1. The Group adopted the agenda proposed in GATT/AIR/3241.

2. The Chairman referred to his informal note of 27 September 1991, in which he had set out the proposed organisation of the meeting. The Group also had before it a new proposal, put to the Group by the delegation of Colombia on behalf of four Andean Pact countries in document MTN.GNG/TRIPS/W/2. The Chairman emphasised the importance of the meeting in accordance with the general scenario for the completion of the Round and urged delegations to make a serious attempt to negotiate agreed language on the outstanding issues, to be incorporated in a revision of document MTN.TNC/W/35/Rev.1.

3. The Group met in a formal session on the afternoon of 16 October and the afternoon of 22 October leaving, as at previous meetings, the period in-between for informal consultations.

4. Introducing the proposal from four Andean Pact countries, the representative of Peru said that the delegations on whose behalf he spoke believed that an appropriate balance between themes in the Uruguay Round could not be attained without an appropriate internal balance in an agreement on intellectual property. The present document had been submitted to indicate necessary elements for balancing such an agreement, mainly in the area of standards (Part II). Few of these elements were new to the Group, many of them being options already contained in MTN.TNC/W/35/Rev.1. Only in a few instances had alternative wording been proposed. He, therefore, suggested that, instead of discussing the proposal separately, it should be taken into consideration during the informal discussions per relevant provision. Finally, he said that two changes should be made to the document: as regards Article 34(n), a proposal to delete the square bracketed part of the second sentence should be added and the proposed text on Article 40 should read "No PARTY shall be obliged to consider unlawful the performance of any act in which an integrated circuit incorporating an unlawfully reproduced layout design is used, where ...".

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5. Responding to a question, the representative of Peru said that in respect of the Articles of the draft TRIPS agreement not explicitly referred to in the proposal of the Andean Pact countries but still involving controversial issues, the Andean position was that the options should be maintained in the text as reflected in MTN.TNC/W/35/Rev.1. The position of the Andean countries on those issues would be determined by progress in the negotiations.

6. The Chairman noted that participants had not had enough time to study the Andean countries' proposal, and suggested that it be taken into account in the informal consultations he intended to hold.

7. When the Group reconvened on 22 October, the Chairman reported to the Group on the informal consultations he had held. He said that these consultations had focused on the outstanding issues in the standards area, considering each of the Sections in Part II of the draft agreement on TRIPS, contained in MTN.TNC/W/35/Rev.1. The areas that had taken the most time were those of Copyright and Related Rights, Patents and Geographical Indications. Issues in Part VI and in Article 73 of the draft agreement relating to the timing of the application of the provisions of an agreement on TRIPS in different PARTIES, had also been considered in some detail. There had also been a discussion of Part I of the draft agreement concerning Basic Principles and General Provisions, and of Part III concerning Enforcement. He said that, although the consultations had been useful in some ways, they had not served to resolve important outstanding differences and that it was clear that participants were not yet ready to negotiate in earnest. Nevertheless, the detailed review of the outstanding issues that had been undertaken had clarified what were the major concerns of participants that remained and, consequently, the problems that had to be solved. This would facilitate the final negotiating process. The discussion had, however, not established a basis for preparing a revision of the draft texts on TRIPS.

8. The Chairman then turned to the question of the further steps in the negotiations. He said that it was his intention to engage in consultations with a view to ensuring that the next meeting of the Group would be its key negotiating session. He, therefore, asked the Group to remain on call and ready to meet at short notice. He would not, however, call a meeting until he was confident that participants were ready to start negotiations in earnest.

9. A participant said that his delegation was ready to continue the negotiations whenever the Chairman had clear indications that fruitful negotiations could take place. He felt it necessary, now that a decisive stage of the negotiations had been reached, to put on record his delegation's views about certain points included in the present draft agreement on TRIPS as contained in document MTN.TNC/W/35/Rev.1, which in particular, posed problems to his delegation. In respect of Article 2, his delegation maintained that the TRIPS agreement should relate to the present international conventions on intellectual property rights without specifying the dates of those conventions. As regards Article 4(d), its view was that the agreement should contain an m.f.n clause that would not allow derogations, lest these might deprive the clause of its value. The
exhaustion clause as it appeared in Article 6 was fundamental to a balanced agreement, in particular between rights and obligations of the patent owner, as well as to the benefits to societies in having access to goods in international markets under the best possible terms. Such a clause was also important for securing an unrestricted flow of international trade. Therefore, the Article should be left unchanged. Turning to the Section on Copyright, he said that it was his delegation’s understanding that the agreement would not depart from the concept of moral rights as in and applied under the Berne Convention to the subject matter covered by that Convention. Only in relation to the protection of computer programs and related subject matter, such as artificial intelligence and compilations of data, could his delegation envisage an exception to the protection of moral rights. On Article 10, he said that computer programs should be protected as works consistent with the regime of copyrights under the Berne Convention. In view of the special technological nature of computer programs, exceptions, such as to the rights of adaptation, reproduction and other conditions, should clearly be permitted under national legislation.

For the same reason, PARTIES should have the right under Article 12 to apply the flexibility available in the Berne Convention to determine the term of protection for computer programs. As regards the Section on Trademarks, he said that the proposed definition of a trademark in Article 17 was vague, and allowed for an interpretation that protection be extended to such signs as sounds, smells and tastes which, due to their non-perennial characteristics, should not be protected as trademarks. His delegation preferred that Article 17 encompassed only visually perceptible signs. With regard to the use of a trademark by a third party other than the owner, Article 21, paragraph 2 should allow PARTIES to require the fulfilment of certain formalities. In respect of Article 22, his delegation was of the opinion that PARTIES should have the right to require use of a trademark with another trademark, especially in order to protect consumers against confusion. With respect to the Section on Patents, he said that one of the most important Articles of the agreement was Article 30. His delegation continued to be of the view that paragraphs 2 and 3 should allow developing countries to apply with flexibility any obligation in respect of patentability, in order to balance their needs of technological and industrial development with their social requirements. As regards Article 31, it had been his delegation’s view that the only exclusive right enjoyed by a patent owner was that of making the patented product in the territory of the PARTY concerned. However, in a spirit of flexibility, it had envisaged the possibility of accepting additional exclusive rights under this Article, provided that the agreement would clearly permit PARTIES to define their respective exhaustion regimes. This was essential for a balance between rights and obligations under the agreement. In this respect, it was also of fundamental importance, in order to achieve a balanced agreement, that Article 32, paragraph 3 would require patent owners to work their patents in the territory of the PARTY concerned and, when licensing them, to refrain from engaging in abusive or anti-competitive practices. In the same spirit, his delegation firmly believed that use by the government of the subject matter of a patent without the authorisation of the right holder should be allowed in the context of the second sentence of sub-paragraph (b) of Article 34. It also believed, as explained in the context of Article 32, paragraph 3, that local manufacturing was essential in order to comply with the working
requirement, and that failure to comply with that requirement should entail the possibility of granting non-voluntary licences which could not be eluded by importation. His delegation continued to have substantial difficulties with the concept of the reversal of the burden of proof of Article 37, in particular as it conflicted with the general civil procedures of his country's law, which nevertheless provided for even stronger and safer measures to achieve the objective set forth in Article 37. In respect of the Section on Layout-Designs of Integrated Circuits, he said that Articles 39 and 40 should not extend the protection of layout-designs of integrated circuits to articles incorporating them, since this might give rise to trade distortions, produce uncertainties in the market, and increase the exclusive rights of the right holder beyond the protected subject matter. If accepted, this would have dangerous implications for the system of protection of intellectual property in general. With respect to the Section on Undisclosed Information, he said that the protection sought for the so-called trade secrets, or undisclosed information, under the TRIPS agreement and thereby equating such protection to that of an intellectual property right, continued to present considerable problems to his delegation. The inclusion of a Section on this subject would be highly detrimental, in particular to the patent system and the requirements of disclosure. Article 42, paragraph 3A, for instance, implied the recognition of a proprietary right without limitations and obligations of any sort, that would allow persons in the possession of such undisclosed information to be totally free from the normal conditions that governed intellectual property rights. Likewise, paragraph 4A of the same Article went far beyond the limits of reasonable protection which should actually be afforded under national legislation to test data submitted for marketing approval of pharmaceuticals and agro-chemicals. As regards Article 43, he said that the balance of this agreement also hinged upon the inclusion of provisions for the control of abusive or anti-competitive practices in contractual licences, in a manner that permitted participants not to be challenged in any dispute settlement procedure when applying conditions to control such practices. Turning to Part III on Enforcement, he said that since the inception of the negotiations his delegation had consistently made clear the difficulties this Part entailed in respect of his country's general civil and criminal procedures of law. The level of obligations many participants sought with regard to enforcement could only be envisaged in so far as they would not impose changes conflicting with his country's legal system, nor additional burdens on its administrative capacity to implement those obligations. Certain provisions or concepts in the agreement, such as those related to the right of information and "remedies which constitute a deterrent" were foreign to his country's legal system and traditions. But in a co-operative spirit, his delegation had accepted to discuss such issues, provided that the corresponding draft would permit those countries which had a statutory law system of Roman tradition to deal harmoniously with the relevant provisions and concepts. With regard to Part VI on Transitional Arrangements, he said that the level of commitment that participants would be required to undertake to implement the agreement would necessarily constitute the yardstick for the definition of the transitional periods. This definition would be facilitated if, for instance, participants could agree to a general rule that the agreement would only apply to new subject
matter that would become protectable under its provisions. In any event, his delegation had considerable difficulty in envisaging the non-application of the agreement for those countries benefiting from a transitional period, in that it would be tantamount to allowing the imposition of unilateral measures against them during that period. Finally, he said that considerations on Article 73 were dependent upon the content of Part II on standards and of Part VI on transitional arrangements. His delegation favoured, as a general rule, limitation of the implementation of the agreement to any new subject matter only, with the possibility for exceptions in very special cases, such as geographical indications and copyrights, where consistent with the Berne Convention.

10. A participant said that apparently the climate was not yet sufficiently ripe to enable the Group to reach a consensus, and that it was not yet possible to prepare a TRIPS section for inclusion in a revision of document MTN.TNC/W/35/Rev.1. Substantive negotiations were still necessary in, amongst other items, the areas of Copyright, Patents, Trademarks, Geographical Indications, Computer Programs, Most-Favoured Nation Treatment and Transitional Arrangements. His delegation continued to express its willingness to engage in such negotiations, aimed at concrete results which would satisfy all participants in the TRIPS negotiations and would strike an adequate balance between the rights and obligations taking into account the particular situation of developing countries in the area of intellectual property, and which could be reflected in a revised version of MTN.TNC/W/35/Rev.1.

11. In addition to endorsing the view that it had not been possible to make progress in the informal consultations, a participant said that also some issues had been re-opened in a direction which would make it even more difficult for some participants to agree on a TRIPS text. He said that his delegation had always stressed the need to strike a global balance in the Round. This should be an equitable and fair balance, not only between the costs and benefits for each PARTY in the Round as a whole, but also a good balance within each Group. In order to attain such a balance in the area of TRIPS, account should also be taken of the need for flexibility for those countries which, according to the terms of the TRIPS agreement, would have to make substantial changes in their legislation in the area of intellectual property protection as well as changes involving profound economic and social implications, including unemployment perspectives. In the case of developing countries, such changes could be quite substantial, leading to a negative burden on their economic and technological development process. His delegation, therefore, believed that the TRIPS agreement, in order to be balanced and in order for developing countries to be able to accept such an agreement, should contain the necessary safeguards or flexibility so as not to hamper the economic, social and technological development of developing countries. In other areas, such as Textiles and Agriculture, where some developed countries were meant to undertake structural reforms, the negotiations had been based on an attempt to set up transitional mechanisms, safeguards and standards which these countries had justified as a means of minimising the economic and social consequences involved in such reforms. Unfortunately, a similar flexibility from these countries had not been shown towards developing countries in the area of TRIPS.
12. A participant said that, because things had not changed in a positive manner since the meeting of this Group on 27 and 28 June 1991, he would simply like to refer to the intervention of his delegation reflected in paragraph 3 of the record of that meeting, contained in document MTN.GNG/TRIPS/1.

13. A participant said that his delegation would like to put on record its position on the requirements in the draft TRIPS agreement concerning patents, notably those of Article 30, as well as on some aspects of that draft that were of special concern to it, in particular the issues of bio-diversity and biotechnology. Bio-diversity provided humanity with new and useful products from food to genes that protect crops. Biological diversity was mostly located in developing countries but developed countries had free access to these genes and collected and used them freely at little or no extra cost. At the same time, transnational corporations wanted patent rights for plant varieties developed by using genes from developing countries as well as laboratory-created substitute products of biotechnology. His delegation would not favour a TRIPS regime obliging PARTIES to provide patent protection in respect of life forms but, if any TRIPS regime were to contain any such obligation, it should not prevent PARTIES from imposing restrictions, such as those which were being discussed in the Working Group on Export of Domestically Prohibited Goods and other Hazardous Substances, on the actual use of products covered by patents. There should also be an obligation to provide adequate information and precautions in patent applications in respect of any environmental and health effects. Furthermore, regulations regarding the use of products covered by a patent should be made available in such applications. Finally, he said that his delegation did not see the need to include geographical indications in the TRIPS agreement. But if this were to be unavoidable, then the protection provided in the relevant section of the agreement should extend to genes and plant varieties as well as tropical beverages, mineral water and food items, and not be limited to wines.

14. The Group took note of these statements, and of the Chairman's remarks as recorded in paragraphs 6-8 above.