

WORLD TRADE ORGANIZATION

RESTRICTED

IP/C/M/42

4 February 2004

(04-0402)

Council for Trade-Related Aspects of Intellectual Property Rights

MINUTES OF MEETING

Held in the Centre William Rappard
on 18 November 2003

Chairman: Ambassador Vanu Gopala Menon (Singapore)

The present document contains the record of the discussion which took place during the TRIPS Council meeting held on 18 November 2003.

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A. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2

- *Notifications from Members whose transitional periods under Article 65.2 or 65.3 expired on 1 January 2000 or acceded to the WTO after that date*

1. The Chairman drew attention to the Secretariat's updated note reflecting the status of the notifications received so far (JOB(03)/102). The note showed from which of the Members in question notifications had been received and/or circulated by 26 May 2003. Since the Council's meeting in June 2003, the following notifications had been received: Congo had notified a number of laws and regulations related to industrial property and provided information on its application of national and MFN treatment as well as Article 70.8 of the Agreement; the United Arab Emirates had notified the Council that its new intellectual property laws had entered into force and submitted an English translation of one of these laws – the translation of the two other laws was being finalized; the two newly acceded Members, Armenia and the Former Yugoslav Republic of Macedonia had notified their TRIPS implementing legislation. From the 81 Members in question, there were now four who had not yet submitted any notification concerning their implementing legislation, namely Papua New Guinea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Swaziland. Notifications from a number of other Members were incomplete. Recalling that pursuant to Article 63.2 of the Agreement the notifications of the laws and regulations in question were generally due as of 1 January 2000, he urged all Members with unfulfilled notification obligations to submit the outstanding material without delay.

2. The representative of Egypt said that document JOB(03)/102 incorrectly stated that the notifications made by his country did not concern all areas of intellectual property, since the notifications in question concerned all areas of intellectual property covered by the Agreement. He hoped that this would be corrected in the next update to the document.

- *Notifications from other Members and notifications of amendments of laws notified earlier*

3. The Chairman informed the Council that, since its June meeting, the following updates to earlier notifications of laws and regulations had been received: Japan had notified the "Basic Law on Intellectual Property" of 2002 and the amended Copyright Law. China had notified the implementing regulations of the Copyright Law and the Trademark Law and an amendment to the implementing rules of the patent law; furthermore, it had provided revised translations of two regulations it had notified earlier. The Kyrgyz Republic had notified amendments to its legislation. These notifications would be available in the IP/N/1/- series of documents.

4. The Chairman drew attention to questions posed by Japan to Thailand (IP/C/W/409), which related to the notification of certain Thai laws and regulations circulated on 21 and 28 March 2003.

5. The representative of Japan noted that the laws and regulations notified by Thailand had been circulated in document IP/N/1/THA/1 in March 2003. He expressed his appreciation of Thailand's efforts to keep the implementation of its TRIPS obligations transparent. He expected responses to the questions contained in document IP/C/W/409 in order to clarify the consistency between Thai laws and the TRIPS Agreement. The representative of Thailand said that his delegation was finalizing its responses and that they would be transmitted to the Secretariat in due course. The representative of Japan expressed his gratitude for the forthcoming responses.

6. The Council took note of the statements made.

(ii) *Notifications under Article 1.3 and 3.1*

7. The Chairman said that the Former Yugoslav Republic of Macedonia had made a notification under Article 1.3 of the Agreement concerning the criteria of eligibility for protection applicable to the protection of producers of phonograms.¹

(iii) *Notifications under Article 69*

8. The Chairman said that, since the Council's last meeting in June, a new notification of a contact point under Article 69 of the Agreement had been received from Armenia. Updated notifications had been received from Austria, Nicaragua, Sweden and Chinese Taipei. These notifications were being circulated in an addendum to document IP/N/3/Rev.7. There were now 118 Members who had notified contact points under Article 69.

B. FOLLOW-UP TO REVIEWS ALREADY UNDERTAKEN

(i) *Follow-up to the reviews initiated since April 2001*

9. The Chairman said that, as requested by the Council at its meeting in June, the Secretariat had updated its informal note that listed all the outstanding material required to complete the reviews that the Council had already undertaken (JOB(03)/209). The table attached to the note listed 18 Members whose reviews had been initiated at the Council's meetings since April 2001 but which remained on the Council's agenda. In addition, the note listed a number of Members whose reviews had already been deleted from the Council's agenda, but to whom further questions had been posed.

10. He recalled that he had informed the Council at its meeting in June that Brazil and the Philippines had provided responses to all outstanding questions just prior to that meeting. Furthermore, China had provided responses to all of the outstanding questions posed to it in the context of its regular review initiated in September 2002, and all of these responses had been circulated to Members prior to the present meeting. He proposed that the regular review of the legislation of Brazil, China and the Philippines be deleted from the agenda, it being understood that any delegation should feel free to revert to any matter stemming from these reviews at any time.

11. The Council so agreed.

12. The representative of Switzerland thanked Brazil and the Philippines for their replies to the questions posed by his delegation. He also thanked Congo for its reply to one follow-up question posed by his delegation, and said that he was looking forward to the responses to the two outstanding questions.

13. The representative of Japan said that he appreciated China's efforts to develop and improve its regulatory framework for IP and expected China to continue this effort. He thanked China for its responses to the follow-up questions posed by Japan. However, since his delegation had accessed the responses from the WTO website just before the meeting and had not had enough time to examine them, his delegation reserved its right to submit additional follow-up questions related to these responses. He said that certain new Chinese legislation had not yet been notified to the Council, such as the provisions dealing with the determination and protection of well-known marks, promulgated in June 2003. All relevant legislation should be notified to the Council as soon as possible so as to enable Members to review it.

¹ Subsequently circulated in document IP/N/2/MKD/1.

14. The Chairman turned to the remaining 15 Members whose reviews had been initiated since April 2001 but which remained on the Council's agenda, namely Congo, Cuba, Egypt, Fiji, Grenada, Mauritius, Moldova, Nigeria, Pakistan, Qatar, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Swaziland, and Zimbabwe. Since the Council's June meeting, Congo had provided responses to a number of outstanding questions, but there were still a few questions pending. A communication had been received from Suriname providing information on the status of the preparation of its new legislation on industrial property, and on copyright and related rights (IP/C/W/283/Add.4). Furthermore, he recalled that, at the Council's meeting in September 2002, Canada, Switzerland and the United States had requested Mauritius to respond to the questions they had posed to it on the basis of the new legislation that was pending at that time, and noted that Mauritius had notified its new industrial property legislation earlier in 2003.

15. The representative of Cuba said that she was hoping that two of the three pending decree-laws would be implemented in the first quarter of 2004.

16. The representative of Egypt said that his delegation would shortly respond to the outstanding questions and notify an Executive Order, whose translation from Arabic to English was being finalized.

17. The representative of Nigeria said that his delegation would provide responses to the outstanding questions shortly.

18. The representative of Pakistan said that, due to technical reasons, his delegation still had not received a response from the capital to the one outstanding question. However, he was given to understand that the response would be sent within the next week or so.

19. The Chairman said that the Secretariat note also listed five Members, namely Argentina, Dominica, Gabon, Ghana and Guyana, whose reviews had already been deleted from the Council's agenda on the understanding that any delegation should feel free to revert to any matter stemming from the reviews at any time. In this connection, certain questions had been raised with regard to the implementing legislation of these countries.

20. The representative of Argentina said that responses to the pending questions would be communicated as soon as her delegation received them from the respective authorities.

21. The representative of Gabon said that his delegation was still waiting for responses from his capital and that they would be communicated as soon as his delegation received them.

22. The Council took note of the statements made and agreed to revert to this matter at its next meeting.

(ii) *Arrangements for the reviews of national implementing legislation of Armenia and the Former Yugoslav Republic of Macedonia*

23. The Chairman recalled that the Council had agreed, at its meeting in June, that it would take up the reviews of national implementing legislation of two newly acceded Members, namely Armenia and the Former Yugoslav Republic of Macedonia, at its first meeting in 2004, and that it would revert to the arrangements for these reviews, in particular the deadlines for questions and responses, at the present meeting. Armenia's notification of its TRIPS laws and regulations had been circulated in August in the IP/N/1/-series of documents. The notification of the Former Yugoslav Republic of Macedonia, dated 22 October 2003, was being circulated in the IP/N/1/-series of documents.

24. In accordance with the standard procedures for the review of legislation and in light of the fact that the Council's first meeting in 2004 had been tentatively scheduled for 8 to 10 March, the

Chairman proposed that the Council set the following target dates for the submission of questions and answers in these reviews: (i) questions should normally be submitted to Armenia and the Former Yugoslav Republic of Macedonia, with a copy to the Secretariat, 10 weeks before the meeting in March 2004. However, given the holiday season, he suggested shortening this period by one week, and set the target date at 5 January 2004; (ii) responses to questions posed within that deadline should be submitted by 9 February 2004, i.e. four weeks before the meeting in March 2004.

25. The Council so agreed.

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

26. The Chairman recalled that paragraph 18 of China's Protocol on Accession required the TRIPS Council to review the implementation by China of the TRIPS Agreement each year for eight years and report the results of such review promptly to the General Council. The TRIPS Council had taken up the first review under paragraph 18 at its meeting in September 2002 in combination with its normal review of China's TRIPS implementing legislation. The report on the first transitional review had been forwarded to the General Council in document IP/C/26. He further recalled that paragraph 18 required China to provide relevant information, including information specified in Annex 1A, to the TRIPS Council in advance of the review. He informed the Council that the information submitted by China to it under Annex 1A of the Protocol of Accession, dated 17 November 2003, had been circulated in document IP/C/W/415. Questions and/or comments in connection with the transitional review had been submitted by Japan, Chinese Taipei, the European Communities and the United States, which had been circulated in documents IP/W/410, 411, 413 and 414 respectively.

27. The representative of China said that, prior to the Council's meeting, China had submitted to the TRIPS Council the information required by Annex 1A to the Protocol on Accession. In order to ensure a better understanding of the status of protection of intellectual property rights (IPRs) in China, her delegation had also made available to the meeting, as a room document, a White Paper on "Intellectual Property Protection in 2002 in China". This paper presented a detailed and updated account of the developments with regard to the IPRs in China, covering patents, trademarks, copyright, new plant varieties, etc. A considerable part of the report was devoted to the efforts and achievements in regard to the enforcement of IPR legislation by the relevant government authorities. She said that these two documents provided Members with a comprehensive and objective picture on the implementation of TRIPS-related commitments by China, and also served as a useful source of information to address some of their concerns.

28. She said that a large volume of questions had been posed to China in the context of the transitional review mechanism (TRM). While wishing to ensure that the questions would be dealt with in the most responsible and serious manner, she pointed out that the communications from some Members had reached her delegation only very recently, leaving China with little time for necessary preparation. She said that China attached great importance to IP protection and the TRM in the TRIPS Council. A strong team had been put together with officials and experts from various departments, including the Ministry of Commerce, State Administration of Industry and Commerce, National Copyright Administration, State Intellectual Property Office, and the Legal Affairs Office of the State Council. She said that their presence was intended to improve the quality of information exchange with Members.

29. Turning to the comments made and questions posed to China, a second representative of China said that his delegation was grateful that some Members had commented on the IP protection regime in China. He found this to be constructive. It was the belief of the Chinese Government that enhancing IPR protection was a long-term course of action with strategic significance. Since the beginning of the 1980s, China had gradually established an excellent IPR legislation and enforcement

mechanism. In China's Criminal Law, there were specific provisions on IPR crimes. China had also set up special IPR courts to hear cases involving IPR infringements. China had modified its laws and regulations in relation to IPRs, making them compatible with international conventions, including the TRIPS Agreement. He said that the Chinese Government would fulfil its commitment to further improve its IPR system, fully implement various IPR laws, upgrade IPR protection with adequate measures to keep pace with international standards, and create a sound legal environment for the introduction of foreign advanced technologies, funds and management skills. At the same time, the Chinese Government would also implement effective IPR policies and strategies, reinforcing its efforts to boost technological innovation with IPR protection, strengthening IPR administration and guiding all economic entities to enhance their competency in management, applications and protection of IPRs as well as the ability to meet international competition, and consequently improve the technological and comprehensive forces of China. The Chinese Government would, as always, pursue IP protection policy and effectively safeguard the legitimate interests of both Chinese and foreign right owners. China was willing to further cooperate and communicate with other Members on the basis of equality and mutual benefits.

30. As to the principle of transparency and notification obligations, he said that China respected this principle and, since its accession, had fully implemented its obligations in the light of the TRIPS Agreement and its accession commitments. Pursuant to Article 63.2 of the TRIPS Agreement, China had notified ten main dedicated laws relating to IPRs in full text and a series of laws and regulations in summary, including the Criminal Law, the Anti-Unfair Competition Law, and the Civil Procedure Law. Following the TRIPS Council's decision of 21 November 1995, China had also provided information on its enforcement regime in a notification of its responses to the Checklist of Issues on Enforcement. He said that China's IPR laws and regulations were characterized by their broad coverage and great quantity. A large volume of judicial interpretations and sub-national legislation had added to the complexity. The notification to the WTO and the provision of requested information had been a huge task, not the least of which was translation. As a developing Member, however, China would redouble its efforts to further improve the notification process while requesting the necessary assistance on translation according to Article 2.5 of the Agreement between the World Intellectual Property Organization and the World Trade Organization. As a major arm in IP enforcement, the judiciary departments in China were also subjected to the principle of transparency, which was evidenced by the public soliciting of comments for judicial interpretations. The Supreme People's Court would further broaden the scope of commenting in the course of interpretation. Meanwhile, all the TRIPS-related laws, regulations, and other regulatory documents would be published in the Chinese Foreign Trade and Economic Cooperation Gazette as well as the bulletins and the websites of the relevant government departments. Members could also access the enquiry point set up by the Chinese Government for interesting information.

31. Regarding the recent reorganization of the responsibilities in China for intellectual property matters, he said that there had been no changes to the responsibilities of China's IP agencies. The Bureau of Economic Crime Investigation under the Ministry of Public Security was responsible for the investigation of IP crimes. The Division of Economic Crime under the Supreme Procuratorate was responsible for the prosecution of IPR crimes. Number 2 Criminal Tribunal of the Supreme People's Court was in charge of IPR criminal cases. As to standards for IPR crimes, he said that two laws applied at the central and local levels, that is, the Interpretation on Specific Application of Law on Several Questions of Trial for Illegal Publication Criminal Cases by the Supreme People's Court and the Regulations on Standards for Initiating Cases In Economic Crimes by the Supreme People's Procuratorate and the Ministry of Public Security.

32. With respect to the consistency of China's administrative actions with Articles 41 through 49 of the TRIPS Agreement, he said that administrative responsibility must be imposed in accordance with the Administrative Penalty Law or the special provisions of the separate law. Some administrative remedies, such as orders requiring the suspension of infringing acts, were similar to civil remedies in form, but they were different in nature. In cases where the form of administrative

remedies seemed to be similar to civil remedies, Articles 41 through 48 of the TRIPS Agreement should be applied to administrative remedies. Some civil remedies provided for in Articles 41 through 48, such as an order requiring the payment of damages to right holders, could not apply to administrative cases in China, since neither the Administrative Penalty Law nor the separate law granted such a power to administrative authorities.

33. The provisions on administrative enforcement in the Chinese trademark system complied with Article 49 of the TRIPS Agreement. The procedures were fair and equitable, including the rules on the presentation of evidence and decisions on the merits of the case in writing, etc. The form, legal basis and nature of administrative remedies were different from those of criminal remedies. Therefore, the Chinese administrative remedies could not be covered by Article 61 of the TRIPS Agreement. Nevertheless, China's criminal legal system met the requirements of Article 61.

34. The representative of China said that the revision of the Chinese Civil Law was an important task for legislators. The ninth National Congress had enacted and revised a draft code. Due to the rapid social and economic development in China, it was necessary to regulate and rewrite some contents of that draft. China needed to do further research and investigation on this matter.

35. China had made every effort to enhance its administrative transparency. This included two main aspects. First, the legislators had enacted the Legislation Law, the Regulations on the Drafting Procedure of Administrative Regulations, and the Regulations on the Drafting Procedure of Rules, which standardized the operating procedure of administrative power. Second, the Administrative Permission Law would be enforced in 2004. The Law further regulated the boundary, conditions and procedure of administrative permission. It provided that only laws, regulations and local regulations could establish administrative permission and local laws could establish interim administrative permission. However, the departmental rule of the State Council could not establish administrative permissions. Thanks to these laws and regulations, administrative transparency had been increasing remarkably and the efficiency of administration would be further promoted.

36. In regard to the relationship between laws, regulations and rules, he said that, according to the Legislation Law, the Regulations on the Drafting Procedure of Administrative Regulations and the Regulations on the Drafting Procedure of Rules, the efficacy of laws and regulations was prior to that of local legislation and departmental rules, and the efficacy of local regulations was prior to local administrative rules. Where local regulations conflicted with the regulations of the State Council, the National Congress had the authority to review them. When local rules conflicted with the departmental rules of the State Council, the State Council would be responsible for the review.

37. Regarding patent pendency he said that, in 2002, the State Intellectual Property Office (SIPO) had received 252,631 patent applications, including inventions, utility models and industrial designs, an increase of 49,048 over the previous year. The growth rate was 24.1 per cent. 951 international applications had been filed and 697 requests had been made for the international preliminary examination. 738 requests for the international preliminary examination had been completed.

38. To date, the State Food and Drug Administration (SFDA) had not found any application for drug registration which used undisclosed information. In regard to data exclusivity provided by the SFDA, he referred to the relevant regulations. Pursuant to Article 35.2 of the Rules on Implementation of Drug Law, the SFDA would not render a marketing approval pursuant to an application by taking advantage of other applicants' undisclosed information. Pursuant to Article 14 of the Measures on Regulation of Drug Registration, when putting forward an application for drug registration, the applicant should ensure that all data submitted had been obtained independently. Pursuant to Article 21 of the Measures on Regulation of Drug Registration, when putting forward an application for drug registration with foreign data being introduced, the applicant should provide the verification of the legal origin of data. Pursuant to Article 22 of the Measures on Regulation of Drug

Registration, the SFDA was entitled to require applicants to repeat the test in order to ensure that the relevant data had been obtained independently. Pursuant to Article 52, during the period of new drug approval, the technical requirements for a new drug would not be lowered because the drug of the same class had received a marketing approval abroad, that is to say, the situation of documentation dependence did not exist. He further said that, pursuant to Article 35.2 of the Rules on Implementation of Drug Law, the SFDA would not render marketing approval to an application taking advantage of other applicants' undisclosed information. The SFDA had the obligation to protect the undisclosed test data obtained independently and other relevant data submitted by the applicant. Those illegally disclosing undisclosed data would be punished. The SFDA would accept a relevant application in accordance with Article 35.3 of the Rules on Implementation of Drug Law under the condition that measures had been taken, as the public interest required, to protect the data against unfair commercial use. He said that, besides Article 120 of the Civil Procedure Law and Article 48 of the Provisions Regarding Evidence in Civil Litigations, the other provisions of the Civil Procedural Law and other laws, such as the Law on Lawyers and the Law for Promotion of Science provided protection for confidential information during civil litigation.

39. Referring to paragraph 256 of the Report of the Working Party on the Accession of China, stating that China's IPR laws provided that any foreigner would be treated in accordance with any agreement concluded between the foreign country and China, or in accordance with any international treaty to which both countries were party, or on the basis of the principle of reciprocity, he said that China would observe the TRIPS Agreement, paragraph 256 of the Report of the Working Group on the Accession of China, and the terms in the international treaties or conventions China had signed and/or joined.

40. With respect to trademarks, he said that China had been protecting foreign well-known marks in the light of international conventions. In line with the Provisions on the Determination and Protection of Well-Known Marks, which had come into force on 1 June 2003, the municipal level administrative authorities for industry and commerce should, within 15 working days from the date of the acceptance of the request of the interested party, report and send all the documents to the provincial administrative authorities for industry and commerce, if the case satisfied the requirements under Article 13 of the Trademark Law. The provincial authorities should, within 15 working days from the date of acceptance of the request of the interested party, report and send all the documents to the Trademark Office (TMO). The TMO should make its determination within six months from the date of the receipt of the relevant documents. Although it had received some domestic and foreign requests for the determination of well-known marks, the TMO had not yet determined well-known trademarks under the new provisions.

41. Turning to the legal differences between the terms "well-known marks", "famous marks", "provincial famous marks", and "famous brands", he said that a well-known trademark referred to a mark that was widely known to the relevant sectors of the public and enjoyed a relatively high reputation in China. Relevant sectors of the public should include consumers of the type of goods and/or services to which the mark applied, operators who manufactured the said goods and/or provided the said services, and sellers and other persons involved in the channels of distribution of the type of goods or services to which the mark applied. The Chinese term "Zhuming shangbiao" (famous trademarks) referred to marks which were determined by the administrative authorities for industry and commerce at the provincial, municipal, or autonomous region level, based upon the local legislations, local government regulations or other administrative provisions, having a relatively high reputation and a greater influence within the specific jurisdiction. A provincial famous mark was the same as "Zhuming shangbiao". The Chinese term "You Ping Ming Pai" (famous brands) was not a legal term in the field of trademarks. The TMO never used this term. In addition, the TMO had used to have a list of marks for enhanced protection, which had been based upon the frequency and scope of trademark infringement. However, this practice had been abolished.

42. With respect to the determination of famous trademarks, he said that the provincial or municipal authorities had the authority to make such decisions, and were not required to report to the TMO. Therefore, the TMO had no such information.

43. In regard to the protection of three dimensional marks and colour marks, he said that by the end of October 2003, the TMO had received 1398 three-dimensional mark applications, among which 343 had been approved for registration. For some technical reasons, the TMO had no statistics on colour marks. In addition, smell and sound marks were non-registrable under the Trademark Law.

44. With respect to the application of the transliteration or translation of others' marks, he said that transliteration or translation was one of the standards to determine identity or similarity. Thus, such applications could be refused during the trademark examination. Moreover, interested parties could file a request to the trademark review and arbitration bureau through the opposition or dispute procedure.

45. Article 15 of the Trademark Law provided that where the agent or representative of the owner of a mark applied for registration in his own name without the owner's authorization and the owner opposed the registration, the application should be refused and the use should be prohibited. This problem could be solved through the opposition or dispute procedure. The interested party could file an application with the TMO or the Trademark Review and Arbitration Bureau (TRAB). He noted that, by the end of September 2003, the number of pending cases in the TRAB was 31,924. The number of pending opposition cases at the TMO was 16,386. The pending new applications for registration at the TMO were 380,000.

46. With respect to the assignment or licensing of trademarks, he said that no government approval of the terms of a licence or assignment was required. However, a trademark licence must be reported to the TMO for the record, regardless of whether the trademark owners were Chinese or foreign. The recording was not required for an assignment contract. As for the effect of the recording of a licence contract, although there was no express provision in the Trademark Law, the judicial interpretation provided that, where the trademark licence contract was not recorded at the TMO, it should not affect its effect, unless otherwise agreed between the interested parties, but an unrecorded licence contract should not resist a third party with good faith. In addition, the Trademark Law provided that the assignment of a registered trademark should be published after it was approved. The assignee should enjoy the exclusive right to use the mark from the date of the publication.

47. Turning to geographical indications, he said that, to date, the TMO had received 260 GI applications for the registration of certification marks, 100 of which had been approved. The registrant of a certification mark could file a complaint with the local authorities for industry and commerce or might file a law suit at the People's Court requesting to stop an infringement.

48. With respect to the exceptions to GI protection provided for in Article 24 of the TRIPS Agreement, he said that every country might encounter the problem of earlier registered trademarks and the GIs. Article 16 of the Trademark Law was substantially in compliance with the exceptions provided for in the TRIPS Agreement. He said that China had acceded to the WTO on 11 December 2001 and the latest amendment of the Trademark Law had come into force on 1 December 2001. Those marks which had obtained registration in good faith would continue to be valid under Article 16 of the Trademark Law, which referred to marks registered before this date rather than after it.

49. The State General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ), in accordance with the Regulation for the Protection of Products with Geographical Indications, carried out the protection of GIs. If a trademark or certification mark already existed, the AQSIQ would still provide GI protection from different respects and functions according to the Regulations and the related stipulations in the TRIPS Agreement. The following action had been

taken against the infringement of GIs: the AQSIQ was the authorized government agency with two major functions, namely comprehensive administration and law enforcement. The agencies of the AQSIQ executed random checks and law enforcement against the infringements of GIs and trademarks in accordance with the Law on Product Quality, the Law on Entry and Exit of Commodities Inspection, Standardization Law of the People's Republic of China, and other relevant laws and regulations.

50. Turning to the protection of copyright, the representative of China said that a series of activities had been organized to study and prove the necessity and feasibility of the provisions that might be introduced in the regulations on the protection of the right to communication through information networks in respect of specific copyright matters. For example, in October 2002, the State Council had sent a high level delegation to Europe to investigate copyright systems in the digital network environment. In November 2002, the National Copyright Administration of China (NCAC) organized a delegation to visit WIPO and exchange views with the organization in respect of China's accession to the two new treaties. In July 2003, the NCAC had held a forum on the Internet Treaties and copyright protection in the digital network environment and listened to opinions from legal and network circles. In November 2003, the NCAC would invite WIPO experts to China to give touring lectures on the two new treaties. The competent authorities had also carried out various other relevant activities. With regard to legislation on copyright protection of digital networks, he said that there was still much work to be done by the competent authorities in a thorough and careful manner, including the investigation and study of the legislative experiences of other Members.

51. Regarding the protection of temporary copies, he said that such term was used neither in the Berne Convention nor in the TRIPS Agreement. In regard to re-publication of materials in Chinese textbooks, he said that, to date, the NCAC had not yet obtained any information in this respect from foreign right owners or domestic publishers.

52. In regard to the reasonable royalty to be provided for under Article 10 of the Regulations for Protecting Software, he said that so far no copyright administrative department had dealt with such a case, and there had been no news reported concerning the relevant judicial decision. In addition, he said that under Article 30 of the Regulations, the "holder of copies of a piece of software" was defined as the end user of software who had performed a reasonable duty of care and had obtained a copy of software in good faith. Accordingly, it could not be inconsistent with Article 13 of the TRIPS Agreement. If the holder of the copy of software used an infringing copy, the person was obliged to prove that he or she had never known, or had reasonable grounds to know, that such a copy was an infringing one.

53. With respect to the use of software for the purpose of study and research provided for in Article 17 of the Regulations, he said that Article 17 contained the same principles as adopted in Article 22 of the Copyright Law concerning fair use. According to Article 21 of the revised Implementing Regulations of the Copyright Law, fair use should not conflict with the normal exploitation of the work and should not unreasonably prejudice the legitimate interests of the right holder. Consequently, Article 17 of the Regulations should be deemed as consistent with Article 13 of the TRIPS Agreement.

54. In accordance with Article 47 of the Copyright Law, copyright administrative departments had been authorized to take action against an Internet Service Provider (ISP) who was illegally making the content available to the public or downloading it.

55. In China, if an infringement took place on the Internet, the infringer, whether an individual or a legal entity, should bear the corresponding legal liabilities pursuant to the Copyright Law. He added that the NCAC had not issued any directive regarding the proper use of the Internet in universities, government offices or state-owned corporations.

56. Regarding the prosecution of hackers, he said that, in February of 2002, the copyright administrative department of Zhejiang province had dealt with a case concerning "the US Chemistry Digest Disc Publication" pirated by means of illegal decoding. Two suspects had decoded a lawful copy of the disc, made reproductions and then sold them on the Internet by sending batches of mails. The copyright administrative department had ordered the decoder and the two suspects to cease the infringing acts and confiscated their unlawful income. In addition, the competent department had confiscated the equipment and tools mainly used to make infringing copies, destroyed the infringing copies and imposed a forfeit on the two suspects. Regarding the removal or alteration of electronic rights' management information, he said that this issue was not covered by the TRIPS Agreement but by the WCT. Nevertheless, the issue was under consideration in China.

57. In respect of the Copyright Law, the Regulations neither decreased nor increased the burden of proof on the right holder. On the other hand, the revised Copyright Law increased the burden of proof on the party against which an action was brought by adopting Article 43.2 of the TRIPS Agreement. The Regulations reflected the legislative purpose of the Copyright Law. According to Article 3.2 of the Regulations, administrative procedures could be initiated not only on the basis of complaints from right holders but also with the removal of cases by other relevant departments, reports from other persons finding out infringements, or initiative investigations by administrative departments. In accordance with the Regulations, the NCAC had to investigate the case with a great impact in the country, which was determined at the NCAC's discretion. In general, an infringement should be dealt with by the local administrative department of the place where the infringement was committed.

58. With respect to the negative prescription of administrative penalty, he said that Article 9 of the Regulations was consistent with Article 29 of the Administrative Penalty Law of China, i.e., where an illegal act was not discovered within two years of its commission, administrative penalties should no longer be imposed, except if otherwise prescribed by the law. The period of time prescribed should be counted from the date the illegal act was committed. If the act was of a continual or continuous nature, it should be counted from the date the act terminated. The prescription of administrative penalty was different from that of a civil action in that the latter was calculated from the date on which the injured party had known or had had the reasonable grounds to know that his rights had been infringed while the former was calculated from the date on which the illegal act had taken place or stopped.

59. Regarding the identification of holders of copyright, he said that the copy of a work with a complainant's name on it might be deemed as a proof of the right holder's identification. A copyright registration was not necessarily required for complainants to apply to administrative procedures. The expression "parties' names" included not only the name of the right holder but also that of a complaining party. Otherwise, an administrative department could hardly investigate a case or render specific administrative penalties without having obtained sufficient information concerning the complaining party, or without having known the exact complaining party. An administrative department might not accept an application for administrative procedures if it was not in charge.

60. He said that the expression "person who has a burden of proof" as mentioned in Article 16 of the Regulations referred to the complaining party but not the right holder. The expression "parties" in the same Article referred to both the right holder and the complaining party. Whether an illegal act was slight or not was determined by the administrative department according to the concrete circumstances of each case.

61. Regarding the auction or re-selling of facilities used for making infringed goods, he said that the person who bought such facilities must observe the law. Moreover, such facilities could be bought only by factories in lawful operation and with the requisite qualifications.

62. With regard to the trial term, he said that Chinese courts would strictly follow the Regulations on Civil Procedure Law and judicial interpretation. According to Article 147 of the Civil Procedure Law, the parties who could not accept a judgement or decision might lodge an appeal. According to Article 178 of the Civil Procedure Law, the parties could apply for another trial to the same court or the superior court for those cases which had been effective. Besides, the court or the procuratorate could start supervising procedures.

63. The representative of China said that commercial exporting belonged to selling. According to the provisions of Chinese laws and judicial interpretations, the intellectual infringement crime of counterfeiting goods export might lead to more serious punishment in manners, methods or results, and the culprit could be punished under more serious accusations. Therefore, some of these intellectual infringement crimes were punished pursuant to the conviction standards for "smuggling" or the conviction standards for "carrying out illegal business activities" in the same law. Second, any of the actions which infringed upon copyright or circumvented a copyright technological protection measure for the purpose of producing, reproducing, distributing and selling, would be directly convicted for the crime of infringing upon copyright. Those who offered help for the above-mentioned actions would be convicted for complicity. If trafficking technological protection actions infringed the monopolization, franchising or restrictive dealing, the culprit would be directly convicted for the crime of selling infringing reproductions. If simultaneously infringing the copyright, the culprit would be co-convicted for the crime of infringing upon copyright. If for the purpose of reaping profits or where the amount of illegal gains was huge, which accorded with the judicial stipulation, together with other serious circumstances, a criminal conviction would also result. Layout-designs and utility and design patents were protected by China's Patent Law and the relevant regulations. Forging others' patents with serious circumstances would be convicted of the crime of forging others' patents according to Article 216 of the Criminal Law.

64. He said that the statistics of privately initiated criminal cases accepted by the Chinese courts from January to September of 2003 were the following: one on copyright, one on commercial secrets, two on selling infringing reproductions, 18 on producing and selling counterfeit products.

65. Apart from those noted in document IP/C/W/374, there were two main regulations concerning the circumstances in which investigations should be initiated by the procuratorate or by individuals: the Interpretation Regarding Practical Questions Concerning the Judicial Application in Hearing the Illegal Publication Criminal Cases by the Supreme People's Court, and the Interpretation Regarding Practical Questions Concerning the Judicial Application in Hearing Producing, Selling Counterfeit Goods Criminal Cases by the Supreme People's Court and the Supreme People's Procuratorate. At this stage, the Supreme People's Court had been carrying out investigation and research concerning the responsibility and scientificity of the Standards for Initiating Criminal Cases. China would stipulate the interpretation with the feasibility or submit the relevant law-making suggestions in the near future. Regarding the steps which were being taken to facilitate the referral from administrative agencies, he referred to the Provisions on the Transfer of Susceptible Criminal Cases by the Administration Organs for Law Enforcement.

66. With respect to the guidelines for penalties to be provided for wilful trademark counterfeiting or copyright piracy on a commercial scale, he said that Chapter 3 of the Chinese Criminal Law, revised in 1997, criminalized the destruction of the socialist market economic order. Section 7 of Chapter 3 was set to target the infringement of IPRs and listed seven crimes in detail, covering trademarks, patents, copyright and confidential information. In addition, on 17 December 1998, the Supreme Court's Interpretation on the Practical Problems on Application of Laws Against Illegal Publications clarified the standards of penalty regarding copyright offences, including the penalty against a crime of illegal business operation. Moreover, the Regulations of the Standards for Litigating Cases in Economic Crimes, which had been promulgated by the Supreme People's Procuratorate and the Ministry of Public Security on 18 April 2001, set the standards of prosecution in IPR offences except copyright crimes. He said that Section 7 of Chapter 3 of the

Criminal Law and these two above-mentioned Interpretations constituted the most fundamental basis for the protection of IPRs in terms of the criminal law. In addition, he said that Section 1 of Chapter 3 of the Criminal Law, which criminalized the production and distribution of counterfeiting products, and the Supreme Court's and the Supreme People's Procuratorate's Interpretation of Practical Problems Concerning Criminal Cases of Production and Distribution of Counterfeiting Products were applicable to some of the IPR infringement cases, mainly trademark offences. Relevant regulations could also be found in Articles 54 and 59 of the Trademark Law, Article 58 of the Patent Law, Article 47 of the Copyright Law, Article 24 of the Software Regulations, Article 40 of the New Species of Plant Regulations, and Article 21 of the Anti-Unfair Competition Laws. Those infringing offences, once proved criminal, would be brought to justice by the Criminal Law.

67. Regarding the interpretation of the notion "identical trademarks", he said that Article 5 of the Advice on the Practical Problems Concerning Administrative Enforcement Regarding Trademark, which had been promulgated by the State Administration for Industry and Commerce, provided that "identical trademark means the characters, pictures and patterns or the combinations of the characters and pictures on two trademarks are identical or have no visual difference by comparison". Article 9 of the Supreme Court's Interpretation on Practical Questions Concerning Applicable Laws Governing Civil Disputes on Trademarks, which had been promulgated on 12 October 2001, stated that "an identical trademark defined in Item 1 of Article 52 of the Trademark Law means, by comparison, the trademark being accused of infringement generally has no visual difference from the registered trademark of the plaintiff". Article 10 of this Interpretation also defined the principle on judgement of identical or similar trademarks as "(1) set the attention of the relevant public as the standard; (2) comparison should be made not only to trademarks as a whole, but also to the major parts of them". The process should only be undertaken when the compared objects were separated and isolated. Therefore, he inferred that identical trademarks in legal terms made a difference to what "identical" meant in daily language.

68. "Goods of the same class" meant goods that were completely identical, or of the same category and class, or with the same name, that shared basically the same nature and function. "Goods of the same class" had a bigger extension than "identical goods". The practical judgement of "goods of the same class" was usually subject to comprehensive assessment by the judge based upon the general knowledge of the public of certain products and the classification of goods by the international classification list of goods and services, with the trademark registration. He clarified that the classification list was not the only benchmark for judgement, but an important standard for reference. To sum up, one of the important criteria to tell whether two products were of the same class was whether they shared the same product name, though they might have different practical functions. However, those goods with different names could also be defined as goods of the same class as long as they bore the same practical function or scope.

69. He reiterated that "identical trademark" was different from what "identical" meant in daily language. China's standard for judgement was whether marks had no visual difference. According to this understanding, this standard generally conformed to the principle of being "not distinguished in essential aspects". He recalled that, as he had already stated, commercial import and export actions constituted a "sale" in real terms. However, under these circumstances, a party involved could be criminally liable for smuggling or illegal operations.

70. With respect to the criminalization of copyright piracy which was not for the purposes of profit, he said that although some infringing acts did not constitute acts of crime according to Articles 217 and 218 of the Criminal Law, that did not mean that they were not criminal acts. They could constitute the crime of intentional property damaging or the crime of construction impediment. China had noticed that some foreign countries, including the United States, the United Kingdom, and Japan, did not specify the aim of making profits as a subjective element for copyright crimes. China was taking this factor into consideration and weighing up the possibility of integrating it into its legal system. Regarding whether China had undertaken criminal, administrative or civil prosecutions

against individuals or entities who used the Internet to obtain access to computer systems, he said that though the acts *per se* did not constitute the copyright crimes defined by Articles 216 and 217 of the Criminal Law, their following acts usually did.

71. In regard to the financial threshold for criminal prosecution, he said that the financial threshold was a major element, but by no means the complete element in IP-related crimes. The record of the administrative penalty for counterfeiting and piracy and serious consequences could all be regarded as factors in crime determination. On the other hand, financial threshold was a generic term which might refer to sales volume, value of goods, illegal profits or damages to the right owner. It could also exist in various forms like money or commodities, as they could be transferred in money terms. As to the so-called illegal business amounts, he said that on the one hand, the illegal business amounts could be determined using other evidence, such as written documents from the purchaser, witness, testimony, and assessment on goods. On the other hand, in cases where the illegal business amount could not be verified, the constitution of crime could be determined through other factors.

72. With respect to counting the value of infringing imports, he said that the Customs would follow the Customs Law, the Customs Regulation for Protection of Intellectual Property Rights and other administrative regulations. The Customs cooperated with traditional authorities, including public security, according to the Regulation on Transfer of Suspected Criminal Cases by the Administrative Agencies, and other laws or regulations.

73. China was considering the revision of the Customs Regulation for the Protection of Intellectual Property Rights according to the TRIPS Agreement and to China's promises upon its accession to the WTO. He also said that the customs had the administrative authority over the import or export of pirated goods over the Internet. The customs and other IPR agencies would make a decision on infringement according to the Customs Regulation for Protection of Intellectual Property Rights, the Patent Law, the Trademark Law, and the Copyright Law.

74. Regarding the number of criminal cases of intellectual property rights infringement, he said that there had been 301 persons and 128 cases in 1998, 379 persons and 248 cases in 2000, and 702 persons and 408 cases in 2002. A total of 1,273 criminal cases relating to intellectual property rights had been closed within the five years, and 2,104 persons had been sentenced. At present, the Supreme People's Court was drafting the judicial interpretation on the application of law in criminal cases of intellectual property rights' infringement, which would include the criteria for conviction and imposing penalties. The interpretation would be adopted and published by the Supreme People's Court after strict examination.

75. The cost of confiscation and disposal of counterfeiting goods undertaken by the Customs shall be borne by right holders. According to Articles 14 and 15, and other relevant provisions of the Regulation on the Customs Protection of Intellectual Property Rights, the applicant who requested the Customs to detain suspected infringing goods should provide a bond to the Customs. After a relevant administrative determination, judicial judgement or adjudication came into effect, the Customs should refund the remainder of the bond, from which the cost of storage, custody, and disposal of the goods as well as the compensation fees to the interested parties for the loss induced by the inappropriate application had been deducted.

76. The Chinese Government had always been engaged in fighting against "localism". The State Council's Provisions on Prohibiting Regional Blockage in Market Economic Activities, published on 21 April, 2001, showed the positive attitude of China against localism in the field of intellectual property rights. China protected right holders in strict accordance with the laws and administrative regulations on the protection of intellectual property rights which were in complete conformity with the WTO TRIPS Agreement. China was now making every effort to implement the obligations of the TRIPS Agreement.

77. With respect to measures against piracy of software, he said that the guiding ideology of the Activity Plan for Fighting against Pirated Software, which had been published in June 2003, was to resolutely crack down on various piracy and infringing acts in respect of software and to promote the development of the Chinese software industry. The working objective was to establish a fair and orderly software market and to realize the fundamental improvement in the social environment of software copyright protection. The Activity Plan was a provisional measure, while the crackdown on various piracy acts was a long-term and standing task. At present, a crack-down on software piracy was included in this Plan in the light of the current situation of China, and it was possible for this Plan to include anti-piracy work in other respects later.

78. Article 47 of the revised Copyright Law had added a provision on legal liability for infringing the right of communication through an information network. The principles of illegal application were the same as the liabilities for various infringing acts, whether on-line or off-line, including ISP liability. Although the issue concerning ISP liability was not within the framework of the TRIPS Agreement, China was making an active and serious study of the issue. Other countries' relevant legislation, in particular that of the United States and the European Communities, had aroused general concerns in China.

79. Regarding the regulations of the export of counterfeit and pirated goods, he said that in the year 2002, the Chinese customs had seized a total of 573 cases worth of RMB 95.62 million, including four worth RMB 230,000 and 569 cases worth RMB 95.39 million.

80. Regarding the relationship between civil, criminal and administrative enforcement, he said that theoretically an administrative punishment did not preclude the subsequent criminal enforcement for the same act. According to the Provisions on the Removal of Suspected Crime Cases by Administrative Enforcement Agencies of 2001, which had been enacted by the State Council, cases of suspected crime of violating the Copyright Law should be removed to judicial authorities. Consequently, it was infrequent that a criminal enforcement came after an administrative punishment.

81. He further said that, in 2003, the NCAC had launched three special actions. In February, the NCAC had launched the Special Action for Striking Piracy during the World Intellectual Property Leader's Meeting. According to incomplete figures, the copyright administrative departments in Beijing, Shanghai, Tianjing, Chongqing, and the provinces of Liaoning, Jilin, Hainan, Guangdong, Fujian, Zhejiang, Anhui, Jiangxi, Jiangsu, Yunnan, Guizhou, Gansu, Shanxi and Inner Mongolia had checked 2,588 markets, 30 schools, and 77 enterprises, imposed administrative punishments on 1,430 infringing or pirating entities, imposed a forfeit of RMB 1,339,500, suppressed 816 shops, removed five cases to judicial authorities, and investigated one underground compact disc press. In July, the NCAC combined with the General Administration for Press and Publication, Ministry of Education, and the National Anti-Piracy and the Pornography Working Committee, had launched the 2003 Autumn Special Action for Striking Pirated Textbooks and Assistant Teaching Materials. This action was still under way at present. In August, the NCAC had launched the 2003 Special Action for Striking Pirated Software. On the first day of this action, 250,000 infringing copies of software alone had been confiscated in Beijing, Shanghai, and the provinces of Sichuan and Guangdong. The local agencies of the industrial and commercial administrations would also step up the efforts to clamp down on trademark infringements. Furthermore, he said that local administrative authorities for industry and commerce conducted routine monitoring and investigation to discourage counterfeit markets. If any counterfeit goods were found in the market, they would strictly enforce the relevant laws and regulations. He added that the relevant IPR agencies undertook enforcement actions every year at the Canton Trade Fair.

82. The representative of Japan recalled that, at the first transitional review in 2002, his delegation had raised questions about five issues, namely further improvement of enforcement including judicial procedures, patent examination procedures, protection of well-known trademarks, licensing regulations on patents and know-how, and the system requiring foreign patent applicants

to use representative offices designated as those for foreign applicants. He expressed his appreciation of the efforts by the Chinese Government to improve the situation, for example by increasing the number of representative offices designated as those for foreign applicants and amending the system pertaining to protection of well-known trademarks. However, given the current situation and problems, such as the damage caused by counterfeiting and piracy and delays in granting patents, he expected China to make further efforts. In this regard, of particular importance were further improvements in enforcement including the active implementation of criminal prosecution, amendments of the guidelines for criminal prosecution and elimination of delays in granting patents.

83. With respect to the issue of further improvements of enforcement, he said that the Chinese Government's enforcement was inadequate in view of Part II of the Protocol and Articles 41 and 61. A recent Japanese survey had shown that the majority of Japanese companies investing in China were still suffering damage from counterfeiting in China. Improvement of enforcement was of greatest importance for the protection of intellectual property rights in China. He requested that enforcement be improved, in particular, in respect to the following three aspects. First, criminal procedures: in his view, criminal prosecution was the most effective way to deal with violators. According to the survey, approximately 10% of the Japanese companies that had been harmed by counterfeiting had been subject to repeated violations of their rights since December 2002. However, the conviction rate was extremely low. Therefore, he hoped that China would actively pursue criminal prosecutions and apply stronger punishments to boost the deterrent effect. The present standard for prosecuting criminal cases included a threshold of a certain level of sale proceeds from counterfeit goods. Changes to this standard would be needed. Secondly, administrative procedures: he expressed his hope that China would take stronger administrative measures, including imposing stiffer fines and increasing the number of seizures, to ensure an active and smooth administrative control of the problem. Thirdly, localism: he appreciated China's reply that it would make aggressive efforts to correct the localism. He hoped to see the introduction and actual implementation of measures in this area. Some Japanese companies that had requested the seizure of counterfeit goods indicated that they had come across cases of localism where authorities had refused to seize goods because they had been produced by a major local company. He called on the central government to strengthen the surveillance of local authorities in order to eliminate localism.

84. Regarding patent examination processes, he said that the average pendency of the examination of Japanese patent applications was 36.8 months and that measures had been taken, including an increase in the number of examiners. Some Japanese companies had expressed their satisfaction at these measures to ameliorate delays in granting patents. However, as regards one patent application, examination had not yet begun after 65 months. Some Japanese companies had reported that the problem of examination delays had not yet been resolved, particularly in the area of advanced technology such as liquid-screen displays, PCs and IC cards. As a result of such delays, licence agreements could not be concluded for investment in China and it was not possible to obtain compensation for damages caused by counterfeit goods. In the light of Article 62.2 of the TRIPS Agreement and the need for improved transparency, he asked China to consider the following two matters: first, enhancing transparency by regularly disclosing data on the pendency of patent examination, thereby promoting mutual understanding between the countries concerned; and second, accelerating patent examination.

85. In regard to the protection of well-known trademarks, he welcomed the increased clarity resulting from the rules relating to the approval and protection of famous trademarks. He hoped that the protection of foreign well-known trademarks would be strengthened without discrimination on the basis of nationality and that approval procedures would be simplified. He also hoped that China would disclose information on the status of domestic and foreign approvals following the enactment of the new ordinances that had been effective since June 2003.

86. As to licensing regulations on patents and know-how, he expressed his appreciation of certain improvements in this area, both in regard to the Export and Import Administrative Ordinance and the legal system. However, he was concerned that the disparity between domestic contract law and the licensing regulations would raise issues relating to national treatment. In addition, some Japanese companies had reported that there had been cases where the information on the abolition of some laws and regulations at the time of China's accession to the WTO had not been sufficiently transmitted to regional authorities. Therefore, he wished that China would ensure proper enforcement by regional authorities of laws and regulations reflecting the relevant revisions.

87. The representative of Chinese Taipei thanked the delegation of China for its comprehensive statement. As regards Article 2.1 of the TRIPS Agreement, he recalled that a communication that China had provided in the context of the transitional review in 2002 (IP/C/W/382) read as follows: "In order to perfect the provisions on right of priority, the amended Trademark Law added new provision relating to right of priority and further stipulates right of priority for goods on an international exhibition". He requested China to provide information on how China had ensured in the course of the past years that the provisions on the right of priority were enforced. Then he requested China to notify to the WTO in due course the "Regulations on the Recognition and Determination of Well-Known Trademarks", which had been adopted in June 2003.

88. The representative of the European Communities thanked China for its comprehensive statement. He said that document IP/C/W/413 which his delegation had submitted was self-explanatory. He said that China's implementation of its commitment to abide by the TRIPS Agreement had resulted in significant changes in China's intellectual property protection. Its legislative framework for the protection of intellectual property was in line with international standards, in particular the TRIPS Agreement. Over the past years, China had been progressively more sensitive as regards the need for reform and enforcement against counterfeiting and piracy. The Chinese police and prosecutors were more willing to accept complaints from foreign right holders. Despite these positive developments, he said that the European Communities remained concerned about the high level of counterfeiting and piracy in China. Therefore, the European Communities encouraged China to make additional efforts to curb counterfeiting and piracy. The European Communities was committed to working with the Chinese Government to create a win-win situation.

89. The European Communities welcomed the recently launched EC-China Structured Dialogue on Intellectual Property which had been signed at the EC-China Summit between the EC Trade Commissioner Lamy and Vice Minister of China's Ministry of Commerce Wei Jianguo. He expected this Dialogue to contribute to a better understanding of intellectual property systems in China and the European Communities. It would also be convenient to address China's intellectual property enforcement challenge. In conclusion, he said that the European Communities was looking forward to increasing its cooperation with China at the bilateral level, which would provide a convenient framework to further address the concerns raised in its submission.

90. The representative of the United States said that China had taken substantial steps to reform its intellectual property law and enforcement procedures. Although he appreciated the hard work of Chinese intellectual property agencies, he did not believe that China's enforcement effort had yet adequately deterred the widespread counterfeiting and piracy in China. Therefore, he urged China to take necessary measures to correct the situation on an urgent basis. He also pledged to work cooperatively with China on a bilateral basis towards this end. Finally, he appreciated the efforts China had made in providing the Council with the detailed replies to many of the questions posed by the United States. He also appreciated that, given the time constraints, China might not have had an opportunity to prepare answers to all questions. He would follow up with China to obtain responses to the other questions.

91. The representative of Korea extended its appreciation to China for its detailed and comprehensive oral and written presentations as well as the written responses to Members' questions.

He wished to know the efforts China had made regarding the establishment of a legal framework for intellectual property protection and implementation of the TRIPS Agreement. He believed that the Chinese Government, as a responsible Member, would continue its efforts and participate in the TRIPS Council's work in a constructive manner. Underlining the importance of enforcement, he said that enforcement could not pick up overnight. His delegation looked forward to China's further consistent efforts and progress in bringing its legal texts into reality.

92. The representative of Pakistan thanked China for its comprehensive presentation. He commended China's performance in terms of the enactment of new rules and regulations, adequate review mechanism, enforcement, customs' protection and criminal prosecution. His delegation looked forward to working with China on all of these matters.

93. The representative of China thanked Members for their positive comments on the efforts and achievements China had made in implementing its TRIPS commitments. She said that China had implemented an administrative and judicial coordination mechanism with respect to intellectual property protection. During recent years, China had been one of the nations that had attracted most foreign investment in the world, which had a close connection with China's effective intellectual property protection. She hoped that Members could be relieved of their concerns relating to China's intellectual property protection, and further learn about China's law and enforcement. She said that intellectual property right holders from all Members would be protected pursuant to China's law. Counterfeiting and infringement were subject to serious investigation and punishment in China.

94. Turning to the preparation of the TRIPS Council's report to the General Council, the Chairman suggested that, given that the TRIPS Council would not have another meeting before the General Council's next meeting scheduled for 15 and 16 December 2003, the TRIPS Council agree that that he, acting on his own responsibility, prepare a brief and factual report to the General Council. The content of the cover page to the report would be similar to that submitted by the TRIPS Council in 2002, and the part of the minutes of the meeting reflecting the discussions held under this agenda item would be attached.

95. The Council took note of the statements made and agreed to proceed with the preparation of the report as suggested.

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

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

F. PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

96. The Chairman recalled that, prior to its meeting in June 2003, the Council had received three communications relating to the agenda items "Review of the provisions of Article 27.3(b)", "Relationship between the TRIPS Agreement and the Convention on Biological Diversity" and "Protection of traditional knowledge and folklore": one from Switzerland (IP/C/W/400/Rev.1); another from India on behalf of Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Peru, Thailand and Venezuela (IP/C/W/403); and a third from Morocco on behalf of the African Group (IP/C/W/404). Given that the documents had been circulated just prior to that meeting, he offered Members an opportunity to make further comments on them as well as any other matters relating to the agenda items.

97. The representative of Switzerland recalled that Switzerland had presented documents IP/C/W/284 and IP/C/W400/Rev.1, which addressed the issues set out in paragraph 19 of the Doha Declaration. It was of crucial importance to find effective and expeditious solutions to the issues regarding access to genetic resources and benefit-sharing. He recalled that his delegation had briefed

the Council at its June meeting on the Swiss proposal to amend WIPO's Patent Cooperation Treaty (PCT) and the Patent Law Treaty (PLT), which had been submitted to WIPO in May 2003. These amendments would explicitly allow national legislatures to introduce an obligation for patent applicants to declare the source of genetic resources and traditional knowledge in patent applications. He welcomed Members' positive reactions both in the WTO and WIPO and took due note of Members' concerns. He said that Switzerland had requested WIPO, in close collaboration with the CBD, to further consider the establishment of a list of government agencies that would be competent to receive information regarding patent applications containing the declaration of the source of origin.

98. The benefits of the Swiss proposal were that, first, it would increase transparency regarding access to genetic resources and traditional knowledge and benefit-sharing. Second, it would establish a sound and equal basis at the international level for Members wishing to introduce measures regarding the declaration of the source of genetic resources and traditional knowledge in their national patent laws, while leaving Members adequate flexibility to develop an efficient national legislation according to their needs. Third, it would enable the contracting parties to the relevant international agreements, including the TRIPS Agreement, the CBD and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), to fulfil their obligations under these agreements in a mutually supportive way. It would also present a specific measure to implement the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (hereinafter "Bonn Guidelines"). Fourth, it would support the determination of prior art regarding traditional knowledge through the simplification of the search of traditional knowledge databases and transparency measures. Traditional knowledge databases were increasingly being established at local, national, and regional levels. The international Internet portal for traditional knowledge proposed by Switzerland would present an additional and complementary measure. The proposed transparency measures would also aid the determination of prior art with regard to traditional knowledge that only existed in oral form because the declared source could provide an important starting point for the further examination. Fifth, the declaration of the source and other information provided to the competent government authority would allow the provider of genetic resources to verify whether the patent applicant fulfilled the requirements and procedures of the national system. The declaration would also enable parties to finalize a contract on access to genetic resources and benefit-sharing and to verify whether each of them complied with their own obligations under that contract and thus assisted in and simplified the enforcement of the obligations.

99. He reiterated that Switzerland was convinced that the way forward was to amend the PCT and PLT as these two agreements formed the legal foundation to resolve these issues and were an avenue to ensure a coherent and expeditious solution. In his view, the TRIPS Agreement provided Members with adequate flexibility and allowed for the transparency measures as proposed by Switzerland in WIPO. In addition, he called upon appropriate international forums to provide, upon request, legal and technical cooperation and assistance in favour of developing and least-developed countries. In conclusion, he said that Switzerland welcomed the WIPO General Assembly's decision in October 2003 which mandated the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to continue its work. It was the view of Switzerland that the IGC would play a key role in finding solutions to the relevant issues.

100. The representative of Norway said that nothing in the TRIPS Agreement prevented Members from requiring the disclosure of genetic resources and therefore a provision could be inserted into the TRIPS Agreement that would either require or enable Members to oblige patent applicants to provide such information. Such a system would enhance the support given by the TRIPS Agreement to certain provisions of the CBD, particularly the provisions on equitable benefit-sharing and prior informed consent. He noted that the interface between intellectual property rights and biological diversity was being discussed in a number of international forums, including the WTO and WIPO. He supported the general content of the Swiss proposal tabled in the Working Group on Reform of the Patent Cooperation Treaty. To illustrate the importance of the Swiss proposal, he said that, in 2002, 70 per cent of patent applications in Norway had been applications under the PCT. With a few

exceptions, all applications concerning biotechnological inventions had been under the PCT. The PCT explicitly prohibited any requirement which was different from or additional to the requirements provided for in the PCT or its Regulations. Thus, the PCT constituted an important obstacle to the introduction of a system where an international patent application covering biotechnological inventions should contain a reference to the source of origin. He looked forward to further discussions in WIPO with a view to arriving at an agreement on how the PCT might be amended to deal with the CBD-related concerns.

101. The representative of Brazil said that the joint communication in IP/C/W403, submitted by developing countries, highlighted the main arguments for introducing a provision into the TRIPS Agreement that would require patent applicants for inventions that had used biological resources to disclose the source of those resources and associated traditional knowledge as well as to provide evidence on prior informed consent and fair and equitable benefit-sharing. Recently documented cases of biopiracy involving the grant of intellectual property rights that freely appropriated biological resources and associated traditional knowledge from biodiversity-rich countries were well-known. The recent case involving the Peruvian Amaca had further compounded such concerns. He expected prompt and effective action on this issue in the WTO in accordance with the mandate set forth in paragraph 19 of the Doha Declaration. He believed that introducing an amendment into the TRIPS Agreement to bring it in line with the provisions of the CBD was an entirely feasible undertaking. He indicated that the technical issues could and should be identified and grappled with effectively. There was no need for endless academic discussion in the TRIPS Council or other forums for Members to be able to pursue effective action in this regard. He further said that the joint submission had already addressed some of these technical issues. He looked forward to continuing to work with other WTO Members in ensuring that biopiracy would be properly dealt with.

102. The representative of Bangladesh said that the review of Article 27.3(b) remained a priority for least-developed country Members. Farming was the main livelihood for 75 per cent of the world's population living in rural areas. Article 27.3(b) ensured that WTO Members had the right to select their own *sui generis* systems for the protection of plant varieties, including a system that accorded due recognition to traditional knowledge and traditional practices and the right of farmers to save, use, exchange and sell seeds and other propagating materials, which was consistent with the ITPGRFA. Nothing in the TRIPS Agreement prevented Members from taking measures to ensure food security and safeguard farmers' livelihoods. However, the patent provisions of the TRIPS Agreement allowed countries to recognize monopoly rights over individual genes and their characteristics, which negated farmers' rights over seeds and propagating materials with such genes and characteristics, reduced genetic diversity, made crops more vulnerable to pest attacks, and raised the cost of seeds and agricultural inputs to unaffordable levels for small farmers. He further said that although the TRIPS Agreement would not apply to least-developed countries until 2006, and 2016 for pharmaceutical products, the imposition of Article 27.3(b) was already being threatened on least-developed countries through bilateral negotiations.

103. He said that the review of Article 27.3(b) should result in an amendment clarifying that no living organisms, including plants, animals and parts of plants and animals, gene sequences, and biological and other natural processes for the production of plants, animals and their parts, should be patentable. In cases where they remained patentable, a provision should be incorporated into the TRIPS Agreement to the effect that patents must not be granted without the prior consent of the country of origin in order to affirm its compatibility with the CBD and ITPGRFA.

104. The representative of Korea said that his delegation was still reviewing Members' submissions in the WTO and in other international forums. Some of the submissions had made his delegation believe that the TRIPS Agreement might not be the most appropriate vehicle to address the issue regarding the declaration of the source of genetic resources and traditional knowledge in patent applications. It was the view of his delegation that there was no conflict between the TRIPS Agreement and the CBD. The TRIPS Agreement was flexible enough to allow Members to

implement the provisions of the CBD in their national legislation. If there was a need to establish international rules in this area, he believed that sufficient technical work had to be done beforehand. In this respect, he noted that WIPO, in particular the IGC, was considering the various issues relating to genetic resources, traditional knowledge and folklore. The CBD was also working on these issues based on Article 8(j) of the CBD.

105. The representative of Thailand said that, although it was not party to the CBD and PLT, his delegation would follow the discussion on amendments of both treaties with keen interest. He said that, as a starting point, Members could focus their attention on the meaning of "traditional knowledge", including the objective of the protection of traditional knowledge. Regarding the relationship between the TRIPS Agreement and the CBD, he said that only those who were Members of the two treaties needed to implement them in a complementary manner. It was the view of his delegation that developing countries still had difficulty in implementing the two treaties in an effective way that corresponded to their social and economic development. Therefore, the TRIPS Agreement should be amended to reflect the necessity of disclosing the source of genetic resources, as had been highlighted in document IP/C/W/403.

106. The representative of the European Communities said that, as had been proposed by Switzerland, it was important to create a clearing house mechanism or an interface between the patent offices which would receive information on the source of genetic resources and the country from where genetic resources had originated, since without such a mechanism the system of disclosure of origin would not work and would not create the transparency that Members were looking for.

107. Turning to the submission made by India on behalf of certain developing countries, he said that he believed that it was a good basis for discussion on the issue of disclosure. He recalled that, in September 2002, his delegation had expressed its readiness to discuss the issue of disclosure as a tool for making the TRIPS Agreement and the CBD more mutually supportive. He said that Members had to further discuss the disclosure system to ensure that it took into account certain realities and practicalities. For example, it was sometimes tortuous and difficult to trace the source of genetic resources. Also, a number of countries, especially the biodiversity-rich countries, did not have legislation on prior informed consent, access and benefit sharing, which made it impossible for patent applicants who wanted to apply for patents based on the use of genetic resources, to present evidence that the requirements of the CBD had been respected. He said that it was realistic for the EC's submission (IP/C/W/383) to limit, for the time-being, the requests to patent applicants to the origin of genetic resources. It might be interesting to further examine the Swiss proposals, especially in the context of the CBD, and to introduce some kind of uniform certificates of origin, which could be useful when all Members disposed of legislation implementing the CBD.

108. Regarding the African Group's submission, he said that it had drawn a distinction between the issues on which an agreement could be reached and on which agreement seemed impossible. He said that it was difficult for his delegation to discuss the issue of the prohibition of patenting of so-called life-forms, while a number of other issues could be usefully addressed. He said that he remained prepared to continue the debate in the TRIPS Council based on the EC position contained in document IP/C/W/383 even with a view to inserting an obligation in the TRIPS Agreement. Furthermore, he said that the TRIPS Agreement allowed Members to request the disclosure of origin as long as such a requirement did not act as a patentability criterion and as long as it had no effect on the patentability of inventions as such. He said that the European Communities recognized the existence of *sui generis* systems for the protection of plant varieties, other than UPOV, and had acknowledged the leeway in the TRIPS Agreement for the recognition of farmers' rights to use, save and exchange seeds and for the protection of traditional knowledge. He informed the Council that the European Commission would present a communication to the EC Council of Ministers the following week in which the European Communities would suggest ways and means to implement the CBD's Bonn Guidelines within the European Communities and this communication would deal with intellectual property-related issues, such as the disclosure of origin.

109. The representative of the United States said that robust patent protection for plants and animals had stimulated the growth of important new industries in the biotechnology sector. This protection had provided clear benefits to society, particularly in the pharmaceutical and agricultural sectors, both in developed and developing countries. For that reason, he continued to strongly support patent protection by WTO Members. With regard to the relationship between the TRIPS Agreement and the CBD, he said that the agreements could be implemented in a mutually supportive manner and that no conflict existed between them. Although he supported the objectives of the CBD, he did not favour using the patent system as a means to seek compliance with the CBD's provisions on prior-informed consent and benefit-sharing. It was the view of the United States that national systems outside patent laws were the most effective way to achieve these objectives. These regimes could have many components, including the use of permits, contractual obligations, and civil and/or criminal penalties. Patent laws were simply not intended, nor were they appropriate, to regulate misconduct, as they provided exclusive rights for a limited time in exchange for disclosures in order to further innovation. Misconduct, such as misappropriation of genetic resources, required direct regulations with enforcement by criminal or civil penalties.

110. He recalled that his delegation had tabled a paper on access to the genetic resources' regime of the US National Park Service (IP/C/W/393). He said that this paper described the laws and regulations that governed access to resources in the US National Parks and the benefit-sharing requirements imposed by the National Park Service. Any party that sought a permit to collect specimens or materials in the national parks, where the results of research would be used for commercial purposes, should enter into an approved benefit-sharing agreement with the National Park Service. The scientific research and collecting permit issued by the Park Service spelt out the terms and conditions under which the party would be permitted to collect research specimens and the purpose to which such specimens might be put. The benefit-sharing agreement identified the allocation of ownership in any inventions made and other rights and obligations of the parties. Some contracts might provide for express damages in the event of a breach of any of the provisions of the agreement. He believed that similar systems, adapted to the legal systems of other countries, would work well in promoting the sustainable use of genetic resources or traditional knowledge and in ensuring that the benefits resulting from any research using these resources or knowledge were shared whether or not the results were patented.

111. Finally, he noted that WIPO's General Assembly held in September 2003 had extended the mandate for the IGC. The United States would continue to participate in the IGC in an active and constructive manner and to explore the intellectual property aspects of genetic resources, traditional knowledge and folklore.

112. The representative of Pakistan said that his country was a co-sponsor of document IP/C/W/356 and pointed out that discussions on the relationship between the TRIPS Agreement and the CBD had been ongoing in the Council for almost four years. It was, therefore, strange to hear statements questioning the appropriateness of the TRIPS Council to handle this issue, especially since paragraph 19 of the Doha Declaration had given the Council a mandate to address the issue. He believed that, since the TRIPS Agreement was the most legally-binding agreement, an amendment to the TRIPS Agreement would ensure the ultimate eradication of biopiracy. He added that it was time for Members to have technical discussions on this issue instead of "forum shopping".

113. The representative of India associated his delegation with the statement made by Brazil and believed that a provision in the TRIPS Agreement to provide for disclosure and prior-informed consent requirements was an entirely feasible undertaking. He agreed with the representative of Pakistan that there was not much merit in an endless discussion on this issue and that Members needed to move the debate forward to a satisfactory conclusion. He noted that some Members who had shown interest in providing for a requirement for disclosure and related matters in the TRIPS Agreement had referred to the need to sort out certain so-called technical points. Therefore, he

suggested that the Secretariat be requested to identify such technical points which could be discussed in detail in order to fulfil the mandate set out in paragraph 19 of the Doha Declaration.

114. The representative of Kenya said that an amendment of the TRIPS Agreement should oblige Members to require patent applicants to disclose the source of biological materials or traditional knowledge, prior consent and equitable benefit-sharing. As regards the proposal that the disclosure mechanism work at the national level, he said that since there was evidence of violation at the international level, a mechanism at the national level would not solve the problem. In other words, an international solution that committed all Members through an amendment of the TRIPS Agreement was needed.

115. The representative of Thailand noted that certain principles contained in the African Group's paper and its annex were in line with the paper that Thailand had co-sponsored (IP/C/W/403). He sought clarification from the African Group concerning its view expressed in paragraph III.B of document IP/C/W/404. He said that Article 27.3(b) could be interpreted in such a way that some items listed in the subparagraphs of the same Article could be excluded from patentability while protection could be provided for others under other intellectual property regimes as appropriate. In any case, plant varieties could be protected either by patents or by a *sui generis* system or by any combination thereof. Regarding paragraph 2(f) of the Annex to the African Group's submission, which set forth the principle that no intellectual property rights should be granted without due recognition of traditional knowledge involved in accordance with this Decision, he said that it would be difficult to implement such a principle in practical terms if the parameters of traditional knowledge protection were not clearly defined.

116. The representative of Canada supported Pakistan's intervention on the "forum shopping". A significant amount of work had been done and progress made on all of these three issues in the WIPO. The IGC had received its renewed and strengthened mandate, which instructed it to accelerate its work and to begin to address the international dimensions of that work. Therefore, the IGC was the most appropriate forum to further Members' understanding of intellectual property issues relating to access to genetic resources, traditional knowledge and folklore, including the issues of disclosure, prior informed consent and benefit-sharing.

117. The representative of Australia questioned whether some Members' concerns, such as those related to the implementation of the CBD obligations, could largely be addressed by strengthening legal and administrative regimes outside the field of intellectual property. She felt that more analysis needed to be undertaken to determine the most effective way of ensuring that access to materials, that were subsequently the subject of a patent application, was sourced in compliance with the CBD. There was a need for improved documentation and information-sharing procedures in that respect.

118. She said that, as a mega bio-diverse nation, Australia's own experience in dealing with these issues indicated that there was no conflict between the TRIPS Agreement and the CBD. Efforts needed to be concentrated on examining compatible implementation of both conventions at the national level before taking the major step of amending one of these conventions. The work of the IGC could and should make a substantial contribution to the debate on these issues. She expected that further comments would be made on the Swiss proposal at the Working Group on Reform of the PCT later in the week at WIPO and that a further opportunity to continue discussions would be provided at the forthcoming meeting of the CBD Working Group on Access and Benefit Sharing in Montreal in December 2003 on the basis of a report provided by WIPO.

119. The representative of China said that almost all Members seemed to believe that there was no conflict between the TRIPS Agreement and the CBD and that these two conventions could be implemented in a mutually supportive manner. China shared this basic understanding and welcomed further discussions and proposals on this issue in the TRIPS Council. Referring to the interventions made by Switzerland and Norway, she said that for the purpose of transparency, the TRIPS

Agreement needed to be amended to at least allow Members to introduce into their national laws the three principles of the CBD, namely prior-informed consent, benefit-sharing and sovereign rights over genetic resources. China looked forward to cooperation with other Members in the WTO and other forums to find a constructive, feasible and satisfactory solution to these agenda items.

120. Responding to Thailand, the representative of Kenya promised to provide clarification on the issues at hand. He indicated that the confusion had arisen from the wording of Article 27.3(b) because, according to his delegation, there were ambiguities about the scope of "plants".

121. The Council took note of the statements.

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

122. The Chairman recalled that a substantial number of suggestions for topics to be considered under the Article 71.1 review had been made prior to the Doha Ministerial Conference, but some of them overlapped with other items on the Council's post-Doha agenda. Since Doha, some general observations had been made under this item, but no suggestions for topics to be taken up had been tabled by any Members.

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

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

124. The Chairman recalled that Article 24.2 provided that the Council would keep under review the application of the provisions of the geographical indication section of the Agreement, and that the first such review would take place within two years of the entry into force of the WTO Agreement. At its meeting in June 2003, the Council had invited those Members that had not provided information in response to the Checklist of Questions contained in document IP/C/13 and addendum 1 to do so. The Secretariat had issued airgram WTO/AIR/2183 on 3 October 2003 to remind Members of the Council's invitation to provide this information. Since the Council's meeting in June, further responses had been received from Uruguay, and circulated in addendum 28 to document IP/C/W/117. To date, the Council had received responses to the Checklist from 44 Members. These responses, except for the more recent ones, had been summarized in a Secretariat note contained in document IP/C/W/253. At its meeting in June 2003, the Council had requested the Secretariat to update this summary note to take into account the information received from Members in response to the Checklist of Questions since its circulation in April 2001. This update was in the process of being finalized.²

125. The representative of the European Communities reiterated his view that the debate under this agenda item could be more structured, and recalled his earlier suggestion that the Secretariat or the Chairman, under his own responsibility, come up with specific proposals on how to further this discussion in a more focused way. This item provided a perfect opportunity to discuss the way geographical indications functioned and how the relevant TRIPS provisions had been implemented by individual Members. Therefore, he encouraged the Chairman, under his own responsibility, to come up with specific suggestions on how to proceed on this matter. Furthermore, he recalled that, under this agenda item, his delegation had posed questions regarding the legislation of specific individual Members. Noting that these questions had not yet been answered, he said that he would very much appreciate receiving written responses to them.

126. The representative of the United States recalled that, in prior discussions under this agenda item, he had indicated that he believed that the Council should follow a proposal that had been made

² Subsequently circulated as document IP/C/W/253/Rev.1.

earlier by Australia to walk through the provisions on geographical indications of the TRIPS Agreement paragraph by paragraph. Had all Members provided responses to the Checklist of Questions on geographical indications, as the delegations of Uruguay and 43 other Members had, the membership would certainly have a more complete picture of the variety of ways in which countries had implemented their obligations with respect to geographical indications. This would make such a walkthrough much more meaningful. He was particularly interested to understand how countries ensured that GI protection was available for nationals of other Members to protect their geographical indications, since, as he had noted before in the Council, he was aware that not all WTO Members currently did so.

127. The representative of Australia thanked the Chairman for circulating the airgram reminding Members of the importance of providing answers to the Checklist and said that she was looking forward to the update to the summary note. It was vitally important that further examination was given to the manner in which countries provided GI protection and that the Council would examine practical examples of GI protection so that all Members could get a better sense of the various regimes that had been developed for the protection and recognition of geographical indications. A closer look at the details of domestic implementation of GI protection would provide not only the best, but also the necessary platform for ascertaining the benefits of protection and perhaps the problems with it.

128. In the past, her delegation had said that this review should be structured in a logical way and proposed an examination that would provide scope for the provision of general comments, definitions and criteria for recognition, procedures for recognition, eligible authorized users, the monitoring of protection against those not eligible or authorized to use a GI (or using one improperly), enforcement, and the relationship to trademarks. Her delegation would be happy to see a discussion structured along those lines, perhaps on the basis of a proposal by the Chairman as the European Communities had suggested.

129. She said that a number of Members appeared to be struggling with the Checklist of Questions, and noted that responses had been received from only 44 Members. In the context of the review, Members should perhaps have an opportunity to highlight any difficulties or questions they were having in relation to filling out this questionnaire.

130. Referring to the European Communities' remarks on unanswered questions – some of which remarks had been previously directed at Australia – she drew the Council's attention to the number of contributions that had been made by her delegation on this issue. These included documents IP/C/W/205 and IP/C/W/117/Add.23, as well as Australia's paper from earlier this year³ which was in fact the response to the questions that had been posed to Australia more recently. Her delegation's view remained that its contribution had been consistent, comprehensive and entirely adequate.

131. The representative of Canada supported all three previous interventions. As suggested by the European Communities, he believed that it would be helpful to have a more structured discussion, and he would welcome a proposal by the Chairman and the Secretariat in this regard. He believed that a review along the lines described by the United States and Australia would be particularly helpful.

132. The Chairman noted that it had been suggested that the Secretariat and he work together with Members to consider how to carry forward the review. He indicated his intention to hold informal consultations on this matter prior to the Council's next meeting.

133. The Council took note of the statements made.

³ Document IP/C/W/392.

I. DECISION ON THE IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

134. The Chairman recalled that, at its meeting of 30 August 2003, the General Council had adopted the Decision on "Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health" (WT/L/540) (hereinafter "Decision"). He said that its paragraph 11 provided that the Decision, including the waivers granted in it, shall terminate for each Member on the date on which an amendment to the TRIPS Agreement replacing its provisions takes effect for that Member. Furthermore, it instructed the TRIPS Council to initiate by the end of 2003 work on the preparation of such an amendment with a view to its adoption within six months, on the understanding that the amendment would be based, where appropriate, on the Decision and on the further understanding that it would not be part of the negotiations referred to in paragraph 45 of the Doha Ministerial Declaration. He informed the Council that the European Communities had submitted a communication (IP/C/W/416), which dealt with domestic implementation of the Decision and its transposition into an amendment of the TRIPS Agreement.

135. The Chairman indicated his intention to hold informal consultations on the matter in various formats, in small groups as well as in open-ended sessions, before the Council's next meeting. The purpose of these consultations would be to give delegates an opportunity to exchange views on the amendment and see how the Council could make progress on this issue.

136. The representative of the European Communities, in presenting document IP/C/W/416, said that all Members had the responsibility to ensure the effective operation of the system set out in the Decision. The most immediate effort had to be made by those countries with manufacturing capacities in the pharmaceutical sector which were prepared to participate in the system as manufacturers and exporters. On the other hand, importing Members should examine what reasonable measures had to be taken within their means, proportionate to their administrative capacities and to the risk of trade diversion, to prevent re-exportation of the products that had been imported into their territories under the system. He said that in order to ensure the efficiency of the system, Members should refrain from overly restrictive interpretations of the Decision. Likewise, any abuse of the system for reasons other than those stated in the Decision would lead to an erosion of confidence among Members and affect the workability of the system.

137. Referring to the EC communication of June 2003 (IP/C/W/402), he said that, given that technical assistance and capacity building were paramount in the implementation of the Doha Declaration, balanced, transparent and unbiased technical assistance to integrate the Doha Declaration into intellectual property policies and practices would be the key for the European Communities as it must be for other technical assistance providers, in particular multilateral organizations. The adoption of the Decision reinforced the case for appropriate technical assistance and the positions taken in the implementation of the Decision as well. Therefore, he proposed that the TRIPS Council instruct the Secretariat to ensure that the WTO-WIPO Joint Initiative on technical assistance in the area of intellectual property rights for the least-developed countries effectively addressed the public health dimension and closely involved the World Health Organization in this process.

138. Turning to the amendment of the TRIPS Agreement, he said that the amendment should be an essentially technical process that must be initiated by December 2003 and terminated by June 2004 at the latest. He believed that textual changes would have to be made to the TRIPS Agreement itself in order to transpose faithfully what had been agreed to in the Decision. To this effect, he supported the Chairman's proposal for consultations.

139. The representative of Kenya supported the Chairman's proposal for consultations.

140. The representative of Canada supported the Chairman's proposal for consultations. He said that, to make the system work, Members who wanted to import medicines under the system needed to

notify their intentions to do so and Members who had the capacity to export pharmaceuticals needed to change their domestic intellectual property rules to allow them to do so.

141. He informed the Council that the Government of Canada had announced in September 2003 its intention to incorporate into the Canadian law the Decision and the Chairman's statement. After intense work and consultation with Canada's brand-name and generic pharmaceutical industries as well as with the key non-governmental organizations and public health advocates, Prime Minister Chretien had tabled the new legislation in the Canadian House of Commons on 6 November 2003. This new legislation proposed changes to two pieces of legislation: the Patents Act and the Food and Drugs Act. He said that the Government, when drafting the legislation, had been intent on being faithful to the Decision. On the basis of the WTO waiver, Canada would allow eligible countries to import from Canada the pharmaceutical products they needed to protect public health. Canada had imposed no limitation on the countries eligible to use the system, other than the limitations some Members had agreed to impose on themselves. Moreover, as part of its continued commitment to the poorest developing countries, Canada had also decided to extend the system to the LDCs who were not WTO Members. As for the products covered by the draft legislation, he said that Canada had ensured that its approach was consistent with the spirit and purpose of the WTO waiver. It had used, as a starting point, those drugs on the WHO list of essential medicines which were patented in Canada. This list constituted a pre-approved list to which more pharmaceutical products would be added through a simple and expeditious mechanism. Consistent with its international commitments, Canada would maintain the flexibility to issue compulsory licences for all products which fell within the scope of the WTO waiver. He said that parliamentary debate, public consultations, and the drafting of implementing regulations in Canada would continue, and there remained the possibility of further improvement on its efforts. He said that this bill would be reintroduced in 2004 and Canada planned to complete the work on a priority basis.

142. He further informed the Council that the Canadian funding for HIV/AIDS initiatives in developing countries would increase to US\$270 million over five years, plus US\$50 million over five years towards the international AIDS vaccine programmes, and another US\$100 million over four years to the Global Fund to fight HIV/AIDS, Tuberculosis and Malaria. Canada had also earmarked US\$80 million for the Global Tuberculosis Drug Facility. It also provided immunization and vitamin A capsules to vulnerable children in more than 40 countries in Africa, Asia and Latin America. It had funded a total of US\$95 million to the Global Polio Eradication Initiative over the last five years.

143. The representative of Norway said that the amendment that the Council had been mandated to carry out would be a permanent solution with legal security. He supported the Chairman's proposal for informal consultations and said that the discussion should avoid the re-opening of substantive issues. In addition, he informed the Council that the Norwegian Parliament had debated a draft bill, which would allow the Decision to be implemented in the Norwegian legal system.

144. The representative of Korea said that the Decision was a constructive compromise representing a delicate balance that addressed the serious concern of developing countries while adhering to the fundamental principles and objectives of the TRIPS Agreement. An amendment of the TRIPS Agreement to accommodate the Decision should be made in the same spirit. It should be limited to the minimum necessary to provide a permanent legal basis for the working of the substantive elements of the Decision and should not re-open the discussion on the substantive elements. Members also needed to reflect on whether it was necessary or possible to incorporate the whole Decision into the TRIPS text and on whether to reflect this text in Article 31(f) or (h) as such. He requested the Secretariat to prepare a technical background note on amendment procedures and possible ways to reflect Members' commitments without including them in the amendment. Finally, he supported the Chairman's initiative to hold informal consultations.

145. The representative of Thailand encouraged Members having similar concerns and interests to hold consultations with the view to putting forward a paper for consideration at the TRIPS Council's next meeting. He was open to the discuss any option to be submitted by Members. He hoped that transparency would be accorded in the process of consultations to be held by the Chairman.

146. The representative of India supported the Chairman's proposal for consultations. He said that Members needed to work with deep commitment to provide for the solution given in the Decision, as this would help governments in undertaking necessary legislative changes at the national level.

147. The representative of Hungary supported the Chairman's proposal for consultations. She said that it was time for Members to think about how to start the process leading to the necessary amendment of the TRIPS Agreement according to paragraph 11 of the Decision.

148. The representative of the United States said that his delegation welcomed the agreement Members had reached on 30 August 2003 to implement paragraph 6 of the Doha Declaration, including the Pérez Motta text and the Chairman's statement. This agreement was tangible evidence of Members' ability to come together and achieve meaningful progress on this issue of vital importance to all Members that had been a priority concern for the TRIPS Council over the last few years. He further said that all that had been left for the TRIPS Council to do was to codify the agreement into a straightforward amendment of the TRIPS Agreement. His delegation hoped that this technical exercise could be accomplished expeditiously and without re-opening substantive aspects of the agreement. He said that this agreement established the right balance between addressing the concerns of countries most in need and ensuring the protection of intellectual property that fostered the future development of life-saving drugs.

149. He said that Canada's recently proposed legislation to implement the agreement showed that the system could be implemented into law even in advance of a final amendment of the TRIPS Agreement. He said that the United States was fully committed to work with other Members to transfer the work that had been done into an amendment of the TRIPS Agreement. This amendment would provide legal certainty to all Members regarding the implementation and interpretation of the system over the long term. He supported the Chairman's proposal to conduct informal consultations on the form of the amendment with a view of fulfilling the mandate under paragraph 11 of the Decision. He thought that at this stage informal consultations might be a prudent first step before exploring other options, including the development of background papers by the Secretariat.

150. The representative of Japan supported the initiation of discussions on the mandate set out in the Decision and the Chairman's statement.

151. The representative of China welcomed the Decision which marked the first significant breakthrough of the Doha Development Agenda (DDA). He said that the solution would not only help address the public health crisis in Africa but also provide assistance to other developing Members in dealing with public health problems. China was pleased to learn that domestic implementation procedures were being carried out in Canada and Norway.

152. The representative of Australia supported the Chairman's proposal for informal consultations. She indicated that informal consultations were a necessary first step before Members considered any further work.

153. The representative of Chinese Taipei supported the Chairman's proposal for informal consultations. He also supported the proposal on the preparation of background papers.

154. The representative of Switzerland said that the adoption of the Decision had sent a positive signal to the world. It was evidence that the TRIPS Agreement was not a rigid international

instrument focusing solely on the benefit of right holders, but an agreement capable of reconciling intellectual property protection with other issues of public interest, including public health policies.

155. He said that the Decision and the Chairman's interpretative statement reflected the delicate balance of the different interests, positions and concerns of the negotiators and stakeholders involved and was the best solution obtainable at that time. He said that the technical implementation of the amendment must adhere to the text and substance of the solution Members had agreed to in August 2003. Any change, unless of formal nature, would jeopardize the consensus and would render impossible the implementation within the mandated timeframe. In addition, he said that considering that the General Council Chairman's statement had been the key to eventually finding a consensus among Members, it seemed important to reflect the statement in an adequate manner in the implementation of the Decision.

156. He supported the Chairman's proposal for informal consultations and said that it was advisable to hold consultations before the submission of any technical papers. He believed that the first TRIPS Council meeting in 2004 could adopt such an amendment for recommendation to the General Council. He informed the Council that Switzerland was currently examining whether changes in its national law were necessary to contribute to the goals, objectives and successful functioning of the solution agreed by Members. Such work at national level could and would only be undertaken if it could be based on the Decision and if the substance of the Decision was not questioned again.

157. Reacting to the points made by Members about technical cooperation in regard to the TRIPS Agreement and public health, the representative of the Secretariat said that the Secretariat had put forward to the Committee on Trade and Development a technical assistance and training plan for 2004 (WT/COMTD/W/119/Rev.1) for consideration. This plan envisaged seven regional activities in the area of the TRIPS Agreement in 2004 for Anglophone Africa; Francophone Africa; Arab and Middle East countries; Asia and Asia Pacific; the Caribbean; Central and Eastern Europe, Central Asia and the Caucasus; and Latin America respectively. One of the topics that had been identified as being a likely subject for these regional events was the TRIPS Agreement and public health. The Secretariat was open to any suggestions and reactions from countries in these regions regarding their priorities. The Secretariat also attached importance to working in cooperation with other international organizations and had already had some initial contacts with WIPO and the WHO. In addition, he informed the Council that in order to carry forward the implementation of the Decision, the Secretariat had established a dedicated webpage on the WTO website on which notifications would be found once they were made. To date, the Secretariat had not received any notification.

158. The Council took note of the statements.

J. REVIEW UNDER PARAGRAPH 2 OF THE DECISION ON THE IMPLEMENTATION OF ARTICLE 66.2 OF THE TRIPS AGREEMENT

159. The Chairman recalled that, at its meeting in February 2003, the Council had adopted a decision on the "Implementation of Article 66.2 of the TRIPS Agreement". Paragraph 1 of the Decision provided that developed country Members would submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they must provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports were to be submitted prior to the last Council meeting scheduled for the year in question. The Decision had been adopted on the basis that the first set of new detailed annual reports to be presented under it be submitted by the end of 2003. It had been noted that many Members had already submitted detailed reports in the Autumn of 2002, and that it was expected that those reports be updated and revised in light of the Decision.

160. Pursuant to this, at its meeting in June, the Council had requested developed country Members to submit reports on actions they had taken or planned in pursuance of their commitments under Article 66.2 by the end of October, in order to allow their timely circulation and review at the present meeting. On 22 August 2003, the Secretariat had issued airgram WTO/AIR/2156 to remind developed country Members of this request. To date, the Council had received information from the following developed country Members: Japan; the Czech Republic; Switzerland; the United States; Norway; the European Communities, and the following individual member States: France, Finland, Germany, Ireland, Spain and Sweden. The resulting documentation was being circulated in document IP/C/W/412 and its addenda.

161. As regards the purpose and conduct of the review of this information, the Chairman recalled that paragraph 2 of the Decision explained that the annual review meetings would provide Members with an opportunity to pose questions in relation to the information submitted and request additional information; discuss the effectiveness of the incentives provided in promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base; and to consider any points relating to the operation of the reporting procedure established by the Decision.

162. The representative of Bangladesh said that the reports submitted under Article 66.2 were critical to ensure the monitoring and the full implementation of developed country Members' obligations to provide incentives to enterprises and institutions in their territories to promote transfer of technology to least-developed country Members. Despite the importance of these reports, only a few developed country Members had so far complied with their obligations. While recognizing that there had been several notifications regarding the issue before the Council's Decision, she said that the establishment of a specific monitoring mechanism superseded any earlier practices and that all developed country Members were required to present their annual reports. It was critical that reports be timely, appropriate and effective. In that sense, LDCs had demanded that reports be sufficiently detailed and specific so as to identify the incentives, the correlation between the particular reasoning of incentives and the obligations under Article 66.2, the enterprise or institution giving the incentives, the type and cost of technology transfer, the terms under which technology transfer existed, the LDCs to which the technology was transferred, the appropriateness and local adaptability of the technology transferred and the beneficiary enterprise or institution in the LDC Member in question. Moreover, reports should include information showing that the incentives reported were specific only to enterprises and institutions transferring technology to LDC Members, and that they did not fall under the general rubric of overseas development assistance. She regretted that so far the reports did not comply with these basic requirements.

163. Introducing the EC report in document IP/C/W/412/Add.5, the representative of the European Communities said that the document was an update of the detailed report which had been circulated in Autumn 2002. The new document was, however, more comprehensive and aimed at responding specifically to the information requested in the Council's Decision of 19 February 2003. Compared to last year's document, the European Communities had added new headings, for example, the type of technology transfer, and statistics, where they were available.

164. As had been confirmed at the previous day's WIPO-WTO Joint Workshop on Intellectual Property Rights and Transfer of Technology, transfer of technology was quite a general term and one which covered a variety of needs and operations. A technological base comprised different elements, including scientific knowledge, physical objects, actual production and know-how. Furthermore, there were different channels for transferring technology. The public sector had gained a certain amount of knowledge but the private sector remained the main player in terms of transfer of technology. In that context, the implementation of Article 66.2 and the help LDCs would receive towards a sound and viable technological base, would in the long term oblige them to take action in different areas. For example, advice and expertise were key elements which some LDC enterprises

lacked, as well as the ability to identify suppliers of technology before entering into contractual relationships and, once the technology had been acquired, the ability to adapt it to local contexts.

165. These were just examples and the European Communities had not felt it necessary to notify all of the capacity building programmes at the national and regional levels, but had merely identified certain general types of incentives that they thought were relevant, i.e., six large groups which they considered were important and complementary in respect of development. Firstly, these included incentives to promote projects among private enterprises (e.g. direct-investment, licensing, franchising, sub-contracting, etc.), which were the main channels for transferring technology. Secondly, improving access to available information and technologies, given that often the access was possible but not easily attainable. Thirdly, supporting common research projects was an important part of the process. Fourthly, providing training for people in terms of technology management to ensure that these technologies were incorporated as effectively as possible in their productive capacity. Fifthly, encouraging trade in technological goods and, lastly, in a more indirect way, certain capacity-building initiatives might also be relevant. The detailed forms included in the European Communities' notification satisfied these objectives often with several of these objectives combined, because the transfer of technology was rarely an isolated activity. These were also combinations of initiatives which meant that the conditions required were as follows: there had to be a demandeur of technology, a provider of technology, as well as technology that was really adapted to the local economy.

166. The representative of the United States said that his delegation had again made a submission in compliance with the obligations under Article 66.2 (IP/C/W/412/Add.3). He asked the representative of Bangladesh to explain what particular aspect of the US submission she had found not to be in compliance with the requirements. If she was not in a position to outline those deficiencies at the meeting, he would be perfectly happy to discuss any concerns she might have bilaterally. His delegation had made a considerable effort, as had other Members who had made submissions under Article 66.2, to ensure that the submission fulfilled the obligations under this provision.

167. The representative of Canada said that his delegation took its Article 66.2 obligations seriously. Noting that Canada's intellectual property team had been occupied for the last couple of months with the legislation to which he had referred earlier in the course of the meeting, he said that his delegation intended to submit its update as soon as possible.

168. The representative of Australia said that her country was in a similar position with both the updated report under Article 66.2 and its report on technical assistance, both of which would be submitted as soon as possible.

169. The representative of Djibouti expressed his appreciation for what the representative of the European Communities had just said about Africa and LDCs and technical assistance as well as transfer of technology.

170. The Chairman urged those developed country Members that had not yet provided reports to do so. It was his intention to provide an opportunity, at the Council's next meeting, for Members to make further comments on the information submitted for this meeting that they might not yet had been able to study.

171. The Council took note of the statements made.

K. TECHNICAL COOPERATION AND CAPACITY-BUILDING

(i) Annual Updates on Technical Cooperation Activities

172. The Chairman recalled that the Council had agreed at its meeting in June to focus on technical cooperation at the present meeting. In preparation for this annual review, developed country Members had once more been requested to update information on their technical and financial cooperation activities relevant to the implementation of the TRIPS Agreement in time for this meeting. Other Members who also had made available technical cooperation were encouraged to share information on these activities if they so wished. The Secretariat had issued on 22 August an airgram WTO/AIR/2156 reminding Members of this request. In addition, intergovernmental organizations observers to the Council as well as the WTO Secretariat had been invited to provide information.

173. To date, the Council had received information from the following developed country Members: Japan; the Czech Republic; the United States; Norway; Switzerland; the European Communities and the following member States: Austria, Denmark, Finland, France, Germany, Italy, Spain, Sweden and the United Kingdom. The resulting documentation concerning the technical cooperation activities of developed country Members was being circulated in document IP/C/W/408 and addenda. So far the Council had obtained updated information from the following intergovernmental organizations: the OECD, the IMF, the FAO and UPOV. This information was being circulated in documents IP/C/W/407 and addenda. Updated information on the WTO Secretariat's technical cooperation activities in the TRIPS area was available in document IP/C/W/406.

174. The Chairman urged those Members that had not yet provided updated information to do so, and said that he intended to provide an opportunity, also at the Council's next meeting, for Members to make comments on the information submitted for this meeting that they might not yet have been able to study.

(ii) Joint Initiative

175. The Chairman recalled that the WIPO and WTO Secretariats had launched on 14 June 2001 a Joint Initiative on Technical Cooperation for Least-Developed Countries. Since then, the WTO Secretariat had kept the Council informed about the implementation of the Joint Initiative.

176. The representative of the Secretariat said that the information on activities under the Joint Initiative over the last year had been summarized in paragraph 8 of document IP/C/W/406 entitled "WTO Secretariat Technical Cooperation in the TRIPS Area". The WTO and WIPO Secretariats were planning to hold a joint national seminar in Chad in December 2003. Further joint national seminars were planned in Uganda and Ethiopia in December 2003, and in Djibouti and Niger in January 2004. He noted that the Joint Initiative was only one part of the WTO Secretariat's technical cooperation activities and recalled that he had already referred to certain other plans for the next year under agenda item I. Finally, he informed the Council that the WIPO and WTO Secretariats had organized on the previous day a Joint Workshop on Intellectual Property Rights and Transfer of Technology.

177. The representative of WIPO said that she did not have anything to add to this information on the implementation of the Joint Initiative. Although not directly addressed to WIPO, she welcomed the EC suggestion, made under agenda item I, to ensure that the Joint Initiative effectively addressed the public health dimension and involved the World Health Organization. She noted that the WIPO and WTO Secretariats were already working on next year's plan, and welcomed the WTO's cooperation in this regard. She thanked delegations who had participated in the WIPO-WTO Joint

Workshop on Intellectual Property and Transfer of Technology. Their contributions had helped to bring the issues at stake into a clearer focus.

178. The representative of Djibouti thanked those responsible for the cooperation between WIPO and WTO in this field and encouraged them to continue this cooperation so that Members would be able to exchange ideas in a very productive manner. In this context, he noted that the WIPO-WTO Joint Seminar had enriched all participants. He said that his delegation had written a letter of invitation to a seminar to be held in Djibouti in December and that another letter had been sent to the WTO and WIPO Secretariats concerning a regional seminar for French speaking countries to be held in the beginning or middle of next year. He added that technical assistance was vital to ensure that LDCs and developing countries be able to gain more knowledge about WTO rules and to better negotiate with other Members of the WTO and WIPO.

179. The representative of Canada thanked the WTO and WIPO Secretariats for their joint technical assistance activities, in particular their new efforts to try to incorporate TRIPS and public health issues into their training. This was an important aspect of the international implementation of the WTO waiver of 30 August 2003.

180. The Council took note of the statements made.

L. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

Accessions

181. The Chairman recalled that the Ministerial Conference, at its Fifth Session on 11 September 2003, had approved the accessions of Cambodia and Nepal to the WTO (WT/MIN(03)/18 and WT/MIN(03)/19). They were the first two least-developed countries to join the WTO pursuant to Article XII of the WTO Agreement, i.e. through the full WTO working party process. The Protocols of Accession were now subject to the ratification of their respective Parliaments. Thirty days after the Secretariat received an official notification of a ratification, the country concerned would become a Member of the WTO.

Dispute settlement

182. The Chairman said that by means of a communication, dated 23 June 2003, the United States and the European Communities had notified a mutually satisfactory temporary arrangement in the dispute United States – Section 110(5) of the US Copyright Act (WT/DS160/23).

183. At its meeting on 2 October 2003, the Dispute Settlement Body had agreed to establish a panel pursuant to requests by the United States and Australia concerning protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS174/20 and WT/DS290/18, respectively). In accordance with Article 9.1 of the DSU concerning multiple complainants, the DSB had agreed to establish a single panel to examine these two complaints. Argentina, Australia, Brazil, Canada, China, Colombia, Guatemala, India, Mexico, New Zealand, Norway, Chinese Taipei, Turkey and the United States had reserved their third-party rights to participate in the Panel's proceedings.

M. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

184. The Chairman said that the list of the 16 pending requests for observer status in the TRIPS Council by other intergovernmental organizations was contained in document IP/C/W/52/Rev.10. He recalled that the Council had discussed these pending requests at its previous meetings, but had not been able to reach consensus on any of them. Given that there were no indications about any developments and that the situation remained the same, he suggested that the Council agree to revert to the matter at its next meeting.

185. The Council so agreed.

N. ANNUAL REPORT TO THE GENERAL COUNCIL

186. The Chairman said that the draft Annual Report of the Council had been circulated in document JOB(03)/210. This document was based on the report the Council had submitted to the General Council on its work in the first part of the year in document IP/C/W/27/Add.1 of 2 July 2003, which in turn had been presented as an update to the Council's 2002 report (IP/C/27). He proposed that the Council request the Secretariat to update the draft to reflect the discussions at the present meeting. This draft would be faxed to Members, who would have five days to comment on the updated parts of the draft report once it had been circulated by the Secretariat, before it was sent to the General Council.

187. The Council so agreed.⁴

O. OTHER BUSINESS

- *Dates of the Council's meetings in 2004*

188. The Chairman said that the Secretariat had tentatively pencilled in the following dates for meetings of the Council in 2004: Monday to Wednesday, 8-10 March, Tuesday to Thursday, 15-17 June, Tuesday to Thursday, 21-23 September, Tuesday to Thursday, 30 November to 2 December.

189. The representative of Brazil said that both his delegation and a number of other delegations had had problems in the past because the TRIPS Council and WIPO meetings had been scheduled to take place at the same time. This had created difficulties particularly for developing countries, which generally tended to have smaller delegations. He requested the WTO Secretariat to coordinate with WIPO when scheduling future meetings for the TRIPS Council, so as to ensure that meetings in the WTO and in WIPO were not scheduled to take place at the same time. Looking at the dates that had been suggested by the Chairman, he said that he was concerned about having a TRIPS Council meeting on 21-23 of September 2003, because usually at that time of the year the WIPO Assemblies took place.

190. The representative of Canada said that a conflict between the TRIPS Council and the WIPO Assemblies could pose a problem for some developed countries as well. He added that it would be very helpful for all of the Council's membership, if the Secretariat could look into this issue.

191. The Chairman clarified that these were just tentative dates for next year's Council meetings, but in light of what had been said he believed that the Secretariat should double check the dates so as to make sure they would not clash, where possible, with WIPO meetings. If any changes were required, the Secretariat could circulate a note to all Members informing them of any changes. However, for the time being, Members should take note of the dates he had just indicated.

192. The representative of the Secretariat said that the Secretariat habitually tried to organize the September TRIPS Council meeting back-to-back with the WIPO Assemblies in order to facilitate broader participation in the TRIPS Council of capital-based delegates from intellectual property offices, especially from developing countries, who might attend the Assemblies' meeting. He said that the Secretariat would coordinate with the WIPO Secretariat to double check the dates and also check the dates of the other meetings to see whether they would give rise to any significant clashes.

⁴ The Annual Report (2003) of the Council for TRIPS was subsequently circulated in document IP/C/30.

193. The Council took note of this information and of the statements made.
