate Technology", is technology that can be applied to 90% of the population in developing countries and can solve the most basic problems for people living in these areas.

363. The aim of the "IP-Sharing project" is to disseminate information on appropriate technology so that locally available technologies can be used to satisfy the aforementioned basic needs. As part of the project, we have set up an IP Share Website, which provides access to a database of more than 200 technological solutions for basic needs. The "IP-sharing project" works as follows: firstly, we survey the technological needs of local people by investigating local problems, requirements, circumstances, lifestyles and cultures. This is done in line with specific requests from recipient countries and by collecting information through various channels such as NGOs, including "Habitat for Humanity" and "Good Neighbors", branch offices of private enterprises, Korean embassies and international organizations. Secondly, we conduct prior art searches from a database of 150 million patented technologies for resolving local problems. Thirdly, we collaborate with technology experts to adapt the selected technologies to the local climate, environment and user conditions. Fourthly, we distribute the final version of the improved technologies or prototype models to the targeted local community. Finally we commercialize products to generate income for local residents and develop stable business operations for the local community.

364. One example under the "IP-Sharing project" is sugar cane charcoal. Due to a governmental logging ban, the people of a country in the African region faced difficulties in obtaining lumber, which is necessary for fuel and the production of charcoal for cooking and heating purposes. Researchers found that sugar cane peel, which is readily available and easily obtainable, can be substituted in manufacturing charcoal. After analyzing the technology involved in the manufacturing of charcoal, researchers performed prior art searches and then developed prototypes. Later, tests were completed for the localization of prototypes. The researchers involved in the development of the technology were dispatched to the country to test the prototypes in the actual environment where the technology would be used in order to transfer the technology to the local residents. The Korean IP Office and the related organizations will continue to support the establishment and operation of social enterprises to help generate income for the local people in manufacturing sugar cane charcoal.

365. Another example is soil brick. In 2010, based on the results of study-visits to a region located in an Asian country, the Korean IP Office had discovered the technological need for a number of issues including soil brick manufacturing, food storage, and water purification. Most of the people in some areas of the country live in mud houses which require frequent repairs. Solid and long-lasting bricks are expensive in that country. Appropriate technology is needed to manufacture high quality, yet inexpensive bricks made of soil that can be easily supplied in that region. Having identified this need, we collaborated with a Korean university institute to develop and distribute a simple brick-making technology. This type of technology is an alternative to more expensive methods of fabricating high-quality brick as these alternatives are made of soil that is readily available in that country.

366. A final example is stove. In 2012, Korea developed a stove for a country which has a high level of energy efficiency compared to the various stoves, which had previously been sold in local markets. Doing so would thus reduce the difficulties and inconvenience for local people as they would not need to collect firewood for cooking on a daily basis.

367. The above examples demonstrate that Korea has tried to narrow the IP divide among countries and promote simple and efficient technologies for use by developing and least developed countries. We believe that this kind of efforts were possible with the appropriate technologies, which have been developed and protected in an appropriate way. From our perspective, the link between innovation and IP is often small at the beginning, but the ultimate effect will be enormous.

12.4 Chile

368. Chile has joined Canada, Chinese Taipei, Korea, the European Union, Switzerland and the United States in co-sponsoring this agenda item as we believe that innovation, and particularly cost-effective innovation, contributes tremendously to society by providing access to new creations for a wider audience. Our objective during this Council meeting is to share examples of innovative products or processes that are low-cost, effective and high-impact, and that are produced by small enterprises with limited resources. I would like to mention a few examples from our country:

369. The story of Nicolás Tironi from Tivar helicopters is an example of entrepreneurship through innovation. Tironi works in fumigation, in improving the application of products and reaching places inside plantations that were previously inaccessible. He developed an aerial application process using electrostatic helicopters (technology that did not exist elsewhere in the world) based on prototypes of crop-dusting planes that had previously unremarkable results as they flew over plantations faster and were more difficult to manoeuvre.

370. Less than a year after the project was implemented, the company was carrying out 98% of its crop-dusting work using this revolutionary system. Not only did it mean significantly lower costs for producers but it also reduced the use of pesticides by 20 times, thus benefitting consumers in general.

371. A high-impact project has been developed in Chile that could revolutionize access to drinking water. It involves a low-cost water purifier using plasma-based technology to eliminate germs and bacteria from contaminated water and provide a continuous supply of clean water free from bacteria and suitable for consumption. The purifier can sanitize two thousand litres of water every 24 hours and the best part is that it costs very little and only uses 100 watts of energy to purify 35 litres of water in five minutes.

372. The Plasma Water Sanitation System (PWSS), which costs around US\$200, pushes the water through a pressurized chamber, where it is atomized and accelerated to a high speed. Next, the water is exposed to an electric field which converts it into plasma particles, thereby eliminating 100% of bacteria or microbes, before it is turned back into safe drinking water.

373. Launching the project on an international scale will revolutionize drinking water systems particularly in hard-to-access areas such as settlements in Latin America or in African countries. Every day around 6,000 children die from conditions and illnesses related to water scarcity.

This low-cost innovative process can solve a problem that affects more than 80 million people in Latin America and over 2 billion people worldwide.

374. I would like to quote the words of one of the individuals who invented this system: "Our goal is to break the paradigm and show that technology and poverty can in fact interact. Poor people do not have access to technology and if they do, it is usually outdated. What we are trying to do with these projects is develop advanced science and apply it to real problems that are left over from the past and that are growing, such as the issue of access to drinking water. The challenge lies in showing major companies the effectiveness of business models that place innovation at the disposition of the people most in need and then seek business applications." A patent application has of course been filed for this invention under the PCT system.

375. Another example is a piece of software called "Prey" that is installed on computers and activated if the user reports the device stolen. When this happens, a tracking system is triggered that uses the Wifi network to which the computer is connected and takes photos of the computer users, which are sent to the owner. The software currently has around 1 million registered users.

376. Lastly, the Consorcio Tecnológico en Biomedicina Clínico-Molecular (Technology Consortium in Clinical Molecular Biomedicine) has developed a technique that detects thyroid cancer, in order to increase the precision of pre-operative diagnoses of malignant tumours. It is a very simple test involving a fine needle aspiration biopsy, and the small sample taken allows a molecular profile to be created. As the test is extremely precise, patients do not need to undergo unnecessary surgery.

377. All these innovations are highly effective in terms of production costs and costs for users and have been developed by small and medium-sized enterprises (SMEs) and non-profit organizations that are fighting against poverty with limited resources, but that may have a high impact on society.

378. As we mentioned at the last session during our discussion on SMEs, Chile has created several programmes to encourage entrepreneurship and productive development in its local communities and small businesses, thereby promoting innovation and the use of intellectual property through an effective yet balanced system in which IP serves as a tool for development and an incentive to develop new technologies.

379. We hope that these contributions will assist the debate on the relationship between IP and innovation in this Council.

12.5 Switzerland

380. Cost-effective innovation is not only determined by the R&D strategy of the individual inventor or an innovative company. External factors such as the regulatory framework and the national innovation policy of a country also play a significant role. The government needs to ensure that public funds to foster innovation are allocated in the most cost-effective way. One element of this framework is an adequate and effective patent system. If there is no such system in place, innovation and technology transfer may not happen, since investments in R&D by private companies and their readiness to share and transfer their innovative technology with potential partners are discouraged. One prerequisite of cost-effective innovation may thus be an institutional framework which allows investment in research, enables the transfer of technology and return on investment into the commercialization of such technology.

381. Switzerland would like to share some of its experience on how innovation and knowledge transfer between research institutions and SMEs may be facilitated for this purpose. We briefly present Switzerland's approach to research funding, a system which has proved effective and successful.

382. Switzerland operates a two-tier system with basic research on one hand and applied research on the other hand. Talking about basic research first, the Swiss National Science Foundation is the most important instrument of the Swiss Confederation for the promotion of research and development of a new generation of researchers. The foundation was set up in 1952 and supports research at Swiss universities and independent research institutes. The main thrust

of the foundation's activity is the financing of individual projects in the area of independent research, assessed and chosen according to qualitative criteria to identify the most talented individuals and the most promising programmes.

383. Turning to the area of applied research, Switzerland operates, inter alia, an innovation promotion agency, the Commission for Technology and Innovation (CTI). This agency lends support to R&D projects, to established companies but also to start-up companies. The CTI thus focuses on the transfer between academic or educational institutions to the private sector. CTI makes the provision of grants conditional on an agreement, which covers among other aspects, the ownership of the IP involved and the sharing of revenues generated.

384. An example of a private foundation which supports young scientists and which is committed to providing project-related start-up financing to fund projects which may trigger a broader impact is the Gebert Rűf Foundation. This foundation aims to use its resources as a form of risk capital financing, subject to ongoing evaluation, to provide a platform for pioneer approaches and to help get novel pilot projects off the ground. The foundation is not a mere sponsor or distributor of funds, but a partner and active member of the project team. This means that conventional grant allocation goes hand in hand with strategic and effective action.

385. An example of such a pilot project, funded together with the Swiss Federal Laboratories for Materials Science and Technology (EMPA) and implemented by private enterprises, was the development of a smart cable-stayed bridge; a project which started in 2003 and was completed in 2011. The model of a cable bridge enabled a number of sub-projects to be carried out in the field of vibration mitigation and safety monitoring of structural materials. It was this cooperation of private and public know how and funds that made these innovation projects cost effective and – in the case of the cable-stayed bridge – a success not only for the researchers but also for the people in Thailand using this type of bridge, for which some of the new technologies were put in operation for the first time.

386. Information on research projects and assessments, which are either run or funded by the Swiss Confederation, can be found on the ARAMIS information system, www.aramis.admin.ch.

387. In a nutshell: experience has shown that a cooperative approach to innovation, to research into solving technical problems of the society, to technology transfer, and to implementing solutions, much increase the potential to achieve a successful and cost-effective process of innovation. Cooperation between the providers of basic and of applied research, between institutions and private industry is facilitated and in many cases made possible thanks to licensing (of IP and patents in particular). It is through licensing agreements that results of basic research can be transferred to institutions which are capable of applied research and which can support their final commercialization. The basis of such a cost-effective cooperation, the licensing partnership and with it the sharing of the benefits from the innovative process, is the patent system. It contributes to allow different players with different capabilities to form a partnership and leverage synergies.

12.6 Chinese Taipei

388. 97% of all our enterprises are SMEs and they are not only models of sustainable development but also the powerhouse of our economy. For us, it is therefore essential that we implement programmes and projects in IP management and deployment strategies that provide support for SMEs. We have established a bridge between right holders and potential users with a website that acts as a platform for information exchange and technology transactions under the auspices of the Technology Marketplace Project.

389. Also, with the Intellectual Property Management System (TIPS), we have helped SMEs to build up their own IP management systems and sharpen their competitive advantage, by providing the resources to hold consultations, experience-sharing, workshops and training courses. And, last but not least, we have created an IP service platform through the Innovative SMEs IP Value Project, in which tailor-made consultations and diagnoses are provided to help individual SMEs to strengthen their patent deployment in the R&D phase - or, in other words, to shorten the process and to increase the benefits of R&D.

390. We have examples of SMEs, such as the Jintex Corporation, the Taiwan Shin Kong Security Company and the Everlight Chemical Industrial Corporation, responding so positively that they have managed to significantly reduce the time spent on R&D by focusing on the orientation of their technical and product development, and securing their trade secrets more effectively. Others, like the Mastech Innovation Corporation Ltd., for example, have realized the importance of IPRs in their processing of transactions and looked for assistance from the Innovative SMEs IP Value Project. We have helped Mastech to become better equipped with knowledge, patent research and analysis skills, as a basis for their product development. They have successfully developed plugs, sockets and lock devices for uninterruptible power supply systems, and applied for patents simultaneously. Mastech is now an innovative and profitable ODM company.

391. Because SMEs are so crucial to our economy, and yet are lacking the resources to develop their IP management and deployment strategies, the support provided to them to increase their capacity for IP creation, protection and application, produces tangible benefits for the whole economy and the community.

12.7 European Union

392. Global challenges are important drivers for research and innovation. Our planet has finite resources which need to be cared for sustainably; climate change and infectious diseases do not stop at national borders, food security needs to be ensured across the globe.

393. One of the key objectives of the European Union's international R&D strategy is tackling global societal challenges by developing and deploying effective solutions more rapidly and by optimising the use of research infrastructures. In November 2012, the High Level Economic Policy Expert Group for Innovation for Growth recognized that research and innovation (R & I) had to be focussed on smart, sustainable and inclusive growth. To this effect, it expressed its preference for frugal innovation in the global perspective. This same expert group has chosen "inclusive innovation" as one of the four major topics for its 2013 work programme. Frugal (or inclusive) innovation allows innovators to do more with less and thus benefit more people with little or no buying power.

394. There is a possibility that the EU's new overarching Research and Innovation programme, "Horizon 2020", could include specific activities on frugal innovation. Horizon 2020 will run from 2014 to 2020. It will be fully open to participation from all over the world. The European Union will cooperate with third countries to jointly advance scientific knowledge and tackle global challenges, while safeguarding the EU's interests.

395. Many EU Member States are already involved in R&D in the field of frugal (or inclusive) innovation. It is a subject increasingly discussed in the academic and business worlds as can be seen by the number of seminars and conferences bringing research institutes, businesses and NGOs together. To cite but a few that have hosted or participated in seminars in the past year are INSEAD (the European Institute of Business Administration) near Paris, the Grenoble Engineering Institute, Delft University of Technology, Oxford and Cambridge Universities, and the Hamburg Institute of Technology.

396. Some of the major EU companies such as Schneider Electric, Unilever, Siemens, Nokia and Renault-Nissan have all embraced the frugal innovation attitude, both at home and abroad. Products are being sold in smaller quantities and packages, being produced using equally effective but cheaper technology, vehicles are being produced and sold at a lower cost but in line, of course, with the EU's strict security standards. Manufacturers are becoming eco-friendly, not only as regards the end products, but also in the methods they use to manufacture, the raw materials they use and company infrastructures and logistics. The initial costs of transforming the company and processes are compensated by future sales in larger quantities.

397. Frugal innovation is also well suited to and stimulated by developing country populations and situations: low buying power, but a high volume driven market. An increasing number of EU companies are also establishing R&D centres outside the European Union and notably in the emerging economies. These can take the form of international joint ventures, a third-party offshore outsourcing contract or cooperation with academic and/or research institutions abroad. Some large EU companies (such as Siemens and Bosch) have longstanding business activities, for

instance, in India, including R&D. They located R&D in India to participate in this fast-growing market, but also to anticipate new technology trends such as frugal innovation. These are real live examples of transfer of technology taking place.

398. Frugal innovation can certainly no longer be ignored and will play a big part in future innovation for the benefit of all countries. However, a number of issues need to be considered beyond the pure innovation perspective when producers of innovative products contemplate entering a foreign market or researchers move to third countries to collaborate on projects.

399. As an example, let me refer to what was recently stated by the EU Ambassador to India in the foreword of the *European Business Group* document entitled 'Innovation and R&D Activities of European Companies in India', in the context of the "*Indo-European research and innovation partnership*" currently being developed so as to further enhance the on-going collaborations, a possible iconic emblem could precisely be "frugal innovation", a concept that India has pioneered for the benefit of emerging markets, with many concrete success stories.

"However, a fully effective EU-India collaboration focusing on frugal innovation requires much more than a mere extension of EU companies' global innovation value chain so as to leverage India's talent and market. A radically new approach is needed, taking account of cultural differences and addressing a number of Indian hurdles ranging from the mobility of researchers (including visa issues) to weak university-academia interactions and to intellectual property issues. And this certainly applies to other emerging countries."

400. To conclude, private business initiatives complement the European Union's external policies and instruments that build partnerships – in particular bi-regional partnerships – to contribute to the sustainable development of these regions and address challenges such as the green economy, climate change, improved agriculture, food security and health. The European Union also supports the Millennium Development Goals – and their possible successors – by strengthening demand-led research and innovation for development, in which frugal innovation will have a justified place.

12.8 New Zealand

401. New Zealand has taken a slightly different take on the theme of cost-effective innovation that focuses on the regulatory settings that promote cost-effectiveness and thereby facilitate innovation. On the theme of cost-effectiveness, there is some evidence that firms are finding national IP regimes expensive to deal with, particularly in such fields as patents. Some of our systems are issuing patents with falling levels of patent quality and associated backlogs. Critics say that low quality patents can impose unnecessary cost on businesses and consumers by restricting access to products and services that should be free for all to use. New Zealand's current patent system is prone to some of these criticisms. Our Patents Act was passed in 1953 and our criteria for the grant of a patent are relatively weak compared with other countries. It is thus possible for patents to be granted for inventions that are not new or non-obvious. But the new patents bill, once passed, will mark the conclusion of a lengthy process of reform and will bring New Zealand's patent criteria in line with international best practice.

402. Improving the quality of patents should also make it more cost-effective for firms to innovate, both because the threat of litigation will be reduced and because any patents that are granted under our regime will be more defensible. Updating our patent examination criteria will also enable New Zealand to pursue work-sharing arrangements with Australia. The single economic market agenda, which seeks to streamline the trans-Tasman regulatory environment, includes a single patent application and examination process that would allow the filing of simultaneous patent applications in Australia and New Zealand. Under this initiative, IP Australia and the Intellectual Property Office of New Zealand, which share examination resources and in doing so, eliminate duplication of examination efforts. This would not only reduce the cost to examine patents but also contribute to ensuring that high-quality patents are granted in Australia and New Zealand.

403. Under the SEM agenda, work is also being undertaken to implement a single trans-Tasman registration regime for Australian and New Zealand patent attorneys. The single registration regime will facilitate greater levels of competition between Australia and New Zealand patent attorneys, which should help to decrease the cost of businesses to receive advice and assistance to

protect their innovations, without compromising the quality of services currently available to Australian and New Zealand businesses.

404. These are just a few examples of some of the initiatives under way in New Zealand, which contribute to promoting cost-effective innovation. We appreciate the chance to share our perspectives on the role of a well-functioning IP system in promoting cost-effective innovation in our economy.

12.9 Japan

405. As we stated at the TRIPS Council's last session, where many Members shared their views and experiences regarding the importance of SMEs making use of IP, our delegation views it as beneficial that we deepen our understanding on how the IP system is actually linked to business and innovation. Developing a common understanding of such "linkage" may lead to meaningful and constructive discussions at this Council.

406. In line with this agenda item on "IP and Cost Effective Innovation", we would like to recall that, at the last session, we introduced one such case. It was a case in which a traditionally round fruit was made into a square one, illustrating that innovations don't necessarily depend on huge amounts of financial backing or large capital investments. We also can see that innovations don't always result from the latest R&D activities conducted by major companies and universities.

407. In looking at how excellent ideas originating from SMEs and individuals can lead to great innovations based on utilizing IP, we would like to introduce another example. It involves a vegetable farmer who created a business opportunity that went beyond the boundaries of agriculture. He developed a three-dimensional packaging container that can be used to distribute vegetables that he grows. He then acquired a patent for it. Details about this packaging container, called "Patruss" can be found at <http://www.patruss.com>.

408. Even though this farmer developed a new packaging container that can be used to protect vegetables so that they don't get bruised or squished during their distribution, the new container can also be opened and used "as is" as a plate. By obtaining patent rights overseas, he was able to forge a business deal so that his container could be used as a packaging container in the European market. This packaging container has attracted attention in the food industry, with the farmer having received many requests to establish licensing agreements for it.

409. In developing this packaging container, the farmer, in addition to the functional elements, attached great importance to the design. The product has thus also been given good evaluations for its design, winning several design awards. This has also contributed to expanding business opportunities.

410. As indicated in the aforementioned cases, even individuals and SMEs are able to link their technology and designs created at a low cost to fantastic business opportunities by properly protecting them as IPRs. We wish to emphasize once again that the IP system is an important tool to support business and innovation, not only for developed countries but also for developing countries.

411. With a view to encouraging autonomous and self-sustained economic development, this delegation believes that it will be advantageous for each Member to adopt useful measures suited to its own strategy and initiatives. In this regard, it is useful for Members to share information about cases in which IP was successfully utilized. We welcome further discussions at the Council on these matters.

12.10 Australia

412. We welcome the opportunity to talk about cost-effective innovation. We would also like to thank New Zealand for the overview it has provided on co-operation between Australia and New Zealand in relation to patents. This is part of broader efforts by Australia and other countries to enhance international cooperation and work sharing in relation to the patent system.

413. In past Council meetings, Australia has provided examples of the positive link between IP and innovation. At this meeting, I would like to provide an example of how Australia's IP system has supported cost-effective innovation to address climate change issues.

414. This example concerns an Australian innovator who wanted to reduce the cost of measuring vehicle pollution, a common problem whether you are in Sydney, Bangkok or Dakar. Traditional methods for measuring air quality require a large storage space, filled with over a million dollars' worth of equipment operated by highly skilled staff. Was there a way to make the technology more accessible and affordable so that it could be used internationally? By conducting a survey of patent databases in Australia and overseas, the Australian innovator was able to canvas what was already available in the market, investigate the use of particular technologies and use that information to create an entirely new and innovative product. This demonstrates how registering IP can contribute to the sharing of ideas and foster innovation. The final product was an instrument that can produce air quality measurements in less than five minutes, requires only minimal operator training, is the size of a shoebox and costs only a fraction of the price of other alternative systems. This cost-effective invention is protected by a patent and has attracted interest from Australian and overseas government and private sector organizations to help reduce the costs of measuring vehicle pollution. This is a good outcome for the Australian innovator, who can recoup the cost of his investment, but also makes a valuable contribution to monitoring a significant cause of climate change.

12.11 Brazil

415. I would like to recall that, in the last two sessions of the TRIPS Council, Brazil expressed the view that a strong and balanced IP system must rely on patents with sufficient description and an adequate examination of patent applications.

416. Granting of exclusive patent rights can only be justified to correct a potential failure in the market for technology and knowledge in order to foster innovation. That correction of market failure entails costs for the society. By establishing monopolies, however provisional they might be, protection of IP can impair market efficiency in allocating factors of production and other resources. To compensate for the possible costs of misallocation, the IP system demands, in return for the granting of exclusive rights, full disclosure of the know-how of the protected invention in such a way that society as a whole might benefit from it and build upon it. This essential trade-off in the patent system has another component: that inventions accorded such rights must be, according to Article 27 of the TRIPS Agreement, novel, useful and non-obvious. However, the manner in which these three conditions were transposed into national legislation and regulations remains one of the most intractable and divisive issues in the current international patent system.

417. Against this background, the greatest challenge for public policymakers was arguably the design for a theoretically "optimal" system that would be capable of generating incentives for investment in innovation, while at the same time minimizing losses caused by the granting of IPRs. The challenge was compounded by the fact that IP was far from being the single element driving innovation. It was only one in a larger mix of different tools to promote innovation.

418. Innovation is heavily influenced by factors other than IP, such as the industrial capacity of a country, the quality of its education, and access to raw materials. Similarly, the level of protection afforded by the IP system is not the only element stimulating technology transfer to developing countries. The importance of the receiving country's capacity and skills to absorb that technology cannot be underestimated. The mere increase in the degree of IP protection and enforcement rules does not, in and of itself, result in higher levels of innovation output. Thus, IP must be placed within the overall framework of public policies for innovation.

419. Exceptions and limitations have a key role to play in calibrating national IP systems in such a way that individual goals of each country can be realistically pursued and eventually met. Other mechanisms to mitigate the potentially adverse impact of IP protection have to do with containing its effects on key areas such as public health and in the interface with competition policy. If it was true that a properly calibrated IP system was likely to play a positive and key role in promoting the technological and social development of a country, then a dysfunctional system might prove an impediment to innovation.

420. The granting of frivolous patents might do enormous harm to R&D activities and disrupt the necessary flows across innovation chains. This is especially true at present, when most meaningful inventions are the combined result of the integration of a series of small innovations increasing efficiency or productivity only incrementally. Patent protection granted to a series of incremental innovations could in fact create uncertainty and thereby prevent breakthrough inventions from being made. In recent years, the international community has witnessed innovative companies, especially IT companies, invest great amount of their resources in patent litigation. These episodes were referred to as "patent wars" by the press. In yesterday's side event, we had the opportunity to hear from the representative of an innovative NGO regarding its activities in developing countries. This organization stated that even at the level of an NGO, it is important to apply for patents as a defensive mechanism. Here we see that not only companies, but also NGOs, identify today's IP system not as an innovation incentive but as a source of litigation.

421. I would like to conclude with two questions: How cost-effective is a system that proliferates frivolous patents? How cost effective is a system that proliferates litigation?

12.12 India

422. We are again puzzled by the inclusion of an agenda item on "IP and Innovation: Cost Effective Innovation" at the behest of mainly developed countries. As in the past, we oppose the repeated inclusion of an agenda item on innovation as it is not related to any particular aspect of the TRIPS Agreement. Since the TRIPS Council was set up to oversee the implementation of the TRIPS Agreement, we would like to know from the proponents as to how this item fits into the overall terms of reference of the TRIPS Council.

423. We have carefully listened to the statements of the proponents alongside with the list of examples of cost-effective innovations in each country. But we do not understand how IP can become a catalyst or a prime mover for innovation. Are other factors such as human resources, the education system, finance, infrastructure, governance, the judicial system etc. not equally important in creating an enabling environment for innovation? Do the proponents believe that with the focus on IP and its enforcement, developing countries can become the powerhouse of innovation? We would therefore invite the proponents to spell out the clear intention behind the agenda item. Because of the repeated demand that an item on innovation be included on the agenda, we get the impression that the co-sponsors would like to convert the TRIPS Council into a talk shop on innovation success stories.

424. During the TRIPS Council meeting in November 2012, my delegation had noted that the word "innovation" appears only once in the TRIPS Agreement, i.e. in its Article 7. We had further stated that IP was not just for the sake of innovation itself, but "to the mutual advantage of producers and users of knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". Thus the objective of the TRIPS Agreement is not solely to protect the commercial interests, but is a tool for the society to achieve socio economic welfare. In this regard, we would have definitely appreciated an agenda item on the "Dissemination of technology to LDCs under Article 66.2 of the TRIPS Agreement" along with "Cost-effective innovation" since only the resource-constrained countries can understand what cost-effective innovation means. The LDCs could innovate only when they develop a sound and viable technological base. Thus the decision of the TRIPS Council to exempt the LDCs from the obligations of the TRIPS Agreement for a period of eight years is an important step towards promoting cost-effective innovation in LDCs.

425. The IP system, meant to protect innovations, is a resource-intensive system. SMEs in developing countries that develop cost-effective innovations cannot bear the cost of protecting their IP in every country. Further, if there is an infringement of its IP, we do not believe that these enterprises would have the capacity to litigate. In fact, we have ourselves experienced how difficult it was in revoking the patent on turmeric issued by the USPTO. Since only the big companies, mostly found in developed countries, have the capacity to protect IP and litigate if necessary, we believe that the IP system protects their interests and not those of the small companies mostly found in developing countries. The success of frugal innovations in developing countries is not a result of the IP system but is due to the capacity of these innovators to cut costs to meet the aspirations of the people at the bottom of the pyramid.

426. We have also seen some references being made by the proponents about cost-effective innovations in India. India would like to be at the forefront of innovation and has therefore declared the decade of 2010 as the decade of innovation. The National Innovation Council was set up to create a cross-cutting system that will provide mutually reinforcing policies, recommendations and methodologies to implement and boost innovation performance in India. The idea is to create an indigenous model of development suited to Indian needs and development. India does not object to the concept of innovation but to the attempts being made by the proponents to link it with IP.

427. The TRIPS Agreement provides enough flexibility in devising a national IP policy and can promote cost effective innovation. Thus, the patent threshold should not be so low that minor innovations are patented and create monopolies. Any attempt to disturb the delicate balance would adversely affect the cost-effective innovation so critical for the developing countries.

12.13 Ecuador

428. We support the arguments made by Brazil and India. There are two important issues that we would like to underscore. Firstly, the IP system is not the only or even the main reason for innovation. It is an element. Secondly, the IP system does not necessarily guarantee technology transfer because it provides for the possibility of export monopolies, which may facilitate technology and knowledge transfer, but in practice does not seem to do that.

429. Many small innovations that have been mentioned in the global disputes at present between transnational companies are extremely important. That has resulted in a whole range of cases that many of us are aware of. As India has said, I wonder to what extent SMEs in developing countries can cover the costs of litigation and of enforcing their IPRs.

AGENDA ITEM 14: OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS**14.1 India**

430. The issue of observer status for the CBD is an issue which my delegation has raised over the last several TRIPS Council meetings. We also note with disappointment the lack of engagement by a Member and their unwillingness to elaborate any concerns they have on the issue. In this regard we also support the request made by the South Centre for observer status.

14.2 Brazil

431. I would like to associate my delegation with the statement made by the delegation of India. Brazil is also a strong supporter of the participation of observers in the work of the Council and its debates. My delegation is of the view that the work of the CBD Secretariat would actively support the discussions in this Council. Similarly, we would welcome the participation of the South Centre as an IGO with more than 50 members that are also Members of the WTO.

14.3 Ecuador

432. Ecuador wishes to express its support for the statements by Brazil and India. My delegation believes that granting observer status to the CBD would be extremely useful for the work and discussions within this Council, in particular on the three standing items on the agenda concerning the relationship between TRIPS and the CBD. Furthermore, we also wish to express our support for the South Centre being granted observer status. Ecuador is a member of this IGO and, as stated previously, its members include several Members of the WTO.

14.4 Indonesia

433. Indonesia would like to associate itself with the statements made by the delegations of India, Brazil, and Ecuador regarding granting observer status to the South Centre. In addition, we would like to reiterate our support to extend an invitation to the CBD Secretariat as an observer to share their insights as necessary and appropriate about the issue of the relationship between TRIPS and the CBD. Finally, we believe that the participation of the CBD Secretariat in this Council will not impair but rather deepen our discussion and broaden our perspective on this issue.

14.5 Cuba

434. My delegation would like to associate itself with the statements made by the previous speakers. The South Centre would provide a valuable contribution to our discussions in the Council, and hence we believe it is important that it be granted observer status.

14.6 Nepal

435. I would like to support the South Centre's application for observer status. We are all aware that the South Centre is an important IGO working in the areas of trade, development and other related issues. Its participation in the Council's meetings as an observer would be most helpful for us all.

14.7 Zimbabwe

436. Like others who have spoken before us, my delegation supports the South Centre being granted observer status.

14.8 United States

437. My delegation is not in a position to support the requests that we have just heard with respect to the South Centre, the CBD Secretariat or other IGOs that have not otherwise been granted ad hoc or permanent observer status.

14.9 Saudi Arabia, Kingdom of

438. We thank the Membership for granting observer status on an ad hoc basis to the IGC and look forward to seeing all the applicants being granted ad hoc status.

14.10 Dominican Republic

439. The Dominican Republic, like previous speakers, formally supports the granting of observer status to the South Centre.

AGENDA ITEM 15: OTHER BUSINESS**15.2 Eleventh Annual Review under Paragraph 2 of the Decision on the "Implementation of Article 66.2 of the TRIPS Agreement"****15.1 Secretariat**

440. You will recall that, at the latest annual workshop to examine the Article 66.2 submissions in an informal setting that was held immediately prior to the Council meeting in November 2012, we discussed the question of improved forms of data management in this area to achieve three objectives: first, to make it more straightforward for developed countries to report Article 66.2-related information; second, to make it more efficient for the Secretariat to process and disseminate this information; and finally and perhaps most importantly, to make the information more easily accessible for those wishing to use it. Following the discussion, the Secretariat has been working on a very tentative prototype of what a data management tool might look like in the form of a strictly optional reporting tool for those countries reporting under this item. This is not intended in any way to pre-empt the discussion, as put forward by the LDC Group concerning a specific format, but rather learns from the wealth of documents that we have in this area, to try to find a practical way of capturing the same data that has been reported in the past but in a more usable form, better disposed to effective processing and dissemination.

441. At the conclusion of this session of the Council, we would like to invite any interested delegations to stay behind to have a look at a presentation of a prototype of this tool, underscoring once again that this is a tentative working prototype and it is intended to be used to consult with interested Members to develop it and refine so that it could be then put into operation as a practical reporting tool.

442. As in previous years, we are indeed planning another annual workshop immediately prior to the next formal session of the Council to look at Article 66.2 submissions and for interested delegations to discuss the content of those submissions and any necessary follow-up or clarification that is needed. That again would follow the same format that has been broadly welcomed in previous years. Further details will be circulated closer to the date of the next Council session.

15.2 Nepal (for the LDC Group)

443. Technology and innovation undoubtedly play an increasingly important role in the global economy and have become a key contributor to meeting urgent human needs for improved health, food security and other basics of life. The key role of technology in development is undisputed. The critical question is how to bridge the technological gap between LDCs and the rest of the world and how to help the countries at the bottom catch up. Unless the technology gap is narrowed, LDCs risk becoming increasingly more marginalized in the global economy.

444. TRIPS Article 66.2 is a special provision, which requires WTO developed country Members to provide incentives to induce technology transfer to LDC Members, in order to enable the latter "to create a sound and viable technological base". Over the years, we have observed that the impact of Article 66.2 has been limited and that the reports submitted on the implementation of the obligations have not been so satisfactory. Prompted by this fact, the LDCs have proposed an improved reporting format contained in document IP/C/W/561. The March 2013 Council session pointed out the need of consultations on this matter. However, since then, we have remained more occupied with the more urgent issue of the transitional period. We are hopeful that consultations will advance in future and an agreement will be reached on the adoption of the proposed format. In the meantime, we also look forward to further understanding of the reporting tool the Secretariat is working on at present. We also look forward to the annual workshop later this year.

15.4 Proposal for an EU Directive on Tobacco Products

15.3 Nicaragua

445. On previous occasions, the Government of Nicaragua has expressed its concern about recent developments relating to the European Union's proposal for a directive on the approximation of the laws, regulations and administrative provisions concerning the manufacture, presentation and sale of tobacco and related products, which was notified to the Committee on Technical Barriers to Trade (TBT) in document G/TBT/N/EU/88.

446. Today, my delegation wishes once again to express its concern regarding recent events relating to the draft report, dated 10 April 2013, by the rapporteur of the European Parliament Committee on Environment, Public Health and Food Safety (ENVI), Ms Linda McAvan, which suggests amendments aimed at strengthening what, in Nicaragua's opinion, is the trade-restrictive nature of many of the requirements contained in the aforementioned proposal. In particular, the draft report proposes the adoption of plain packaging for cigarettes and roll-your-own tobacco, as well as authorization requirements for new products and additional restrictions on the distribution and sale of tobacco products.

447. In this respect, attention is drawn to Ireland's recent official announcement indicating that it is to adopt plain packaging for tobacco products.

448. Nicaragua believes that the provisions of the new draft directive are more trade-restrictive than necessary and has already submitted its comments concerning the necessary evidence required to support the existence of such trade barriers and the availability of less trade-restrictive alternatives.

449. Having examined the provisions of the proposed directive, Nicaragua considers them inconsistent with the European Union's WTO obligations under the TRIPS Agreement and the TBT Agreement.

450. The proposed tobacco directive establishes a series of trade-restrictive measures, including:

- Labelling requirements (large health warnings with both words and pictures, covering 75% of the front and back of the packets, together with a total ban on the use of descriptors or information relating to the product);
- Packaging requirements (detailed and prescriptive requirements concerning the shape, size, material, opening mechanisms, and minimum content of packets); and
- Ban on entire categories of products (such as mentholated products and slim cigarettes).

451. The proposed tobacco directive unjustifiably prevents the use of trademarks, thereby violating Article 20 of the TRIPS Agreement; it sets forth labelling requirements for health warnings (Articles 8 and 9), restrictions on the use of information relating to the product, including trademarks (Article 12), and additional measures regarding packet standardization (Article 13).

452. The additional amendments suggested in the draft ENVI report, which would further complicate access to the EU market for tobacco products in general, also violate the European Union's obligations under the provisions of the TBT Agreement and some provisions of the GATT 1994.

453. It is not Nicaragua's intention to question the sovereign right of countries to establish legitimate policies aimed at protecting public health. On the contrary, Nicaragua shares this objective and does not question the right of the European Union or other countries to protect human health, and promotes global efforts to reduce tobacco use.

454. However, Nicaragua believes that the European directive should be based on credible scientific evidence and be consistent with WTO provisions and the commitments undertaken in other international bodies and that consideration should be given to the negative impact that such

measures will have on the trade flow of the products concerned, in particular for countries with small economies such as Nicaragua.

455. For Nicaragua, the tobacco sector is a key element of our poverty reduction strategy, which is one of the main objectives of Nicaraguan government policy as it generates some 35,000 direct jobs and 45,000 indirect jobs, and accounts for exports worth in the region of US\$185 million. These figures show the substantial trade and systemic interest that my country has in this issue. We will follow with great interest developments with regard to this directive, hoping that a solution will be found consistent with the rules established by the relevant international bodies.

456. The Government of Nicaragua welcomes this opportunity to express its concerns on this issue, and, as a cigar-producing and exporting country, we hope that the European Parliament will take these concerns into account.

15.4 Dominican Republic

I. Introduction

457. On 18 January 2013, the European Union (EU) notified the Committee on Technical Barriers to Trade (TBT) that the European Commission had published its proposal for a new *Tobacco Products Directive* (proposed Directive).⁶¹ We know that the Directive is being examined by the European Parliament (EP), which has appointed the Committee on the Environment, Public Health and Food Safety (ENVI Committee) as the main legislative committee. We take note of a recent draft report submitted on 10 April by the Rapporteur of that Committee, Ms Linda McAvan (Draft EP Report).⁶²

458. Since the Dominican Republic shares the European Union's objective of protecting human health, we continue to be deeply concerned about the adoption of the proposed Directive. The WTO Agreements provide ample policy space to pursue this legitimate objective, even if the resulting measures restrict intellectual property rights or international trade. However, any such measure must be firmly backed by credible and solid evidence that it contributes effectively to achieving the legitimate policy objective. Only then can the measures be said to favour the legitimate interests in question, and only then will they be in keeping with the WTO's overall objective of providing security and predictability to promote development and trade.

459. A number of requirements set forth in the proposed Directive, including the recent EP Draft Report, are in breach of that rule. The requirements are not presented as being based on any evidence, and if the European Union were to adopt them, far from favouring the health objectives, they would undermine them. Furthermore, the requirements set forth in the proposed Directive would appear to be inconsistent with the European Union's obligations under the TRIPS Agreement, the TBT Agreement, and the GATT 1994.

460. We recall that the Dominican Republic already expressed its concern regarding the consistency of the proposed Directive with the TBT Agreement at the TBT Committee meeting of 6 March 2013.⁶³ Today, we would like to express our serious concern regarding the proposed Directive in relation to the European Union's obligations under the TRIPS Agreement.

II. Description and impact of the proposed tobacco products directive

461. The proposed Directive imposes a series of requirements concerning the packaging of tobacco products, which individually and collectively could undermine the TRIPS Agreement's valuable role of trademarks protection. A number of these requirements unjustifiably encumber the use of trademarks and will have wide-ranging and damaging effects on international trade:

⁶¹ G/TBT/N/EU/88.

⁶² European Parliament, Committee on the Environment, Public Health and Food Safety, "Draft Report on the proposal for a directive of the European parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation, and sale of tobacco and related products" (PE508.085, 10 April 2013).

⁶³ G/TBT/M/59.

- Plain packaging: The proposed Directive, as notified to the TBT Committee, does not explicitly require the use of plain packaging for tobacco products. However, it does contain a provision that enables EU member States to introduce additional regulations on tobacco products including, essentially, the adoption of plain packaging for tobacco products.⁶⁴ At the meeting of the TBT Committee last March, we expressed our concern that the Explanatory Memorandum accompanying the Directive could be seen as a tacit encouragement of plain packaging,⁶⁵ and that various EU member States appeared to be heading in that direction. Indeed, Ireland immediately made an official announcement that it was set to become the second country in the world, after Australia, to introduce plain pack cigarettes.⁶⁶ We also note that the draft EP report proposes the inclusion of an explicit plain packaging requirement in the Directive.⁶⁷
- Ban on descriptive elements: As we pointed out to the TBT Committee, the proposed Directive bans any element or feature on the packaging that suggests that a particular tobacco product is less harmful than others, even if such statements are true.⁶⁸ The Directive also prohibits the use of descriptors that refer to products as "natural" or "organic" - once again, even if such descriptors are factually correct.⁶⁹ Similarly, the proposed Directive bans any description of the flavour and prohibits tobacco producers from using any descriptors that convey information on flavour or taste⁷⁰ - yet again, even if such information is correct, and regardless of the fact that it is perfectly legal for many tobacco products to contain such flavours and have a particular taste.⁷¹
- Ban on "deceptive packaging elements": The proposed Directive, as notified to the TBT Committee, prohibits the use of "deceptive packaging elements", which supposedly include "misleading" colours.⁷² The European Commission's impact assessment that accompanies the proposed Directive envisages the use of certain colours on packaging, such as white and gold, which suggests a questionably broad interpretation of the term "deceptive".⁷³
- Graphic health warnings: Cigarettes and roll-your-own tobacco must carry graphic health warnings that cover 75% of both the front and back surface of the packet and appear on the top edge of the packet, and which measure not less than 55 mm in width and 64 mm in height.⁷⁴

462. This series of packaging requirements would radically alter the way in which tobacco products are packaged, sold and consumed in the European Union. The packaging restrictions eliminate any distinction between tobacco products that compete legally on the market. Moreover, by eliminating from the packaging the tobacco product information for the consumer, these requirements could undermine the health objectives pursued by the European Union. If adopted, these packaging requirements would set a dangerous precedent that could pose a threat for trademark protection of other products considered to be harmful to health.

463. The requirements set forth in the proposed Directive could have a serious impact on trade for developing countries such as the Dominican Republic. There can be no justification for such

⁶⁴ Article 24.2 of the proposed Directive.

⁶⁵ Paragraph 3.2 of the Explanatory Memorandum, available at <http://ec.europa.eu/health/tobacco/products/revision>

⁶⁶ "Ireland set to become second country in the world to introduce plain pack cigarettes", official press release, available at <http://www.dohc.ie/press/releases/2013/20130528.html>.

⁶⁷ European Parliament, Committee on the Environment, Public Health and Food Safety, "Draft Report on the proposal for a directive of the European Parliament and of the Council on the approximation of the laws regulations and administrative provisions of the Member states concerning the manufacture, presentation and sale of tobacco and related products" (PE508.085, 10 April 2013), pages 26-27.

⁶⁸ Article 12 of the proposed Directive.

⁶⁹ Article 12 of the proposed Directive.

⁷⁰ Article 12 of the proposed Directive.

⁷¹ Article 12 of the proposed Directive.

⁷² Article 12 of the proposed Directive.

⁷³ Impact Assessment conducted by the European Commission, pages 30-31, available at <http://ec.europa.eu/health/tobacco/products/revision>.

⁷⁴ Article 7- 9 of the TPD. The TPD also requires warnings covering 50% of the sides of the package measuring at least 20 mm in width and 43 mm in height. Article 8.3 of the proposed Directive.

an impact, because these measures are not based on credible and reliable evidence and could be replaced by less restrictive alternatives.

III. Inconsistency with the TRIPS Agreement

464. The Dominican Republic is concerned that the proposed Directive may unjustifiably encumber the use of trademarks, thereby violating Article 20 of the TRIPS Agreement.

465. Article 20 of the TRIPS Agreement states that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings."

466. Under the proposed Directive, the "use" of a trademark relating to tobacco products would be encumbered by "special requirements". The packaging restrictions require the use of trademarks "in a special form" and in a manner "that is detrimental to the trademark's capability to distinguish the goods of one undertaking from those of other undertakings".

467. Furthermore, these encumbrances on the use of trademarks are unjustified. The European Union has been incapable of providing credible and solid evidence that these packaging requirements would truly contribute to the public health objective that it pursues. Nor has it been able to consider whether it might adopt less restrictive measures as regards the use of trademarks.

468. For example, the proposed ban on descriptive elements⁷⁵ is contrary to Article 20 of the TRIPS Agreement, since those elements form part of a trademark. The proposed Directive seeks to prohibit, inter alia, any element of the packaging of tobacco that could suggest that a particular tobacco product is less harmful than others, even if that statement is true. We fail to see how eliminating precise and non-misleading information can benefit public health, particularly when the descriptor could convey information that would encourage consumers to switch to less harmful products. We have similar concerns in relation to Article 20 with regard to the possible prohibition of colours such as white and gold. The Dominican Republic is not aware of any scientific evidence in support of the EU's argument that such colours are "deceptive" to consumers in the European Union.⁷⁶

469. As regards the fact that the European Union or some of its member States, such as Ireland, are going beyond the notified Directive and are requiring plain packaging⁷⁷, the Dominican Republic reiterates the serious concern it has expressed on previous occasions.⁷⁸ The Dominican Republic firmly believes that plain packaging is inconsistent with Article 20 and other provisions of the TRIPS Agreement. We also recall that the Australian plain packaging measures are currently being widely debated at the WTO.⁷⁹

470. For all of the above reasons, the Dominican Republic calls upon the European Union to review its proposed Directive in accordance with its obligations under the TRIPS Agreement and other WTO Agreements.

15.5 Honduras

471. We are taking the floor briefly in view of the fact that we are under "Other Business". However, we would like to take this opportunity to express our concern at the proposed tobacco directive, which was notified by the European Union and circulated to Members in document G/TBT/N/EU/88.

472. We share the concerns expressed today by other delegations. We believe that these measures go beyond what is necessary in seeking a legitimate objective, which is the protection of human health. And thus, these measures become a technical barrier to trade and also jeopardize

⁷⁵ Article 12 of the proposed Directive.

⁷⁶ Impact assessment conducted by the European Commission, pages 30-31.

⁷⁷ Article 24.2 of the proposed Directive.

⁷⁸ IP/C/M/66; IP/C/W/565; G/TBT/W/339; G/TBT/W/346.

⁷⁹ WT/DS434; WT/DS435; WT/DS441; WT/DS458.

IPRs, particularly those pertaining to trademarks and geographical indications, and appellations of origin, as there is no proof upon which such a measure could be based. This assists in promoting illicit trade. For these reasons, my delegation will be closely following developments in this matter.

15.6 Cuba

473. Cuba endorses the detailed arguments made by delegations that preceded us and thanks the delegations of Nicaragua, the Dominican Republic and Honduras for their highly relevant statements on this matter.

474. Cuba agrees that the new EU Directive on Tobacco Products is a measure inconsistent with the IP provisions laid down in the TRIPS Agreement and the provisions of other important WTO legal texts such as the Agreement on Technical Barriers to Trade.

475. We have emphasized on more than one occasion that we shall always recognize the legitimate right of governments to protect their populations' health, which is one of Cuba's priorities. We have the privilege of being able to state that, despite being a developing country, Cuba has achieved tangible results in the health sphere that show the health of Cuban citizens ranks high among our Government's priorities.

476. To quote but one example, at the end of 2012 and for the fifth consecutive year, Cuba recorded an infant mortality rate of 4.6%, i.e. less than five deaths for every thousand live births. This indicator is even lower than the infant mortality rate in Canada, which is 5%, and that of the United States, which stands at 7%. Cuba's success in the health field is unquestionably based on the political will of the Cuban Government, which has established an accessible, universal and free National Health System for the entire Cuban population.

477. In full responsibility and awareness of the importance of protecting health, we therefore express renewed concern about measures such as those recently adopted by some Members, which, under the guise of protecting health, give rise to new trade restrictions and, in particular, breach the international rules governing intellectual property.

478. These measures will have an impact on our economies, as well as adverse consequences for our populations, because of the effects they will have on trade in tobacco-producing and exporting countries with limited resources, such as Cuba.

479. This type of measure will not only destroy the value of trademarks and appellations of origin built up over a great many years but will also diminish competitive opportunities for imported products while opening the door to illicit trade in tobacco products.

480. Measures such as those which the European Union intends to adopt could constitute the basis for its member States to adopt national legislation in breach of the right to use trademarks and inconsistent with, *inter alia*, Article 20 of the TRIPS Agreement, Article 2.2 of the TBT Agreement, and Article 10bis on unfair competition of the Paris Convention.

481. In view of the foregoing, we urge the European Union to take our concerns into account and to envisage truly effective health promotion measures, based on well-established scientific evidence showing the practicability of their adoption, and consistent with the existing WTO legal provisions.

15.7 European Union

482. The European Union thanks the previous delegations for their detailed and lengthy contributions to this discussion under "Other business". The proposal was prepared by the European Commission under its power of initiative and it contains a number of measures which are non-discriminatory and proportionate to the legitimate health objectives pursued. This proposal is fully consistent with the European Union's international commitments, including its obligations under the WTO. In the legislative process, the proposal was then passed to the Council in the European Parliament, where it currently has more than 1,000 amendments proposed. I am not in a position to comment on this process, and I do not think it would be a productive use of our time.

But certainly we take note of the legitimate concerns that are expressed and will convey them to Brussels.

15.8 Zimbabwe

483. Our delegation appreciates the efforts by the European Union to protect the health of consumers, however we would like to share concerns expressed by Nicaragua, the Dominican Republic and others who have spoken before us regarding the directive on tobacco products. As we have stated before, these measures are inconsistent with the TRIPS and TBT Agreements and therefore will restrict trade.

484. Zimbabwe is one of the largest producers of tobacco in Africa. There are more than 90,000 registered tobacco growers, and 82% are small-scale farmers. Over 200,000 families and their dependants rely on tobacco farming as a source of livelihood. Tobacco contributes significantly to GDP and is a major export earner. The European Union's measures will therefore impact negatively on employment, export performance and poverty alleviation efforts.

485. There is no scientific evidence that the measures will influence the behaviour of consumers or reduce smoking amongst youths. However, it is a known fact that the measures will result in higher poverty levels, which will compound health challenges that developing countries face.

486. In light of the restrictive effect of the measures on trade and the negative impact on tobacco-producing developing countries' economies, we request the European Union to consider our concerns.

15.9 Australia

487. Australia commends the European Union and its members for the tobacco-control measures it has implemented to date, including its revised Tobacco Products Directive proposal. In addition to a range of measures, including mandating increased graphic health warnings, we understand that under the proposal, EU member States would be allowed to implement plain packaging of tobacco products as far as compatible with the Directive and EU law. In particular Australia welcomes the announcement by the current EU president, Ireland, that it will be taking the lead by introducing legislation to mandate plain packaging of tobacco products.

488. The proposed EU Directive is a legitimate measure designed to achieve a fundamental objective – the protection of human health, in particular, the protection of young people from smoking initiation and uptake.

15.10 New Zealand

489. New Zealand would like to register its support to the European Union for its moves to consider introducing controls on the packaging of tobacco products. The negative effects of smoking cannot be overstated. In New Zealand, smoking is the single largest cause of preventable death and disease.

490. It is within a Member's rights to implement necessary legitimate measures in order to protect the health of its citizens. As agreed by all our Ministers in the 2001 Declaration on TRIPS and Public Health, "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health".

491. As we have previously advised this Council, New Zealand is determined to continue tackling this tobacco epidemic, and takes the negative impact on public health of tobacco consumption very seriously. There is an extensive and compelling body of international research and scientific studies which establishes that plain packaging, as part of a comprehensive tobacco control programme, will contribute to our objective of improving public health.
