The following communication, dated 10 October 1991, has been received from the Permanent Mission of Colombia, on behalf of the countries of the Cartagena Agreement (Andean Group), contracting parties to the GATT (Bolivia, Colombia, Peru and Venezuela), with the request that it be circulated to the Negotiating Group.

In this text the countries of the Cartagena Agreement (Andean Group) which are GATT contracting parties (Bolivia, Colombia, Peru and Venezuela) set out their position on certain aspects of the draft Agreement on TRIPS (the Draft) contained in document MTN.TNC/W/35/Rev.1.

A. General considerations

1. The Andean Group countries consider it necessary to maintain the global nature of the process of multilateral trade negotiations of the Uruguay Round. They agree that a final determination on the subject of intellectual property must respond to the evaluation of the results of the Uruguay Round conducted in accordance with the mandate established in the Punta del Este Declaration.

2. They consider it desirable to have a framework of rules accepted by the broadest possible number of countries to govern intellectual property aspects. They therefore express their readiness to participate constructively in the negotiating process in order to contribute to the establishment of a new multilateral régime on intellectual property.

3. They believe that it is desirable to grant greater protection to intellectual property rights in a duly balanced arrangement whereby those rights may be progressively strengthened in a framework that at the same time ensures the economic and technological development of the above-mentioned countries, as agreed in the Punta del Este Declaration.

4. They stress that as a necessary condition for the final agreement to be balanced and hence acceptable to all, it must clearly include the obligation of parties to refrain from adopting unilateral measures of trade retaliation and to modify their domestic legislation in such a way as to guarantee compliance with the agreements.
5. They concur that the agreement should provide greater flexibility for developing countries to increase progressively the scope of their protection for intellectual property rights. In this connection, they point out that an adequate transition period should be provided, to allow not only the amendment of their national legislation but also the structural adjustment of the sectors to which intellectual property rights will be extended. They likewise consider it essential that the final agreement include the necessary provisions to guarantee international technical and financial co-operation enabling effective implementation of the new régime.

6. Having regard to the foregoing, the countries of the Andean Group submit the text of their proposal, in English, for consideration by the Negotiating Group on TRIPS.

PART I. GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 2: Intellectual Property Conventions

2.2 Nothing in this Agreement shall derogate from existing obligations that PARTIES may have to each other under the Paris Convention, the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

PART II. STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

Article 9: Relation to Berne Convention

PARTIES shall comply with the substantive provisions of the Berne Convention.

Article 10: Computer programmes and compilations of data

1. Computer programmes, whether in source or object code, shall be protected as works under the Berne Convention. Such protection shall not extend to ideas, procedures, methods of operation or mathematical concepts. This shall not prevent PARTIES from requiring, as a condition of protection of computer programmes, compliance with procedures and formalities consistent with the principles of the Berne Convention and Part IV of this Agreement, or from making adjustments to the rights of reproduction and adaptation and to moral rights necessary to permit normal exploitation of a computer programme, provided that this does not unreasonably prejudice the legitimate interests of the right holder.

Article 11: Rental rights

Rental rights should be excluded from this Agreement and included in the Protocol of the Berne Convention.
Article 13: Limitations and exemptions

13.2 Translation and reproduction licences shall be granted in the cases provided for under the Berne Convention.

Article 16: Protection of performers, producers of phonograms (sound recordings) and broadcasts

Deletion of brackets around 16.1, 16.3 and 16.6.

Article 18: Rights conferred

18.2 Article 6 bis of the Paris Convention shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, account shall be taken of the knowledge of the trademark in the relevant sector of the public.

Article 22: Other requirements

It shall be a matter for national legislation to determine the conditions for the use of a mark.

Article 27: Notification of geographical indications

In order to facilitate the protection of geographical indications, the Committee shall establish a multilateral system of notification and registration of geographical indications eligible for protection in the PARTIES participating in the system.

SECTION 4: INDUSTRIAL DESIGNS

Article 28: Requirements for protection

28.1 PARTIES shall provide for the protection of industrial designs which are new or original. PARTIES may provide that designs are not new or original if ...

Article 29: Protection

29.3B With respect to the obligations of the owner of a protected industrial design, the provisions set forth in paragraph 3(b) of Article 32 below shall apply.

SECTION 5: PATENTS

Article 30: Patenable subject matter

30.1 Subject to the provisions of paragraphs 2 and 3 below, patents shall be available for any inventions, whether products or processes, in all
fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Patents shall be available without discrimination as to where the inventions were made.

30.3(a) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

30.3(b) Biological material that exists in nature, animal inventions and plant varieties including essentially biological processes for the production of animals and plants; inventions related to the genetic identity of humans;

30.3(e) Mathematical methods, algorithms and computer programmes.

Article 31: Rights conferred

31.1 Subject to the provisions of Articles 32 to 36 below and of Article 6 above, a patent shall confer on its owner at least the following exclusive rights:

31.1(b) Where the subject matter of a patent is a process, to prevent third parties not having his consent from the act of using the process.

Article 32: Conditions and obligations on patent applicants and owners

32.3(a) To ensure the working of the patented invention in order to satisfy the reasonable requirements of the public. For the purposes of this Agreement the term "working" may be deemed by PARTIES normally to mean manufacture of a patented product or industrial application of a patented process and to exclude importation.

32.3(b) In respect of licensing contracts and contracts assigning patents, to refrain from engaging in abusive or anti-competitive practices adversely affecting the transfer of technology.

32.3(c) To refrain from the abuse of patent rights and from practices which unreasonably restrain trade.

Article 33: Exceptions to rights conferred

Parties may provide exceptions to the exclusive rights conferred by a patent, taking account of legitimate interests of the patent owner, third parties and the public.

Article 34: Other use without authorization of the right holder

34.(a) Subject to paragraph (k) below, each case of such use shall be considered on its individual merits.
34.(g) The competent authority shall have the authority to review upon motivated request, the continuance of such use if the person so authorized fails, without legitimate reasons, to comply with the purposes for which the use without the authorisation of the right holder was granted.

34.(h) The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the purpose and economic value of the licence.

34.(k) Laws, regulations and requirements relating to such use may discriminate between fields of technology or activity in areas of public health, nutrition or environmental protection or where necessary for the purpose of ensuring the availability of a product to the public at the lowest possible price consistent with giving due reward for the research leading to the invention. In these cases PARTIES may not apply sub-paragraph (b) above.

34.(l) Parties are not obliged to apply the conditions set forth in sub-paragraphs (b) and (f) above where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. Appropriate remuneration may be awarded in such cases.

34.(o) Notwithstanding the provisions of sub-paragraph (a)-(k) above, where such use is made for public purposes by the government or by any third party authorized by the government, PARTIES are not obliged to apply the conditions set forth in sub-paragraphs (...) above in such cases. Where it comes to the knowledge of the government that a patent is being exploited under the provisions of this sub-paragraph, the government shall ensure that the patent owner is informed and is adequately compensated.

Article 37: Reversal of burden of proof

37.1 For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in Article 31.1(b), if the subject matter of a patent is a process for obtaining a product, PARTIES may provide in at least one of the following circumstances that any ...

SECTION 6: LAYOUT DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

Article 39: Scope of the protection

Deletion of this article.

Article 40: Acts not requiring the authorization of the holder of the right

No PARTY shall be obliged to consider unlawful the performance of any of the acts referred to in that paragraph in respect of an integrated circuit incorporating an unlawfully reproduced layout-design where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit, that it incorporated an unlawfully reproduced layout-design.
Article 41: Term of protection

41.1 In PARTIES requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of eight years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

41.2 In PARTIES not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than eight years from the date of the first commercial exploitation wherever in the world it occurs.

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Article 42

In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, PARTIES shall provide in accordance with their national legislation the legal means for preventing the misappropriation by third parties of undisclosed information lawfully within the control of natural and legal persons under their jurisdiction so long as such information:

- is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

- has commercial value because it is secret; and

- has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

SECTION 8: CONTROL OF ABUSIVE OR ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 43

Deletion of 43.3B and 43.4.

The proposal introduced by the Republic of Korea MTN.GNG/TRIPS/W/1 on the establishment of a system for prevention of differences on Technology Transfer is the adequate mechanism to implement Section 8.