

WORLD TRADE ORGANIZATION

RESTRICTED

IP/C/M/26
24 May 2000

(00-2113)

**Council for Trade-Related Aspects
of Intellectual Property Rights**

MINUTES OF MEETING

Held in the Centre William Rappard
on 21 March 2000

Chairperson: Ambassador Carlos Pérez del Castillo (Uruguay)

Subjects discussed:

- A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS
- B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT
- C. REVIEW OF LEGISLATION:
 - (i) Review of the legislation of the Kyrgyz Republic and Latvia
 - (ii) Reviews in 2000 and 2001
- D. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9
- E. IMPLEMENTATION OF ARTICLE 66.2
- F. SECTION 211 OF THE UNITED STATES OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT OF 1998
- G. TECHNICAL COOPERATION
- H. WORK ON ISSUES RELEVANT TO THE PROTECTION OF GEOGRAPHICAL INDICATIONS
- I. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)
- J. REVIEW OF THE IMPLEMENTATION OF THE AGREEMENT UNDER ARTICLE 71.1
- K. EXAMINATION OF THE SCOPE AND MODALITIES FOR NON-VIOLATION COMPLAINTS
- L. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

A. OBSERVER STATUS FOR INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

1. The Chairperson said that he had held informal consultations on this matter, in order to explore whether it would be possible to make progress in coming to decisions on the 15 pending requests from international intergovernmental organizations. He wished to underline that the delay that had occurred in this regard did not help in giving the WTO a favourable image. In these informal consultations, he had proposed that, as a first step, the Council might consider first the requests from those multilateral organizations which had obtained observer status in other bodies of the WTO, in particular those which were agencies related to the United Nations. In this connection, Members had agreed that additional information should be sought from the World Health Organization ("WHO").

2. The representative of the United States said that his delegation was of the view that the information that had been received from the WHO did not fully respond to the guidelines for considering requests for observer status (Annex 3 of document WT/L/161). His delegation would be favourably inclined to consider ad hoc observer status for the WHO, if additional information would be provided that met Members' expectations.

3. The representative of the European Communities supported the United States saying that it might be useful to have the WHO as an observer in the Council.

4. The Council took note of these statements and agreed to revert to this item at its next meeting.

B. NOTIFICATIONS UNDER PROVISIONS OF THE AGREEMENT

(i) Notifications under Article 63.2- *Notifications of legislation to be reviewed in 2000 and 2001*

5. The Chairperson recalled that, on 1 January 2000, the transitional periods of Article 65.2 and 65.3 had expired. Consequently, obligations had entered into effect on that date for a large number of Members who had been entitled to avail themselves of these general transitional periods. Their obligation under Article 63.2 to notify their national implementing legislation had also become effective. The procedures adopted by the Council for such notifications were contained in document IP/C/2 and called for them to be made within 30 days, i.e. by the end of January 2000. The Secretariat had prepared a note¹ reflecting the status of the notifications received so far, as it had done in 1996 when similar obligations had entered into force for developed country Members. The note was divided into three sections, one dealing with the notifications due by those Members that had agreed to have their legislation reviewed in June 2000, a second one concerning the Members to be reviewed in November 2000, and a third one relating to the remaining Members. The note showed from which Members notifications had been received and distributed. In several cases, the Secretariat was in contact with delegations in order to get the necessary additions to the notifications or clarifications of certain points. In the distribution of these notifications, the Secretariat had given priority to those received from delegations whose legislation was scheduled for review in June 2000. Virtually all the material received from these Members had been distributed. However, as the table concerning these Members in the Secretariat note showed, gaps remained. Although eight of these Members had fully or largely completed their notifications, five of these eight had not yet notified their responses to the Checklist of Issues on Enforcement contained in document IP/C/5. From the other five Members some material had been received, but most of it was still outstanding. Given that the deadline for submitting questions to the Members to be reviewed in June was 17 April, he urged them to submit the outstanding material without delay. In case some of the material to be notified was

¹ Job No. 1745, dated 21 March 2000.

not yet ready, he suggested that the delegations concerned submit whatever could be notified without delay and complement the notification as soon as other parts of the material were ready for submission.

6. Continuing, he said that the note also showed that many Members had not yet submitted any notification concerning their implementing legislation at all, in particular those whose legislation would be reviewed at a later stage. He recalled that Article 63.2 of the Agreement required Members to notify the laws and regulations pertaining to the subject-matter of the Agreement applicable as of 1 January 2000. The purpose of this obligation was to assist the Council in its review of the operation of the Agreement and he, therefore, appealed to those Members which had yet to notify their TRIPS implementing legislation to do so without delay, pursuant to the Council decision contained in document IP/C/2.

- *Notifications of amendments to legislation notified earlier*

7. The Chairperson informed the Council that, since the last meeting, amendments to legislation notified earlier had been received from Bulgaria, the Czech Republic, Denmark, Hungary, Portugal, Slovenia and Spain. These would be available in the IP/N/1/- series of documents as soon as possible.

(ii) *Notifications under Articles 1.3 and 3.1*

8. The Chairperson informed the Council that notifications had been received from Israel and Estonia, which would be available in the IP/N/2/- series of documents shortly.

(iii) *Notifications under Article 69*

9. The Chairperson recalled that, since the last meeting, new contact points had been notified by Estonia under Article 69. This brought the number of Members that had notified contact points under this provision to 95. Modifications to earlier notified contact points had been received from Bolivia, Germany and Tunisia. All these notifications would be available in the IP/N/3/- series of documents as soon as possible.

C. REVIEW OF LEGISLATION

(i) *Review of the legislation of the Kyrgyz Republic and Latvia*

10. The Chairperson recalled that both the Kyrgyz Republic and Latvia had received a number of questions from the delegation of the European Communities just one week before the last meeting, when the review of their legislation had been taken up, and that these delegations had not had sufficient time to prepare responses before that meeting. Responses had subsequently been received from both Members and distributed in the IP/Q/- series of documents. Since then, follow-up questions had been received from the United States addressed to both Members.

11. The representative of the European Communities said that his delegation had not yet had an opportunity to review the responses that had been received and wished to reserve the right to revert to this review at a later time.

12. The representative of the United States referred to the questions that his delegation had submitted to both Members and said that his delegation hoped to receive responses, if possible, prior to the next meeting in order to have an opportunity to consider them.

13. The representative of Latvia noted that this was the second time that questions in the review of her country's legislation had been posed at very short notice prior to a meeting of the Council so that her delegation was not in a position to provide the responses at the meeting. Her delegation

would provide comprehensive responses to the questions that had been posed by the United States in due course.

14. The Council took note of these statements and agreed to revert to the follow-up questions posed in these reviews at its next meeting.

(ii) Reviews in 2000 and 2001

15. The Chairperson said that this item had been taken up in informal consultations at which, insofar as the reviews in 2000 were concerned, the order of Members to be reviewed at each of the two meetings had been determined by drawing lots. The result was that, at the meeting scheduled for the week of 26-30 June, the legislation of Trinidad and Tobago would be reviewed first and, at the meeting scheduled for the week of 27 November to 1 December, the legislation of St. Lucia would be taken up first. The other Members, whose legislation was to be reviewed at these meetings, would be taken up in alphabetical order after Trinidad and Tobago and St. Lucia, respectively.

16. Turning to the reviews in 2001, he said that it had been suggested that these be conducted at three meetings: the first in February/March, the second in June/July and the third in November. He had been consulting with the 42 Members concerned on the question as to at which of these meetings their respective legislation might be reviewed. Some progress had been made in this regard, although he was not yet in a position to put forward a complete timetable for the reviews in 2001 for the Council's consideration. Therefore, he proposed that the Chair continue conducting the necessary consultations with a view to proposing a complete programme by the time of the Council's next meeting.

17. The representative of Singapore sought some indication from the Secretariat of the days on which each Member was likely to be reviewed in order to assist delegations in planning their attendance at the meetings.

18. The Chairperson said that the Secretariat would circulate an indicative list of dates for the review of each Member at the June and November meetings drafted on the basis of prior experience. However, it had to be borne in mind that these lists might not give more than a rough indication, because the reviews in question would concern the totality of each developing country Member's legislation, whereas the developed country Members' legislation had been reviewed subject by subject. In any event, he believed that it would be prudent for the delegations whose legislation was going to be reviewed to plan to stay until the end of the review meeting in order to be able to respond to any follow-up questions, or new questions that might be raised at the meeting.

19. The Council took note of these statements and agreed to proceed as proposed by the Chair.

D. IMPLEMENTATION OF ARTICLE 70.8 AND 70.9

20. The Chairperson said that he had no new developments to report under this item. He recalled that, at the Council's previous meeting, the representative of the European Communities had informed the Council that his delegation, after having carefully studied the information provided by certain Members in response to questions posed to them, believed that these Members had not clarified their positions sufficiently and that it would pursue the matter bilaterally.

21. The representative of the European Communities said that his delegation had not had the opportunity to pursue this matter bilaterally with the Members concerned and, therefore, requested that this item be kept on the Council's agenda.

22. The Council took note of this statement and agreed to revert to this item at its next meeting.

E. IMPLEMENTATION OF ARTICLE 66.2

23. The Chairperson said that, since the previous meeting, information had been provided in writing by Switzerland in response to the Council's invitation to developed country Members, at its meeting of 1 and 2 December 1998, to supply information on how Article 66.2 of the TRIPS Agreement was being implemented. Such information had been provided earlier in writing by Australia, Japan, the European Communities and 12 of their member States, New Zealand and the United States. This information was available in document IP/C/W/132 and addenda and supplements. Information had also been provided orally during the discussion of this agenda item at Council meetings since December 1998. He recalled that the Council's discussions had shown that some delegations had had difficulty in assessing the mass of information made available. He suggested that one way of helping in this respect would be to request the Secretariat to prepare a short note setting out the types of measures that had been notified, with cross references to where further details could be found.

24. The Council agreed to proceed as suggested by the Chair and to revert to this item at its next meeting.

F. SECTION 211 OF THE UNITED STATES OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT OF 1998

25. The Chairperson recalled that this matter had been on the agenda for several meetings. Additional information had been received from the United States and would be circulated in the IP/C/W/- document series as soon as possible.

26. The representative of the United States reiterated that Article 63.3 required Members to supply, in response to a written request from another Member, laws and regulations and final judicial decisions and administrative rulings of general application pertaining to the subject-matter of the TRIPS Agreement. His delegation had provided that information in response to the written request submitted to it by the delegation of Cuba under Article 63.3. It had provided the text of the legislation and the regulations referred to in that legislation. As a supplement to the original response, his delegation was providing Cuba with the text of the revised regulations, the text of the District Court decision in *Havana Club Holdings SA v Galleon SA et al.* and the opinion of the Appellate Court in that case. In the view of his delegation, the materials it had provided to Cuba fulfilled completely the obligations of the United States under Article 63.3. The TRIPS Agreement provided for dispute settlement procedures to be used when one Member believed that another Member had taken an action inconsistent with its obligations and he noted that some Members had availed themselves of that opportunity in this situation.

27. The representative of the European Communities asked the representative of the United States to indicate in which respect the text of the judgement of the United States Court of Appeal clarified the question of the alleged incompatibility of Section 211 with several provisions of the TRIPS Agreement.

28. The representative of Cuba said that the additional information provided by the United States had only been received the day preceeding this Council meeting. His delegation had not had time to study it and, consequently, was not yet in a position to comment on it. He echoed the comments of the representative of the European Communities and underlined the need to demonstrate the compatibility of this legislation with various provisions of the Agreement. Efforts made by Cuba and other delegations had, to date, not been fruitful in getting the United States to comment on the issues raised by his country concerning Section 211. He reiterated that the delegation of the United States had limited itself to reproducing a compendium of legal texts. The communications of the United States, addressed to Cuba and circulated in documents IP/C/W/139 and IP/C/W/139/Add.1, neither provided sufficient information on, nor showed good faith implementation of, the obligations under

the TRIPS Agreement. For these reasons, his delegation did not believe that the United States had fulfilled its obligation under Article 63.3 to furnish information in sufficient detail concerning the compatibility of Section 211 with the TRIPS Agreement. Continuing, he noted that, at the time of the Council's reviews of the United States' legislation, Section 211 had not yet been promulgated so that it could not be analysed in the light of the TRIPS Agreement. Given that the Section had not been notified in accordance with the obligations under Article 63.2 of the Agreement and the procedure established by the Council as contained in document IP/C/2, Cuba would take the necessary measures in the hope that this obligation would be fulfilled. He therefore requested that this item be kept on the Council's agenda at its next meeting in the hope that the United States would fulfil its obligations under Article 63.2.

29. The representative of the United States, responding to the question posed by the representative of the European Communities, said that the Appellate Court's decision had simply upheld the decision of the lower court. His delegation had had an exhaustive discussion of the consistency of the provisions of the US law in question with the TRIPS Agreement during the consultations with the European Communities under the DSU. His delegation's arguments were well known to the European Communities' delegation.

30. The representative of the European Communities said that his delegation had held two rounds of consultations with the United States which had not brought the two parties closer together. His delegation remained convinced that Section 211 was incompatible with several provisions of the TRIPS Agreement and was considering, since this was a matter of great concern to it, whether further steps needed to be taken.

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

G. TECHNICAL COOPERATION

32. The Chairperson recalled that the Council, at its previous meeting, had had a special focus on technical cooperation and that in that context developed country Members had provided their annual updates of information on their technical cooperation activities. Some of that information had been provided just prior to that meeting and most of it had only been available in its original language. Therefore, it had been agreed, as in previous years, to invite Members to make further comments on these annual reports at the present meeting. He also informed the Council that, since the previous meeting, Germany had notified modifications to its contact point for technical cooperation purposes, circulated in the IP/N/7/- series of documents.

33. The representative of Australia, reporting to the Council on two technical cooperation activities her delegation had been involved with recently, first drew Members' attention to an Australian "Informal Survey of Notification and Review of National Intellectual Property Laws under the WTO TRIPS Agreement". Hard copies of this survey had been distributed to all Geneva missions in December 1999. It was also available on the Internet.² The survey had been undertaken to support developing countries in preparing for the notification and review process after the obligations for which the general transitional period under Article 65.2 expired in 2000 had become effective. The general observations in the survey illustrated how in practice notification and review had been used to fulfil the intended purpose of promoting transparency under Article 63. The survey had been intended both to draw on the experience of others in such a way as to ease the burden of notification and review for developing countries and also to help facilitate the beneficial flow of information about national intellectual property systems.

² The survey can be found at <http://www.dfat.gov.au/trips>.

34. Secondly, she referred to a statement on cooperation for intellectual property technical assistance in the Asia/Pacific region, which had recently been issued jointly by the Director General of WIPO and three Australian Government Ministers. The statement reaffirmed Australia's commitment to technical cooperation, which was coordinated so as to serve more effectively the identified needs of its intended beneficiaries. During his recent visit to Australia, Dr. Idris had opened the WIPO/Australia Regional Symposium on the Strategic Management of Intellectual Property in the 21st Century, which had been attended by over 100 representatives from some 30 countries of the Asia/Pacific region. This symposium had underscored the fact that strategic management of intellectual property was emerging as one of the key factors in ensuring that the economic and social benefits of intellectual property protection were widely available within the framework of the TRIPS Agreement and had explored practical ways of securing these benefits.

35. The representative of Korea introduced his country's technical cooperation efforts for developing and least-developed countries. He promised to submit a paper in greater detail shortly. Briefly, in June 1999, in the framework of APEC, Korea had organized a symposium for developing country APEC economies to help them implement the TRIPS Agreement. The participation in this symposium by the WTO Secretariat had played an important role in the success of the symposium. Korea was also planning, as a leading member of the Collective Action Plan on IPR, within the Committee on Trade and Investment of APEC, to hold an international workshop and the 11th Intellectual Property Eminent Persons Group meeting on Cheju Island in July 2000.

36. The Council took note of the statements made.

H. WORK ON ISSUES RELEVANT TO THE PROTECTION OF GEOGRAPHICAL INDICATIONS

37. The Chairperson reported to the Council on the discussion that Members had had during informal consultations that had taken place on this matter and which had focused on the procedural aspects of the work under the built-in agenda. It had been agreed that the record of that discussion would be incorporated into the minutes of this meeting.³ In his report, the Chairperson emphasized that all delegations which had taken the floor had expressed a readiness to actively participate in pursuing the built-in agenda both as regards the negotiations leading to the establishment of a multilateral system for the notification and registration of geographical indications as well as the review provided for under Article 24.2. As regards the notification and registration system, work on the negotiations was under way. The European Communities would be tabling a new proposal in the near future, which would provide a new and needed impetus to the work on Article 23.4. Work under Article 24.2 was also under way. Delegations were awaiting the summary paper from the Secretariat, which would, in a more systematic manner, set out the different responses to the Checklist (IP/C/13 and Add.1) which the Council had received from Members. As a result of the Decision taken by the General Council on 7 and 8 February 2000, the review under Article 24.2 must also address the trade and development impact on developing countries. Switzerland had announced that it would table a paper in the near future addressing the issue of the diversity of systems existing for the protection of geographical indications. There had been no consensus on the approach to be taken to the issue of the extension of the scope of protection under Article 23 to other product areas and the Council's mandate in this connection. The Chairman would hold informal consultations before the Council's next meeting on the methodology for carrying forward the work on geographical indications.

38. In response to a question from the representative of the European Communities, the representative of the Secretariat explained that the Secretariat had not been able to finalize its summary overview of the responses to the Council's Checklist due to resource problems, which had prevented it from meeting the considerable task of completing the paper in question on the basis of the detailed outline that had been agreed by the Council. The Intellectual Property Division of the Secretariat had been short-staffed over the past months, precisely at a time that it had had to service

³ Accordingly, the record of that discussion is contained in the Annex to these minutes.

four active panels. He apologized for the delay and expected the paper to be available, at least in English, several weeks before the next meeting but noted that translation was beyond his control.

39. The Chairperson then opened the floor for a debate which he believed should focus rather on the substantive aspects of the work in this area. He informed the Council that the Secretariat had received follow-up questions from the United States⁴ to the responses that had been received from the European Communities to the Council's Checklist concerning the review under Article 24.2.

40. The representative of Australia wished to express some further views, in addition to the comments she had made during the informal consultations. She acknowledged the interest of some countries in securing better protection for geographical indications, which they perceived as intellectual property assets. However, in her view, their proposals might not deliver the expected benefits. She believed that closer attention to actual national systems would be more productive. The TRIPS Agreement established that no protection was required at all unless a geographical indication was protected in the country of origin (Article 24.9). Moreover, much of the notified national legislation made little practical distinction between 'normal' and 'extended' protection. Actual implementation by a wide range of Members should be considered as the most reliable guide to further action and the voluminous information that Members had requested from one another under Article 24.2 should be given serious attention. Members might well find that, rather than advancing their interests, a rewriting of the rules would simply add to the administrative burdens of TRIPS implementation with no net benefit. There was no guarantee that any of the specific geographical indications that had been mentioned in the debate would actually receive any further protection at a national level in the event that the TRIPS Agreement were rewritten. Despite Members' demands for detailed information under Article 24.2, and parallel processes underway in WIPO and the OECD, there had been no serious endeavour to consider and review that information and draw practical conclusions from it. As a priority, the Article 24.2 review should be extended to those developing countries for whom TRIPS implementation had recently fallen due. Geographical indication protection involved a diverse range of legal means, as the number of mechanisms already notified and reviewed made clear. In fact, it was not surprising that no synthesis of this information had yet emerged. In this respect, Australia had cautioned, at the time that such a synthesis had been proposed, that it would be difficult to force a diverse range of legal means into a single template. The review should be informed and shaped by the full range of national approaches taken and not be dominated by the legal systems of the minority of Members which had notified prior to this year. This would ensure a balanced, practical and informed approach to consideration of this item, rather than the pre-emptive approach which had been evident so far.

41. In relation to the multilateral register to be established under Article 23.4, the representative of Australia said that the TRIPS Council's mandate was limited to the substantive negotiations already stipulated in Article 23.4, unless it was given a clear directive otherwise. This applied equally to any proposal to broaden the scope of the proposed register. The TRIPS Council simply had no mandate to do this and any expanded mandate would need to be established in the appropriate body. Australia opposed any proposal that would in itself create new obligations or administrative burdens for Members and stressed the burdensome nature of such proposals for countries still implementing the TRIPS Agreement. It opposed any system that created a presumption that a notified geographical indication should be protected by participating Members; that presumed a formality-based registration system at a national level; or that expected automaticity of protection beyond existing national mechanisms. It had not been considered necessary under the TRIPS Agreement to override or pre-empt national decision-making processes on trademark or patent protection to create default global protection for individual intellectual property rights, even for well-known marks which were viewed by some as having global reach. Geographical indications should not become default global rights without reference to the specific commercial conditions and legal situation applying in the jurisdiction of each Member concerned. Article 23.4 existed only to facilitate the protection of

⁴ Subsequently distributed in document IP/C/W/168.

existing rights, not to create new rights. It should not operate to overrule or pre-empt national geographical indication systems. It remained the prerogative of Members to choose the legal means for geographical indication protection that most served their interests. Many had good reasons for not choosing the burdensome approach of a pre-emptive registration based system, with all the resource demands of such a system, and might instead choose non-registration systems. For some countries, the use of general consumer protection or unfair competition law should be sufficient to meet the TRIPS obligations.

42. The representative of Australia said that she remained engaged in the mandated negotiations on this issue and committed to moving the negotiations forward. She suggested that, in moving this issue forward, Members should concentrate on clarifying some of the more important substantive questions, such as whether there was any legal basis for using the register to create new obligations or a presumption that individual geographical indications should be protected; whether Members would be obliged to establish formality-based registration systems for geographical indication protection, beyond their existing obligations to establish legal means; how Members interpreted and intended to respect the optional nature of the register; how Members could maintain the distinction between the Article 23.4 register negotiations - an existing negotiating process initiated some two years ago - and proposals to expand Article 23.1 protection to products other than wines and spirits; and why the existing multilateral register (namely the Lisbon Agreement, dating from 1958) had been unappealing to the overwhelming majority of WTO Members (only 19 countries had ratified this Agreement over 42 years). The lack of clarity about the proposed register seemed to be a further consequence of reversing the natural order of reviewing national implementation before creating new mechanisms and new obligations. The pressing task confronting the TRIPS Council - admittedly more difficult and complex than the top-down, prescriptive creation of new obligations on intellectual property rights - was to review how geographical indications were already protected in WTO Members, and from that to draw conclusions about how that protection could be facilitated through a multilateral notification and registration process.

43. The representative of Argentina expressed his delegation's support for the proposal from Canada, Chile, Japan and the United States with regard to Article 23.4 as contained in document IP/C/W/133/Rev.1.

44. The representative of Hong Kong, China endorsed that negotiations under Article 23.4 should go ahead quickly in respect of developing a system of notification and registration in respect of geographical indications for wines. He noted that there was doubt as to the mandate for extending that to geographical indications for spirits. On the other hand, for the sake of cooperation, his delegation had no objection to spirits being taken into account in this exercise. Hong Kong, China was looking forward to the papers which were being prepared by the European Communities and the Secretariat which it believed would be of great assistance in taking forward this exercise. As to the extension of the scope of protection to other categories, his delegation had reservations as to whether a mandate existed at present to do so. However, it was, of course, logical and, in a sense, inevitable, that demands arose for such extensions and it was part of a discussion which had been going on for some time. In his view, the process under Article 23.4 should be carried out efficiently and should not have to be repeated at some future date. He hoped to see that any process carried out under Article 23.4 in respect of wines should result in a system which was extensible to other categories at some point in the future without having to be largely reworked or rethought. If this consideration could be taken into account when such work went ahead, time and resources could be saved in the future.

45. The representative of the United States associated himself with the statement made by Australia.

46. The representative of Mexico, in addition to the comments she had already made during the informal consultations, wished to explain Mexico's understanding of the nature of the Council's work in relation to a multilateral system of notification and registration for geographical indications. The

mandate for the work was contained in Article 23.4 in respect of wines and in the Singapore Ministerial Declaration in respect of spirits. Taking the wording of Article 23.4, the purpose of the system should be to facilitate the protection of geographical indications. This purpose implied establishing means to identify and make public in a transparent manner those geographical indications which Members were already obliged to protect in pursuance of the provisions of the TRIPS Agreement. The system should not in any way touch on the rights and obligations established in the Agreement; the function of the register would simply be to facilitate, through more transparent and agile procedures, the protection of geographical indications as set out in the Agreement. The value added as a result of such procedures would be consistent with the requirement to grant additional protection to geographical indications for wines and spirits in conformity with Article 23 itself. Mexico agreed that the system should be voluntary in nature, and it should be open to all Members wishing to participate in such a system. This meant, in her delegation's view, that Members were not obliged to register geographical indications in order for these to get the protection in other Members, since the obligation to grant protection derived from the provisions of the Agreement, not from the register itself. Protection in accordance with these provisions should be introduced in the different systems used by Members themselves, recognizing that it was up to each Member to afford the protection to geographical indications for wines and spirits according to its own domestic legislation, provided this was in conformity with the provisions of the TRIPS Agreement. Geographical indications which would be eligible for protection under the TRIPS Agreement should, therefore, be eligible for inclusion in the multilateral register and the system to be established should provide a procedure to ensure that only those geographical indications which fully met the conditions for protection established in the Agreement would be registered.

47. In order to illustrate and better understand the way in which the register should operate, she described a dark room in which there were a few people wearing a red hat and others wearing a green hat. The red hatted people would represent geographical indications that met the conditions established in the Agreement and, therefore, had the right to protection under the Agreement, whereas those wearing a green hat did not meet the conditions or requirements for such protection. This was the situation in which Members found themselves at present. In this dark room, there were geographical indications which, under the conditions of the Agreement, deserved protection and others which did not, but it was not known which were which. The establishment of a multilateral register would be a way of lighting up this dark room, enabling Members to see who were wearing a green hat and who were wearing a red hat. Lighting up the room would facilitate the protection of the red-hatted people because Members would be able to identify them clearly and, thus, the provisions of Article 23.4 would be met. This would not involve the creation of any new rights or obligations because those wearing red hats already had the right to be protected before they went into this dark room and it was quite clear that a green-hatted person could not suddenly change to a red-hatted person simply because the light went on in this dark room. The system would be voluntary, because only those who wanted to walk into this room would participate in the system. To sum up, the multilateral registration system would enable Members to shed light on the situation in which they all found themselves, allowing Members to accord the required protection for geographical indications. Mexico believed that while the system should not increase obligations, neither should it in any way diminish or limit the rights already acquired under the Agreement. A multilateral notification and registration system which did not facilitate the effective protection of geographical indications for wines and spirits would not meet the mandate that the Council had. In Mexico's view, any system or scheme which would be limited to the simple collection of information on a database would not fulfil the purpose of Article 23.4. Mexico looked forward to participating in future discussions and was interested to see the proposal which had been announced by the European Communities on this subject.

48. The representative of Iceland said that his delegation had listened with great interest to the discussion and legal interpretations concerning the mandate. However, such discussion was not bound to take Members forward a lot, bearing in mind that Members were obliged to enter into negotiations on the establishment of a multilateral system of notification and registration according to

Article 23.4. He reminded Members that one of the major reasons for the failure in Seattle might have been that Members had been trying to swallow too big a bite which got stuck in Members' throats. Fortunately, Members had been able to spit it out before getting choked. He suggested that the Council concentrate in the coming months on the multilateral system for the notification and registration of geographical indications. There were a number of questions unanswered in regard to such a system. For instance, what would be the cost of operating such a system? What was the system supposed to cover? In that connection, there was also the question as to whether Members should extend the scope. He tended to agree with those that had said that the mandate was unclear. The scope was limited to wines and, possibly, spirits. As regards the costs, he wondered whether the system would put an additional burden on Members, in particular developing and least developed countries. How would the dispute settlement mechanism apply in relation to the system, and arbitration? Members should concentrate on the system itself and see if they could reach any consensus or agreement to establish such a system, run it for several years and see how successful it would be. If it turned out to function well and helped Members, then Members might start discussing the possibility of extending the system to other types of goods.

49. The representative of India expressed support for the point made by Hong Kong, China according to which the eventual registration system should be made extensible to other product areas. He urged the Council to give careful consideration to this point, given the obvious advantages in terms of time and energy. The questions posed by Australia were pertinent questions, but could be best discussed in an informal setting. While informal consultations should be used by delegations to explain the various positions they had taken and get into a dialogue, the TRIPS Council meetings should be used to formally state these positions, for example as to whether a Member was or was not in favour of an extension of the product coverage.

50. The representative of Brazil said that Brazil supported the establishment of a multilateral system for notification and registration of geographical indications for wines and spirits on a non-burdensome and voluntary basis, without additional obligations for Members. The proposal put forward by Canada, Chile, Japan and the United States seemed to be more in line with these criteria, but his delegation would consider with an open mind any other proposals that would be presented in the future by other Members.

51. The representative of Korea expressed support for the thrust of what had been said by the Australian delegation, especially with respect to the nature of the multilateral system of notification and registration. Korea shared the concerns expressed by Australia. The discussion on the multilateral system should be conducted with due respect to Members' own legal frameworks, which varied from Member to Member. Participation might be limited in a system that did not take account of particular situations in individual Members. He was looking forward to the proposal announced by the European Communities.

52. The Chairperson suggested that the Council take due note of the statements made, including those made during the informal consultations, and revert to the matter at its next meeting.

53. The Council so agreed.

I. REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

54. The Chairperson said that informal consultations held on this matter had provided an opportunity for an interesting exchange of views concerning the way in which the Council should organize its future debate. Different positions had been expressed. One delegation had said that the Council did not have a mandate to continue with the review of the provisions of Article 27.3(b); such review could only be undertaken on the basis of a decision from a higher body, which could also give guidance in this respect. Some other delegations were of the view that the review of the provisions of Article 27.3(b) was continuing and was a topical item. There were several options for dealing with it

in the future. The first would be to continue open debate as at previous meetings. The second option would be to further discuss the matter on the basis of a recapitulative list of the substantive questions raised by Members. This second approach would make it possible to have a more organized and systematic debate on the elements which delegations had stated were of fundamental importance to them. He, in his capacity as Chairperson, had recalled the main issues that had arisen in this connection.⁵ No consensus on the approach to be taken had emerged from the discussions during the informal consultations. A number of delegations had expressed themselves in favour of a more organized debate. Some delegations had said that, if the Council were to opt for such an approach, there should be additional consultations concerning the content of the list to be established. He suggested that the various options of how to approach this matter in the future could be discussed in further informal consultations.

55. The representative of India said that he attached importance to this review. He believed that the substantive review of Article 27.3(b) had begun and should figure on the agenda of all subsequent meetings of the TRIPS Council during the year 2000. He said that the flexibility which was presently available under Article 27.3(b) should not be diluted at any cost; if anything, it might need to be enhanced. India was open to any delegation raising any issue under the rubric of Article 27.3(b). India itself had raised the issue of the interface between the TRIPS Agreement and the Convention on Biological Diversity without any presumption of compatibility or otherwise. Next, India had raised the issue of the disclosure of the source or origin of any biological resources used in an invention for which a patent was sought. Then, India had raised the issue of domestic mechanisms for benefit-sharing concerning the commercial exploitation of such patented inventions with indigenous communities and holders of traditional knowledge. India had also broached the subject of benefit-sharing by innovators through either material transfer agreements or transfer of information agreements. India believed that, if a patent application mentioned the source of the biological resources involved and if that was open to full public scrutiny upon filing of the application, this might alert countries with possible opposition claims to examine the application and state their claims well in time. Other issues concerned the patenting of living organisms and the definition of biological or non-biological processes.

56. The representative of India said that the Council should attempt to address some of these issues within the next half year and subsequently. He was not opposed to a list as had been suggested by the Chair but, if such a list posed problems, the Council should simply give enough time to Members to comment on the issues raised by India and others. India expected a certain engagement by its trading partners on at least some of the issues that India had raised. Of course, the list of issues was not closed. If Members had other issues, India was perfectly willing to address them. So far, there had been only one meeting in which comments had been made from various angles and where papers had been put forward. Members could now go beyond those papers and make specific and concrete suggestions. He urged Members to approach the review in a constructive fashion. Wanting to advance the process, he said he was flexible about the modalities and the instrument.

57. The representative of the United States expressed the view that over the past year the Council had, in fact, had a thorough, substantive and frank discussion and review of the provisions of Article 27.3(b). A great deal of information had been developed in that process and a great variety of views had been expressed about the topic in the course of that discussion. The information was reflected in the synoptic table prepared by the Secretariat and the views were recorded in the minutes of the four meetings held in the course of 1999. It was not immediately clear to the United States what could be said or done at this time that would add to the information that had already developed. In fact, the United States believed that the Council's last discussion of the issue was something of a

⁵ The link between the provisions of Article 27.3(b) and development; technical issues relating to patent protection under Article 27.3(b); technical issues relating to *sui generis* protection of plant varieties; ethical issues related to the patentability of life-forms; the relationship to the conservation and sustainable use of genetic material; and the relationship with the concepts of traditional knowledge and farmers' rights.

re-hash of the third meeting it had had in 1999. As the United States had noted earlier, there was nothing in Article 27.3(b) which required that the review should be extended beyond 1999. However, the United States was interested in learning from other Members what purpose further discussions might serve. Some views had been expressed during the informal consultations. He would certainly consult in the capital regarding the ideas that had been put forward in preparation for the next meeting.

58. The representative of Peru said that her delegation had already expressed its preference as to how to proceed with Article 27.3(b). Peru was flexible about the procedure to be followed. Peru did not believe that a special mandate was necessary for the continuation of the review, because Article 27.3(b) clearly stated that the provisions of that subparagraph would be subject to review four years after the entry into force of the WTO Agreement and did not stipulate a deadline for the review.

59. The representative of Brazil shared the view of many delegations that the language in Article 27.3(b) indicated that the review should be a substantive exercise of examining and discussing the basis and contents of the exceptions contained in that Article. An exercise of information-gathering and examining the implementation of Article 27.3(b) should serve the purpose of supporting that substantive analysis. The representative of Brazil agreed with his Indian colleague insofar as he had stated that the review had only just started. The last meeting of the TRIPS Council had been very productive in the exchange of views of several Members on the different issues related to the review of Article 27.3(b).

60. On the issue of patentability of life-forms, the representative of Brazil considered that, in principle, an optimal outcome of the review of this particular issue would be to maintain the status quo of Article 27.3(b), given that it provided enough flexibility for Members to decide on the most appropriate legislation. On the other hand, Brazil would not refrain from participating in a debate on the proposals presented by some countries, such as India and the African Group, on the clarification of the definitions of microorganisms and biological processes. One noteworthy recent development on this issue was the call of President Clinton and Prime Minister Blair to make the human genome freely available to all researchers. Although the scope of the initiative might not challenge existing patent legislation (it covered the total of the human DNA, but did not cover the work on the sequences of patented genes in academic work), it could be understood as an indication of willingness to admit some limitations to patentability of life-forms and their parts.

61. As regards the protection of plant varieties by an effective *sui generis* system, the representative of Brazil noted that, while some delegations might find it useful, for instance, to have more guidance as to the concept of "effectiveness" for *sui generis* systems, the present language in Article 27.3(b) seemed to provide enough flexibility for each Member to decide on the most appropriate form of plant variety protection. Brazil had established a Law on the Protection of New Varieties of Plants in 1997. The *sui generis* protection in Brazil resulted in an effective protection of new plant varieties that had been developed in Brazil. Recently, Brazil had also adhered to the Convention on the Protection of New Varieties of Plants (UPOV). The UPOV system should always be considered as an important reference point, but an attempt to incorporate it into Article 27.3(b) could damage the delicate balance already established in that provision. The TRIPS Council should not single out one particular Act of UPOV as a model for implementation. From the perspective of developing country Members, for instance, the 1978 UPOV Act remained a useful reference for discussions, even if that instrument was no longer open for membership. In the last TRIPS Council meeting, the European Communities had recognized the difficulties in creating *sui generis* protection systems and the administrative system for handling the rights under it. Such recognition found support in the fact that, so far, few developing countries had adhered to the 1991 UPOV Act. Likewise, national experiences of other countries in developing other *sui generis* systems should not be excluded as important contributions to the discussions, as the recent notifications of the legislation from developing country Members might reveal.

62. On the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the representative of Brazil said, as he had already stated at the last TRIPS Council meeting, that Brazil had made its best efforts to implement and enforce the TRIPS Agreement. At the same time, Brazil had vested interests in implementing the CBD, as the owner of the greatest biodiversity on the planet and the first signatory of the Convention. As a Member of both instruments, Brazil understood that both these should be mutually supportive and promote the sustainable use and exploitation of resources. In this sense, one of the most relevant issues to be discussed in the review of Article 27.3(b) should be the compatibility of the TRIPS Agreement with the relevant provisions of the CBD. On the one hand, the CBD already set some elements for supporting adequate and effective protection of intellectual property rights (as established in Article 16.2 of that Convention). Another provision that allowed for mutual support with other international agreements was Article 16.5, which established that "[t]he Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives". Brazil believed that that provision was closely connected to the exercise of reviewing Article 27.3(b) of the TRIPS Agreement, by ensuring that TRIPS provisions provided for benefit-sharing by both providers and users of genetic resources. At the last meeting of the TRIPS Council, several Members had made statements under the review of Article 27.3(b), which should be considered as a meaningful starting point for discussions on the compatibility between the TRIPS Agreement and Article 8(j) of the CBD. Brazil had already expressed its appreciation for the proposal by Bolivia, Colombia, Ecuador, Nicaragua and Peru. The proposal by Cuba, Honduras, Paraguay and Venezuela, as well as the one by the African Group, demonstrated that this issue remained as a priority for developing country Members. At the same time, Brazil also wanted to highlight contributions made by some developed country Members. Norway, for instance, had presented a very balanced and open-minded approach as regards the relationship between the TRIPS Agreement and the CBD. Switzerland had also presented interesting inputs and ideas to the debate, such as the creation of a database managed by WIPO in cooperation with organizations which collected traditional knowledge of communities, in order to facilitate the examination of the novelty of claimed inventions. To some extent, Brazil agreed that traditional communities would benefit from the use of existing intellectual property rights - and such a task would certainly fall within WIPO's mandate. Nevertheless, Brazil would not necessarily share Switzerland's conclusions that the creation of new intellectual property rights might be unnecessary, as the discussions at the WTO and other fora seemed to have just begun. Finally, Brazil emphasized the importance of the debates undertaken in other international organizations. Brazil understood that the discussion at these fora by no means resulted in a duplication of work, but rather established a synergy between the WTO and these other organizations that could contribute with their expertise on specific issues related to the discussions in this Council. In this sense, he would like to single out the discussions on access to genetic resources and traditional knowledge at WIPO. One of the possible outcomes of the Meeting on Intellectual Property and Genetic Resources on 17 and 18 April 2000 might be a recommendation for the establishment of a Standing Committee on Biodiversity and Traditional Knowledge in WIPO, which would serve as a significant input for the Council's exercise of reviewing Article 27.3(b).

63. The representative of Pakistan said that there seemed to be three issues in relation to Article 27.3(b), i.e. the question of the mandate, the question of a method of work and that of substance. On mandate, the Council could be brief, since everyone agreed that substantive discussions had already begun under Article 27.3(b) itself and the provision in question was not time-bound. Regardless of what had happened in Seattle, the Council could proceed with the substantive discussions that it had initiated last year. He was encouraged by the flexibility expressed by the United States in its statement. He also noted that the United States had not withdrawn its very substantive paper on the matter, on which Pakistan was considering making comments. In regard to the method of work, he supported the Chairperson's suggestion to develop a list of possible topics for discussion.

64. The representative of Pakistan said that one of the really critical issues that had come up in the past two months was the scope of patentability in regard to genetic resources and discoveries in the area of biogenetics. Brazil had already referred to the joint statement by President Clinton and Prime Minister Blair in which, apparently, the indication was that a discovery of merely DNA sequences should not be awarded a patent. This gave rise to the further question as to at what stage of discovery in the area of genetics should patents be awarded, if at all. One view was that a patent might be given merely on the basis of a discovery of a certain sequence of the DNA. There was also a view that a patent should be given if the function of that sequence of DNA was also described. Another view was that the patent should be granted only if there was a distinct diagnostic and therapeutic application identified along with a particular sequence of DNA. It was extremely interesting that varying economic interests were behind each of these proposals. For genomics companies, the earlier the patent could be given in the discovery process, the better it was. For pharmaceutical companies, on the other hand, it was the last stage at which the award of a patent would make sense. But from a broader societal perspective, perhaps it was necessary to ask the question as to what were the implications of these approaches for the flow of scientific knowledge and research. These were the sort of issues which the Council was tangibly confronted with in the rubric of discussions on exemptions from patentability under Article 27.3(b). This would possibly be discussed under one of the points that the Chairperson had identified during the informal consultations.

65. The representative of Pakistan said that, in the United States paper, there was a most interesting assertion that the famous *Chakrabarty* case had really spurred the development of a new industry, i.e., the biotechnology industry. While it was possible that this assertion could be made, it should be backed up by some sort of economic analysis as to the exact causal linkage between the granting of patents and the fostering of an industry. Would the industry have already formed and evolved regardless of this decision? Would the process have been slower or faster? Could there have been systems of incentives other than awarding patents on microorganisms and, by implication, life-forms that would have been explored? There was also an assertion in this paper that no inconsistencies had been identified between the TRIPS Agreement and the CBD. There would be many present at the Council meeting who would perhaps beg to differ. He suggested that perhaps the different view might be in regard to what was meant by inconsistency. There might not be inconsistencies in terms of there being an overt contradiction between the two instruments, but surely there were certain areas where the CBD pronounced itself much more clearly than the TRIPS Agreement did. This might stem perhaps from differences in initial premises and it might be necessary to see whether the TRIPS Agreement needed to be complemented by similarly clear provisions in certain areas, for example in relation to prior informed consent or as regards community rights concerning traditional knowledge, etc. These were issues which had been identified but which needed to be kept in mind. He also referred to a Recommendation by the Council of Europe in September 1999 regarding biotechnology and intellectual property, which in some of the preambular paragraphs made assertions such as "[t]he Assembly therefore believes that neither plant, animal nor human-derived genes, cells, tissues or organs can be considered as inventions nor be subject to monopolies granted by patents". In the small operative paragraphs, the Recommendation provided that there should be further study and there was a whole list of issues which the Council of Europe had agreed should be studied. Many of them might coincide with some of the points identified by the Chairperson during the informal consultations. The first issue reflected a desire to have a detailed study of all aspects linked to the protection of intellectual property in biotechnology innovations with a view to further improving international legislation. This would necessitate the assessment and review of the effects of granting patents on a broad scope as regards the progress of research and development. The Recommendation also called for the development of a code of conduct for scientists and scientific units working in the field which would guarantee both a free scientific approach to worldwide genetic resources and benefit-sharing in developing countries and, more radically even, to discuss a suitable alternative system of protecting intellectual property in the field of biotechnology, fitting the purposes of the CBD and meeting the needs of worldwide private as well as public interests. He concluded by noting that these issues were being debated at various levels and

the Council had a mandate to discuss many of them. The best approach for the Council was clearly what had been recommended by the Chairperson.

66. The representative of Ecuador stated that, following the Chairperson's suggestion made during the informal consultations, his delegation had given some thought to the way in which the Council should tackle this particular issue. Ecuador believed that the work which had been carried out throughout the year 1999 on this issue had been very useful but had, in fact, been limited simply to a compilation of information. That was not the entire goal of the mandate. The Council had to continue its work with a view to examining the substance of the issue which had still not been dealt with conclusively. He gave his delegation's full support to the Chairperson's suggestion to draw up a non-exhaustive list of possible topics for the Council's further discussions in this area. Ecuador was ready to look at other issues and topics and it believed that the important thing in this context was to make progress, to push ahead. While referring to Ecuador's long statement on aspects of substance relating to Article 27.3(b) at the last meeting, he expressed support for many of the points the representatives of Brazil and India had made.

67. The representative of Australia said that her delegation preferred to see discussions proceed in an open-ended way as suggested in the Chairperson's first proposal. Australia was concerned that the other approach might move things away from the review of implementation that Article 27.3(b) mandated. She preferred to see Members tabling their own concerns in whatever way they saw fit, especially in regard to the way in which they were actually implementing the existing provisions. She noted that, whilst the mandate in Article 27.3(b) was limited, the discussions had already facilitated a useful and timely information exchange. However, the information gathered had concentrated on quite a small number of Members and now that many more were in the process of notifying their intellectual property laws under the Agreement, the information gathered should draw on a much wider range of Members' experiences rather than being dominated by the approaches taken by the first to implement Article 27.3(b) and notify the legislation in question to the Council. Australia, therefore, looked forward to a wider range of information on national approaches to this key provision. There was a widely felt need for clear practical information about the operation and effect of existing options for intellectual property rights systems in this area of technology, and Australia welcomed the opportunity this review provided to share this information.

68. The representative of Australia said that substantive negotiations on the existing TRIPS rules or amending the existing text would be untimely. There was no mandate in any case but, setting legal questions aside, she believed it would be premature and counter-productive to rewrite the rules before there was any consideration of how the majority of WTO Members had chosen to implement them in their national systems. She said that claims of shortcomings should first be taken up with reference to the range of practical options illustrated in the notification and review of national systems. The minimal discussion that had taken place in the TRIPS Council so far had barely touched on this rich source of information and she felt that that should be given priority given the commonly felt need for early practical solutions. Finally, she was willing to share Australia's experience on the interaction of the existing intellectual property system with these broader issues, not because it wanted to suggest that its experience was applicable to other Members' situations, but because it attached priority to a cooperative and collaborative approach to finding practical solutions to common problems.

69. The representative of New Zealand said that the discussions that had occurred during the informal consultations and this Council meeting had been very productive and useful in helping the Council approach the issue. New Zealand concurred with a number of speakers that had stated that the mandate of this review was a continuing one. The Council should build upon the useful information exchange and analysis that the Council had had last year. He endorsed Australia's remarks on the need to gather further information in relation to the vast majority of Members regarding Article 27.3(b). In relation to a list as suggested by the Chairperson, New Zealand recognized the Chairperson's desire to separate out the different issues which had been lumped together under this agenda item over the last year. However, the Council needed to further consider

the indicative list. One or two of the points mentioned appeared to encompass not only Article 27.3(b) issues but also other issues, which could be addressed separately, possibly under Article 71.1. As some speakers had noted, some of the issues the Council had been discussing under this item, were highly visible in other organizations and other sectors outside the aegis of the TRIPS Council, such as WIPO and the CBD. He endorsed his Brazilian colleague's remarks in relation to the synergies between such organizations and the WTO. In the case of the CBD, he noted that there was an upcoming meeting in Seville in the week of 22 March 2000 that should be of interest to the TRIPS Council, and for those that dealt with TRIPS issues. A large part of the agenda was devoted to exploring a work programme on legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. The CBD secretariat had issued a background document for that meeting and he wished to draw Members' attention to one paragraph in particular because it explicitly referred to the Article 27.3(b) review. This paragraph stated: "In consideration of the high level of multi-agency activity seeking ways and means for the protection of traditional knowledge, a strong case remains for preserving the status quo with regard to Article 27, paragraph 3(b), until consensus emerges on the best ways to harmonise policy, legislative and institutional mechanisms for the protection of traditional biodiversity-related knowledge at the international level and which takes into account the aspirations of indigenous and local communities with regard to such protection."

70. The representative of Korea expressed appreciation for the Chairperson's proposal during the informal consultations to draw up a list of topics to facilitate discussion on the subject. He stated that he would certainly examine its merits carefully and would consult with his capital in light of discussions the Council had had so far. Briefly touching upon some of the topics mentioned by the Chairperson, he said on the subject of patentability of life-forms that Korea was comfortable with the present level of protection described in Article 27.3(b). On the subject of the relationship between the CBD and the TRIPS Agreement, Korea was basically of the view that intellectual property rights should and could maintain a mutually supportive relationship with biodiversity for sustainable development. The concept of traditional knowledge was yet to be developed further and defined and, to the extent that it was known, it varied from country to country. In this respect, WIPO would soon launch exploratory and analytical work. Therefore, it would be appropriate to further examine the relationship between intellectual property and the protection of traditional knowledge after the concept had been defined and an acceptable scope had been developed at the international level.

71. The representative of the European Communities stated that he had no difficulty in going along with the Chairperson's first option, i.e. to continue with open-ended discussions. He recognized that the other approach suggested by the Chair might be more productive but, although he was prepared to discuss a number of topics listed by the Chair, he did not want to commit himself now to such an approach. Clearly, specific issues had been raised over the past year in the Council, which deserved further examination and possibly also clarification. However, it was not clear that all of them were strictly linked to intellectual property protection or within the scope of Article 27.3(b). Work that was being undertaken in other fora and the TRIPS Council should not necessarily act in parallel. Finally, he noted that a number of the issues presented had been raised by Members which had hardly started implementing the provisions of Article 27.3(b).

72. The representative of Egypt said that his delegation considered it important that the substantive discussion on this issue continue over the year 2000. Egypt reaffirmed its support for the paper presented by the African Group on this issue during the preparation for the Seattle Ministerial Conference. Egypt wanted to stress that the stability of Article 27.3(b) should be maintained. There was no reason for having a special mandate to review the Article. Article 27.3(b) did not specify a deadline for finalizing this review. He expressed support for the Chairperson's proposal to continue the debate on the basis of a list of key issues, in order to help organize and structure the Council's debate and to facilitate its work. His delegation was open to discuss this issue in a constructive manner allowing the Council to reach an outcome which would be in the interest of all participants.

73. The representative of Venezuela expressed support for the list of topics that the Chairperson had suggested for discussion under Article 27.3(b). His delegation was grateful for the documentation which had been made available throughout the preparation for the Seattle Ministerial Conference, in particular the paper put forward by Brazil, as well as the comments that had been made during the present discussion by Brazil, India, Pakistan and New Zealand. On the issue of genetic resources and traditional knowledge, Venezuela wished to note that work had been carried out not only in the TRIPS Council, but also in, for example, the Committee on Trade and Environment. The Secretariat had produced a background note on the relationship between the TRIPS Agreement and the Convention on Biological Diversity, as requested by the CTE. Venezuela would like that document to be distributed to the TRIPS Council as well. The reason for this was that, in the note, there was analysis of national experiences, two of which were particularly relevant: that of Costa Rica and that of the Andean Union. Venezuela believed that this note would help the Council understand better what was happening in national fora and in other international bodies. Commenting on the document from the United States on Article 27.3(b), he said that the paper clearly set out the interests of the United States in regard to the issues under discussion in the context of Article 27.3(b). Maybe, the identification of biological resources and traditional knowledge would increase the costs of patenting. But on the other hand, it must also be recognized that the lack of identification of such information increased the costs of those who had to litigate against attempts to patent some forms of traditional knowledge. Venezuela believed that the CBD was not in conflict with the TRIPS Agreement in terms of the recognition of countries' sovereignty over biological material, genetic resources and benefit-sharing. Finally, he drew attention to the proposal on the protection of traditional knowledge that it had made during the Seattle preparatory process in the context of Article 71.1 of the Agreement.

74. The representative of Singapore said that the discussion thus far had been useful because it was aimed at clarifying how the Council should proceed in regard to Article 27.3(b) and at identifying what was or was not relevant to Article 27.3(b). One issue concerned the relationship of this provision to other international instruments. The question was whether, since the Agreement had come into force, developments had taken place which required a re-look at Article 27.3(b). A reference had been made to the CBD. Had there been developments in regard to whether intellectual property protection should be given to other areas, for example traditional knowledge? In Singapore's view, the points mentioned by the Chairperson as possible topics for discussion were merely starting points for further discussion, helpful for determining what was or was not relevant to the review. After discussions, a possible conclusion could be that the TRIPS Council was not the most suitable body to look into, for example, the question of whether traditional knowledge should or should not be given protection. This was an important question on which work was going on at WIPO.

75. The representative of Canada associated his delegation with Australia's intervention, in particular with respect to a preference for the Chairperson's first option. He thought that it would be premature at this point in time to come out with a checklist. The interventions and papers by various delegations had raised a number of issues in relation to which Canada would like to contribute. Therefore, Canada believed that it would be useful for an open-ended discussion under this review to continue. As Australia had pointed out, Canada had, in fact, heard from a fairly small number of delegations about the issues that had been mentioned. Given that many Members were in the process of implementing their TRIPS obligations, Canada would continue to examine this issue in the context of implementation by those Members. Canada believed that open discussions at further meetings in the course of the year would be beneficial.

76. The representative of Mexico said that her delegation had followed the debates in connection with Article 27.3(b) in the Council with great interest. In relation to the exemption from patentability, Mexico believed that Article 27.3(b) represented a very delicate balance. Indeed, Article 27.3(b) showed how difficult negotiations had been during the Uruguay Round in reaching consensus on the protection of biotechnological inventions. The complexity and the ramifications of protection for these inventions went beyond the domain of intellectual property, since, for instance, human life, food safety, social, ethical and even religious issues were involved. Mexico was open to continuing with

this exercise, if the Council deemed it appropriate, but believed that it was important in the review process for the Council to be careful to maintain the delicate balance that the negotiations had managed to achieve. Furthermore, in connection with the question of the *sui generis* mechanism of protection for plant varieties, she said that Mexico had acceded to UPOV in 1997 and had incorporated substantive provisions of that Convention in its national laws and regulations while at the same time faithfully complying with the requirements of Article 27.3(b) as currently drafted. Mexico agreed with those Members that had expressed the view that the UPOV mechanism was an effective *sui generis* mechanism for the protection of plant varieties in accordance with Article 27.3(b). In Mexico's view, the UPOV system could also provide a useful benchmark for the review exercise given that it had been adopted by a large number of Members. The UPOV system was in any event less *sui generis* than other mechanisms intended to protect plant varieties. Therefore, Mexico was open to continuing with this exercise and to studying other systems which might be presented by Members as a means of protecting plant varieties, this should not be interpreted as meaning that Mexico was ready to consider fundamental or radical changes to the provisions of Article 27.3(b), that would imply additional requirements to the measures that many Members, including Mexico, had adopted to comply with their obligations under this provision. As to how the Council should proceed with this exercise, she was grateful for the proposals made today. Mexico acknowledged that the suggestion of working on the basis of an illustrative list would be useful in making debates on these subjects, which were extremely complex, more systematic. However, for the same reason, the Mexican delegation wanted to have more time to think about this and reserved its position for the time being. Experts in the capital should first analyse the suggested list of topics for discussion, in particular as to whether the elements listed should be dealt with under Article 27.3(b) or perhaps in some other context.

77. The representative of Japan said that his delegation needed more time to examine the indicative list proposed by the Chairperson, partially because some of the items seemed to be outside the scope of Article 27.3(b). As regards the relationship between the CBD and the TRIPS Agreement, he noted that the CBD and the TRIPS Agreement had different perspectives which were complementary and mutually supportive. Therefore, they should be implemented and deliberated in separate frameworks. Accordingly, his delegation was of the view that it was premature to address CBD-related issues in depth within the framework of the TRIPS Agreement. As regards issues related to traditional knowledge, the concept of the traditional knowledge of local and indigenous communities was not yet clearly defined and its relation with intellectual property was not clear. Therefore, possible inclusion of the protection of the traditional knowledge in the TRIPS Agreement had not yet reached a suitable stage for discussion in the TRIPS context. Instead, he suggested that the Council should wait for the ongoing work done by other international fora, such as WIPO and the FAO.

78. The representative of Hungary said that, on the basis of the language in Article 27.3(b), he believed that the Council had a mandate to continue the review under that provision of the TRIPS Agreement. He shared the view that an open-ended discussion was not a productive approach and felt attracted to the second option put forward by the Chairperson during the informal consultations. Hungary was ready to look at an indicative list and thought that annotations to that list would be useful. Hungary requested the Chairperson to circulate a checklist to Members.

79. Summarizing the discussion, the Chairperson said that, as to how the Council might proceed with its work, the debate had reaffirmed the need to continue with a review of the provisions of Article 27.3(b). On procedure, his interpretation was that most Members supported an approach which would allow a more orderly, systematic and productive debate than the debates that had occurred to date. During the informal consultations he had taken the liberty to mention a number of possible topics which he felt could help make the debate more orderly and could be taken up one by one for debate at later meetings. He stated that his aim had not been to have an exhaustive list of such points. Neither should how he had described these points be given any weight in terms of to whatever conclusions discussions on them might eventually lead, nor in terms of whether or not they fell within

the purview of the review under Article 27.3(b). Some delegations felt that the Council when tackling these topics in the future should have more information regarding the implementation of Article 27.3(b) by Members. So far, the Council had received information from, mostly, developed country Members. Developing countries were now implementing Article 27.3(b) in their legislation. Consequently, it would be useful in future debates to have information from them as well in this respect. The debate had also revealed that the Council needed to follow the work being done by other organizations dealing with these topics, in particular WIPO and the Convention on Biological Diversity, since the Council might not be the most appropriate forum to deal with each and every topic that had been mentioned in the course of the informal consultations or this Council meeting. Consequently, the Council needed to develop a work method for further work on the issues raised in this regard. Of course, if any list of topics for discussion were to be developed, it would require consensus amongst all Members. He suggested that the Chair might be allowed, on the basis of the discussions that had taken place, to have further consultations on a specific list of possible topics on which the Council could have debates at the forthcoming meetings without pre-empting the final result of course. If there were no objections to that suggestion, that would be the way the Council would proceed.

80. The representative of Venezuela agreed with the Chairperson's summary and conclusion. However, he reminded the Chairperson that Venezuela would like the background note that the Secretariat had prepared for the CTE on the relationship between the CBD and the TRIPS Agreement with a focus on Article 27.3(b) and the environment to be circulated as a TRIPS Council document.

81. The Chairperson said that due note had been taken of that request and that there did not appear to be any objection to it.⁶

82. The Council agreed to revert to the matter at its next meeting, taking note of the statements made.

J. REVIEW OF THE IMPLEMENTATION OF ARTICLE 71.1

83. The Chairperson recalled that Article 71.1 of the TRIPS Agreement obliged the TRIPS Council to review the implementation of the Agreement after 1 January 2000.

84. The representative of Venezuela referred to the proposal that his delegation had co-sponsored in the context of the preparations for the Seattle Ministerial Conference concerning the protection of intellectual property rights of the traditional knowledge of local and indigenous communities, and that had been re-circulated as a TRIPS Council document.⁷ He reiterated Venezuela's interest in the topic, including future studies and negotiations. He noted that Venezuela had discussed this topic also in relation to Article 27.3(b). Some Members believed that traditional knowledge was related to both Articles 71.1 and 27.3(b). He was requesting discussion of this topic in connection with Article 71.1, but noted that he was unsure as to whether some elements of folklore should be discussed under Article 27.3(b). Some of these issues were addressed in a decision of the Andean Community concerning the Common Regime on Genetic Resources, as well as at the national level. He noted that in that decision certain elements had been defined, including indigenous, local, and derived resources. Recognizing the work under way in WIPO, he expressed his wish that the issues be explored in all fora.

85. The representative of Paraguay supported the statement made by Venezuela insofar as he had suggested that the proposal that had initially been made at the preparatory meeting for the Ministerial Conference at Seattle should be taken forward in the context of Article 71.1 of the TRIPS Agreement,

⁶ The document was, subsequently, circulated as document IP/C/W/175.

⁷ See document IP/C/W/166.

while taking into account all of the action concerning new topics arising in other international organizations and bodies.

86. The representative of Jamaica said that Jamaica could relate to many of the issues in the proposal from Cuba, Honduras, Paraguay and Venezuela on the protection of intellectual property rights for traditional knowledge under the TRIPS Agreement as raised under Article 71.1. As Jamaica had a rich heritage of traditional knowledge, it wanted to protect its rights in respect of international trade and such cultural expressions. It looked forward to and would participate in future discussions and negotiations on this issue.

87. The representative of the United States sought a clarification from the delegation of Venezuela in respect of paragraph 8 of its proposal which requested that the Seattle Ministerial Conference establish a mandate to carry out a number of items. He asked whether it was the view of the delegations that had made the proposal that, in the absence of any mandate coming out of Seattle, there did exist some other mandate to carry out the requested activity and, if so, he wondered where such a mandate lay.

88. The representative of Venezuela said that a reply to this question had been given at the time of the Ministerial Conference. Venezuela considered that, under Article 71.1, the Council was able to carry out reviews on the basis of new events. He noted that work had been done on the issue since 1992 with the creation of an intellectual property, folklore and traditional knowledge body within ECOSOC, and that this issue had been dealt with by WIPO during the last two years. Venezuela said that the topic could be considered as a new issue, in the same sense as issues relating to new technologies, or the new WIPO copyright treaties.

89. The representative of Peru said that Peru wanted to associate itself with the Venezuelan proposal to take up the issue and to request studies on traditional knowledge under this particular heading. Peru was also a member of the Andean Community and had Community legislation on the topic. Peru considered this topic to be of great importance for the Andean countries.

90. The representative of the United States thanked the delegation of Venezuela for its clarification. He appreciated the reference that had been made to the third sentence of Article 71.1, which provided the Council with an opportunity to undertake, at any time, reviews in the light of relevant new developments which might warrant modifications or amendments to the TRIPS Agreement. This was, indeed, one element of the review that the Council was tasked with under Article 71.1. He recalled that the Council had had some discussions earlier during the meeting about the most appropriate way to structure the review of Article 27.3(b), if such a review was to be continued. Perhaps a similar discussion should occur regarding how to structure a review under Article 71.1. He noted also that other delegations had identified particular topics for discussion in the context of that review.

91. As to how the Council might structure the review, the representative of the United States pointed out that Article 71.1 directed the TRIPS Council to first review the implementation of the Agreement when the transition period for developing country Members ended, i.e. on 1 January 2000. The Article specified that every two years thereafter, the Council had to review the Agreement in the light of the experience gained through implementation. Finally, the Council was authorized to review implementation at any time in the light of relevant new developments that might warrant modification or amendment of the Agreement. He noted that the Council had begun other reviews called for in the TRIPS Agreement by gathering relevant information. Much material on implementation was already available or would be developed over the next two years in the course of the review of implementing legislation of developing country Members. In order to assist the Council in the review of the operation of the Agreement, it might be useful for all Members to keep notifications of all laws and regulations up-to-date as was required under Article 63.2 of the Agreement. It would also be useful for the review of implementation, if each Member that had already been reviewed submitted in due

course a brief summary of the significant changes it had made to its laws to implement the obligations of the TRIPS Agreement. That information coupled with the information compiled regarding implementation by developing country Members over the next two years and the information developed during other reviews would enable the Council to consider how the Agreement was, in fact, functioning. As other delegations had already pointed out, there had been changes since the text of the Agreement had been completed a number of years ago. He, therefore, believed that, at the appropriate time, Members could usefully discuss these new developments for the purpose of strengthening the Agreement. He considered that an opportunity should be provided for all Members to bring forward proposals to strengthen the Agreement based on relevant new developments.

92. The representative of the European Communities felt that the Council was in a slightly confusing and ambiguous situation. He noted first that the communication from Cuba, Honduras, Paraguay and Venezuela was a proposal which, in the title, was linked to Article 71.1 of the Agreement. On the other hand, as the delegation of the United States had pointed out, a mandate had been sought from the Seattle Ministerial Conference. Secondly, he noted that the issue of traditional knowledge had also been discussed in the context of Article 27.3(b). He stated that there was some ambiguity as to how the Council could or should deal with such issues. He wondered whether the Council could deal with such issues under the third sentence of Article 71.1, as had been implied in the discussion. He requested that the Council reflect further on this situation and revert to the question of how to deal with Article 71 at its next meeting. He stated that he did not see how the Council could make much progress at the present meeting and address these issues properly so that it could reach conclusions.

93. The Chairperson said that, in the light of the comments made by the European Communities, the item might require more reflection by all, not only as regards the nature and scope of the review but also as regards the topics that should come under it and which topics should be dealt with under reviews of other Articles. He said that it would be useful if, before the next meeting, written suggestions could be provided as to how the Council might best approach the review. This might enable the Chairperson to consult with Members with a view to structuring the discussions at the next meeting.

94. The representative of Ecuador said that he fully agreed with the approach suggested by the Chairperson. He noted that the consideration of Article 71.1 included a whole series of aspects whereas the Council had so far only focused on the proposal that had been put forward by the delegate of Venezuela. He thought that it was important to give a lot more thought to this and to take up the item once again at the subsequent meeting.

95. The representative of Australia said that the TRIPS Agreement provided for a sequence of events to occur and that, in implementing Article 71 and reviews under other provisions, Members should be following that logical sequence. The first step in that process was the implementation of existing TRIPS standards. The second was a review of their implementation at the national level, which had already happened for developed countries and was about to happen for developing countries. The third was the review of the general implementation as a collective exercise. The fourth was a consideration of possible amendments or clarifications. The fifth was a formulation of recommendations from 2002 onwards. She believed that Article 71.1 exemplified this approach in that it limited the general review of the TRIPS Agreement mandated for 2000 to implementation only, and required that the reviews as from 2002 should then develop recommendations for amendments to the Agreement in the light of its implementation. Because many developing countries were still in the process of concluding their implementation of the Agreement, and it was impossible to assess its actual effect, Australia believed that it would be contrary to the interests of all to circumvent this established implementation and review sequence. All Members needed to make the system work, and come to understand how a wide range of Members had given effect to TRIPS standards as they currently existed, before they could consider objectively which elements might benefit from substantive revision. In this regard, she did not agree that there was a mandate for negotiations on any

substantive new intellectual property standards in the area of traditional knowledge or in any other field.

96. The representative of Singapore said that, while delegations were free to raise any matter, at the end of the day, a decision would need to be taken as to what really was the role of the TRIPS Council and it might be that some issues that had been raised might not be considered proper topics for the TRIPS Council to pursue.

97. The representative of Brazil shared the view of Australia on the character of this first review of the TRIPS Agreement. Brazil considered that Article 71.1 was clear as regards the fact that implementation was supposed to be the main objective of the review under the TRIPS Agreement and there seemed to be logical steps in the process of implementation and review of the TRIPS Agreement two years from now, once experience had been gained through the process of implementation. As other developing countries, Brazil had endeavoured to adapt its national legislation to the TRIPS standards in different areas. It considered that a significant number of developing country Members might not be ready to undertake a thorough and comprehensive review of the Agreement at this moment. In this sense, Brazil would not object to the scope of the review including issues such as technical cooperation, transfer of technology and other implementation-related issues.

98. The representative of Venezuela noted that, before presenting its document, Venezuela had welcomed any comments as to whether the review under the Article should be now or in two years time. He was interested in the order, the time-frame and the sequence of steps. He noted that Australia had proposed a sequence. There was also the question of compliance with obligations and transparency.

99. The Chairperson said that it was important to give this matter more thought before the next meeting. He invited delegations to put their proposals forward in writing as to how the Council should conduct the review. He noted that this would be helpful in guiding the Council's discussions at its next meeting.

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

K. EXAMINATION OF THE SCOPE AND MODALITIES FOR NON-VIOLATION COMPLAINTS

101. The Chairperson said that the Council had received from the European Communities a request that this item be included on the agenda of the present meeting. He therefore offered the floor to the European Communities to introduce this item.

102. The representative of the European Communities said that his delegation had proposed to put this point on the agenda because, in its view, the forum of the TRIPS Council had not adequately addressed the scope and modalities of possible non-violation complaints. The Community believed that there were important issues and that the Council should finally undertake that work in a serious way. Therefore, the European Communities hoped that the Council could agree to devote more time to look at this matter, i.e. the scope and modalities of non-violation complaints. The European Communities would table a communication in the near future and looked forward to contributions from other Members of the TRIPS Council in the hope of having a useful discussion at the next meeting.

103. The representative of Canada supported the representative of the European Communities. He requested that this item be on the agenda because Canada also felt that work on scope and modalities needed to take place. Canada would participate in that work in a substantive way.

104. The representative of Poland took the floor on behalf of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovenia and the Slovak Republic. He welcomed and fully supported the initiative of the European Communities because, in the view of the Members on behalf of whom he was speaking, the complexity of the examination called for in Article 64.3 of the TRIPS Agreement and the lack of progress on it in the Council last year clearly necessitated substantive further discussions and a more in-depth analysis. He believed that the discussion should aim at forging consensus on the recommendations on scope and modalities required in the cited paragraph. He was ready to engage in such an exercise with an open mind. He reiterated the view that irrespective of the expiration of the five year period provided for in Article 64.2, non-violation complaints remained inadmissible under the TRIPS Agreement until a decision was made by consensus at a Ministerial Conference on the approval of the TRIPS Council's recommendations regarding the scope and the modalities of those complaints.

105. The representative of the United States noted that it would come as no surprise to the Members of the Council that it was the view of the United States that the moratorium on non-violation complaints under Article 64.2 had in fact ended on 1 January 2000. He said that there was nothing in paragraph 3 of Article 64 that conditioned the expiration of the moratorium on the submission by the TRIPS Council of a recommendation to the Ministerial Conference on scope and modalities and that, in fact, the paragraph made clear that an extension of the moratorium could only be provided by consensus. The United States believed that, now that the moratorium had expired, nothing in Article 64.3 required the Council to use its precious time to discuss this matter further. The Council had spent a considerable amount of time last year thoroughly reviewing country positions on scope and modalities. He also pointed out that Article 26 of the Dispute Settlement Understanding addressed the questions of scope and modalities of such complaints adequately. While he listened with interest to the views of other Members regarding the purpose that might be served by continuing these discussions, the United States was not in a position to agree to continue the discussion of scope and modalities now that the moratorium had expired. He stated that he would, of course, take any and all views expressed on such a purpose back to his capital and return to the next meeting prepared to discuss them further. The United States was not preparing to launch any non-violation dispute in the near future; rather, the United States was concentrating on laws and practices of Members that appeared to be inconsistent with the obligations of the Agreement itself.

106. The representative of Korea supported the European Communities' proposal that the Council should continue to work on scope and modalities.

107. The representative of Australia said that, like Canada, Australia also supported the continuation of work on scope and modalities on non-violation disputes. Australia did not consider that there had been a serious discussion of this issue as yet and was ready and willing to participate actively in such discussions.

108. The representative of Singapore said that, whilst it was true that paragraph 2 of Article 64 referred to a particular period, one also needed to look at paragraph 3 which referred to work by the Council on scope and modalities. Noting that paragraph 3 had not been fully complied with, he supported the suggestions to continue work.

109. The representative of Japan recalled the Japanese proposal, presented at previous meetings, to the effect that the examination of the scope and modalities of non-violation complaints provided for in Article 64.3 should be pursued. The proposal by the European Communities was in line with the Japanese proposal. Japan could support the European Communities' proposal and was ready to make contributions to the upcoming examination process. On the other hand, Japan wanted to point out that the TRIPS Council had failed to reach any consensus on the issue of the extension of the moratorium provided in Article 64.2 at its last meeting.

110. The representative of India said that, without prejudice to its position on this issue, India was most interested in looking at the European Communities' paper and in pursuing the proposal to examine the scope and modalities regarding non-violation complaints.

111. The representative of Pakistan said that, like preceding speakers, Pakistan was also interested in pursuing discussions on this item but, again, with the caveat that this would be without prejudice to its position, being that Pakistan did not see the need for the use of non-violation complaints in the TRIPS area in the first place.

112. The Chairperson said that, although he interpreted the situation as being such that most countries wished to see the continuation of work on this item, the Council could not reach a consensus on the matter. However, there were no objections to the inclusion of the item on the agenda for the next meeting. He suggested that the Council revert to the issue at its next meeting, without prejudging the scope of the discussion to be held.

113. The Council so agreed.

L. INFORMATION ON RELEVANT DEVELOPMENTS ELSEWHERE IN THE WTO

(i) *Accessions*

114. The Chairperson noted that, on 17 December 1999, the Government of Jordan had accepted, subject to ratification, the Protocol of Accession of Jordan to the Marrakesh Agreement Establishing the World Trade Organization, done at Geneva on 17 December 1999 (document WT/Let/323). Paragraph 2 of the Protocol of Accession for Jordan (document WT/ACC/JOR/33 and Corr.1) incorporated the commitment given by Jordan in relation to intellectual property rights as reproduced in paragraph 248 of the report of the Working Party on the Accession of Jordan. This paragraph said that "the representative of Jordan stated that Jordan would apply fully all the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights from the date of accession to the WTO, without recourse to any transitional period".

(ii) *Dispute Settlement*

115. The Chairperson noted that by means of a communication, dated 12 January 2000, the European Communities and their member States had requested consultations with the United States regarding Section 337 of the US Tariff Act of 1930 and amendments thereto. On 17 March 2000, the report of the panel on Canada - Patent Protection of Pharmaceutical Products (WT/DS114) had been circulated to Members.

ANNEX

RECORD OF INFORMAL CONSULTATIONS ON ARTICLES 23.4 AND 24.2

1. The Chairperson recalled that the General Council, at its meeting of 7 and 8 February 2000, when agreeing to initiate mandated negotiations on agriculture and services, had taken note of a statement by its Chairperson which, *inter alia*, noted the importance attached by Members to other elements of the built-in agenda, including the mandated reviews and the negotiations that were foreseen under the TRIPS Council in respect of geographical indications. The Chairperson of the General Council had said that, while these reviews and negotiations might not pose the same immediate practical questions as the services and agriculture negotiations, insofar as they were subject to existing procedures, this did not in any way detract from the need to make serious progress on them. The General Council had also agreed that the mandated reviews should address the impact of the Agreements concerned on the trade and development prospects of developing countries.
2. The representative of the European Communities said that, for the European Communities and their member States, work on the multilateral register for geographical indications was a key objective. Substantive discussions on this should continue without delay. His delegation would be tabling a paper, in the near future, that could form an additional and, hopefully, appropriate basis for reaching consensus in the Council.
3. The representative of Poland, speaking on behalf of the CEFTA countries Members of the WTO as well as Estonia and Latvia, emphasized the utmost importance these countries attached to tangible progress in the work of the TRIPS Council on geographical indications. He believed that the multilateral system of notification and registration called for in Article 23.4 of the TRIPS Agreement needed to be set up expeditiously. He was also of the view that, on the basis of the review under Article 24.2 of the Agreement, negotiations needed to be held under Article 24.1 aimed at extending the scope of additional protection under Article 23 to products other than wines and spirits. The numerous proposals prior to Seattle concerning the product coverage of Article 23, and the work and progress in the informal consultations held before and at Seattle, showed that negotiations on the extension of the scope of Article 23 enjoyed the support of a great number of Members from all geographical regions and at all levels of economic development. The CEFTA Members as well as Estonia and Latvia were concerned about the lack of progress achieved so far, recalling that more than four years had passed since the implementation of TRIPS obligations without any significant progress on the built-in work in this area. He hoped that the positive spirit shown on the launch of the mandated negotiations on agriculture and services would prevail and bring a new impetus also to the negotiations on geographical indications. It was in this positive spirit that the CEFTA Members as well as Estonia and Latvia had given their support, in good faith, to the idea of dealing with agriculture and services separately. Most of these delegations had stressed the need for organizational simultaneity of negotiations on agriculture, services and geographical indications and wished to reiterate their interest in all built-in agenda negotiations receiving the same treatment. Early establishment of reasonable benchmarks in the case of geographical indications would make it easier for these delegations to consider benchmarks in other mandated areas. The CEFTA Members, Estonia and Latvia believed that, if Members were interested in establishing time-frames in other negotiating areas, they had to be consistent and show the same level of ambition or at least should be ready to recognize interests of others in the area of geographical indications. He suggested that the Chairperson conduct a series of consultations with a view to preparing ground for appropriate decisions on how to proceed further in this area.
4. The representative of Turkey said that his delegation believed that both the additional protection under the Agreement for geographical indications for wines and spirits as well as the multilateral registration system for geographical indications to be negotiated should be extended to

products other than wines and spirits. He supported, therefore, the view of the CEFTA Members, Estonia and Latvia.

5. The representative of Argentina said that he was somewhat surprised about the statement made by the representative of Poland, on behalf of the CEFTA countries and others. In his delegation's view, their position seemed to be based on an understanding that did not exist. Members had already committed themselves to the initiation of the negotiations on services and agriculture at the end of the Uruguay Round. It was not a question of any Member supporting this in exchange for something else, unless a Member did not intend to comply with the mandate which the Ministers had signed on to at that time. Of course, as had been expressed in the General Council, Members should not leave aside some aspects of the built-in agenda. However, that did not mean that Members had agreed on parallelism between the current work on the negotiations on services and agriculture, including in respect of defined deadlines to carry that work forward. Furthermore, there was a considerable divergence of views about how far Members should be going in the context of Article 23.

6. The representative of India said that his delegation too attached utmost importance to work in the TRIPS Council on geographical indications. The multilateral system of notification and registration, which was mandated in Article 23.4 of the Agreement, should be set up expeditiously. He believed that there was also a mandate for negotiations on extending the scope of additional protection to products other than wines. However, while conceding that negotiations had to be conducted, the question to be decided in the TRIPS Council was how these negotiations were going to be conducted. He recognized that there were differences of view in the Council on this issue, but these could be discussed and negotiated in the usual way and hopefully a positive outcome could be reached that would be mutually satisfactory for all sides. Referring to the procedural questions raised by Argentina, he said that for his delegation the substance of the issue was more important. The mandated reviews should address the impact of the TRIPS Agreement on the trade and development prospects of developing countries and, in the context of geographical indications, it could hardly be denied that a number of developing countries attached tremendous importance to extending the scope of protection to products other than wines and spirits. It was in that spirit that his delegation requested that the TRIPS Council attempt to address the issue in substance and see how Members could achieve an outcome that would be mutually satisfactory for all sides. He considered the suggestion by CEFTA Members as well as Estonia and Latvia to request the Chairperson of the TRIPS Council to conduct consultations a good one. He also strongly supported the substance of the intervention made by the CEFTA Members as well as Estonia and Latvia, and requested the TRIPS Council to address the issue at an early date.

7. The representative of New Zealand agreed with Argentina that the arguments of the CEFTA countries, Estonia and Latvia in trying to put the negotiations under Article 23.4 on the multilateral register on par with those on agriculture and services were fanciful, in particular given the clear language of Article 23.4 itself. Further, it was also to be noted that the language of progressive liberalization, as seen in the context of the GATS and the Agreement on Agriculture, were nowhere to be seen in Article 23.4 or elsewhere in Section 3 of Part II of the TRIPS Agreement. While it was useful to explore the provisions of Articles 23.4 and 24.2, one should not lose sight of the fact that Article 23.4 was fairly clear and precise in relation to the scope and nature of the negotiations it mandated. The product coverage was wines and, given the Singapore Declaration, possibly spirits. The question of extending the additional protection for geographical indications under paragraphs 1 to 3 of Article 23 to other products did not come within the scope of Article 23.4 but was rather an issue which Members should consider possibly in the context of the Article 24.2 review. This Article 24.2 review was still continuing and his delegation was looking forward to the overview paper from the Secretariat. He noted that most of the responses to the Council's Checklist in the context of the Article 24.2 review had been received from developed country Members. In the process of this continuing review, developing country Members should start sending in their responses as to how they had implemented Section 3 of Part II of the TRIPS Agreement. His delegation did not see the

Article 24.2 review as having pointed to a need to extend the scope for additional protection. The various responses to the Checklist indicated that those Members that had responded had implemented the provisions on geographical indications, whether those of Article 22 or Article 23, in a variety of ways and the membership as a whole was still evaluating this broad response to these obligations. Looking at the road ahead, the TRIPS Council should focus on trying to give some more substance to the review under Article 24.2 so as to approach it in a methodical way without necessarily saying that the end point had to be an extension of the scope.

8. The representative of the United States said that the delegations of Argentina and New Zealand had largely covered the observations he had wanted to make about the discussion on Articles 23 and 24.2. His delegation could not associate itself with the observations made by Poland on behalf of the CEFTA countries as well as Estonia and Latvia with regard to the interpretation of Article 24.1 and whether or not that provision in fact did provide a mandate for the Council to consider expanding the scope of protection. However, this in no way detracted from its willingness and intention to participate actively in negotiations on a notification and registration system in the context of Article 23.4. He expressed his delegation's interest in examining the proposal which the European Communities had indicated they would be bringing forward. The United States was committed to making substantial progress on this issue in the course of the coming year. Making progress on Article 23.4, as it was currently set out in the Agreement, and completing the review under Article 24.2 was already a rather substantial amount of work for the TRIPS Council. Leaving aside the fact that the Council had no mandate for discussions on the issue of scope, expanding that work for which it had a mandate by considering the issue of scope was probably more than the Council could handle during the year.

9. The representative of Switzerland expressed support for the statement of the delegation of Poland on behalf of the CEFTA countries, Estonia and Latvia. There was a need to extend the additional protection for geographical indications for wines and spirits to other products and it did not seem justified to treat certain categories of products better than others. The logic of the multilateral trading system, which was to ensure certain coherence between different markets, made it essential to continue work in order to extend this type of protection to other product areas. Article 24, in particular its first two paragraphs, provided the basis for continuing work and negotiations in this regard. He hoped that the compilation of the responses to the Checklist that was being prepared by the Secretariat would soon be available. As regards the organization of the Council's work, he said that the statement made by the Chairman of the General Council on 7 February 2000 had highlighted the importance of the built-in agenda in the area of geographical indications. Negotiations in the areas of agriculture and services and negotiations on geographical indications had to be dealt with on an equal footing, both as regards modalities as well as the time-frames to be established. At a future Council meeting, Switzerland would present a paper showing that the diversity of the systems of protection was not going to be an obstacle to the work to be carried out under Article 24.2.

10. The representative of the European Communities welcomed the interventions made by the representatives of Poland, Switzerland and India to the extent that they called for substantive discussions and negotiations in the area of geographical indications. He thought that this was the key message and was not surprised that these delegations had indeed made this call for substantive negotiations, given the strong support for such negotiations expressed by a large number of WTO Members at the WTO Ministerial Conference in Seattle. He expressed full support for the suggestion that the Chairperson conduct consultations in order to see how this process could be carried forward.

11. The representative of Australia said that some of the points she wanted to make had already been covered by Argentina and New Zealand. From Australia's perspective, there was a clear difference between the wording of Article 23.4, which clearly called for negotiations, and Article 24.2. Australia had shown a commitment to these negotiations and looked forward to the negotiations progressing. Her delegation looked forward with interest to the paper foreshadowed by the European Communities. On the Article 24.2 review, however, like New Zealand, she wished to

point out that a lot of information had been submitted to date in response to the Council's Checklist and her delegation looked forward with interest to the Secretariat's paper. This summary paper would provide an excellent opportunity to consider, from a practical perspective, how Members had actually implemented the section on geographical indications at the national level. Her delegation felt that there was a need to have such a substantive discussion and in depth consideration of these provisions, in order to help increase the understanding of all Members about this relatively new area of intellectual property. She considered this a necessary step before beginning to talk about any amendments of the Agreement to increase the scope of protection under the Agreement and questioned the existence of any mandate in Article 24.1 and 24.2 in this regard.

12. The representative of Pakistan said that there was an imbalance in the TRIPS Agreement, in the view of a number of delegations, in regard to the scope of protection offered to some products and not offered to other products. In the opinion of a large majority of Members, this imbalance had to be rectified. On how to proceed, he said that the constructive approach would be to engage in a serious, substantive review of the section on geographical indications, keeping in mind the very important caveat which the General Council had raised in its observation that the developmental impact of individual agreements would have to be borne in mind when undertaking reviews. He underlined that the purpose of this work was the review of a particular section of the TRIPS Agreement and not an academic exercise. Therefore, he did not rule out that, as suggested by the CEFTA countries and others, at an appropriate stage Members should establish time-frames and benchmarks in order to impart a certain direction and momentum to the discussions in this area. The discussions should not merely meander without any end period and without any direction that Members were supposed to take. Therefore, he supported the suggestion that the Chairperson undertake consultations on this matter, keeping in mind the rationale for the exercise.

13. The representative of Singapore said that, in his delegation's view, it might be premature to consider immediately what exactly was mandated. It would be more productive if one looked at Articles 23.4, 24.1 and 24.2 closely to see what they were concerned with. It was quite clear that, under Article 23.4, work needed to be done on the question of the protection of geographical indications in relation to wines, i.e. the question of the register, and, since the Singapore Ministerial Conference, this question would also have to be tackled under that provision in relation to spirits. This work could be looked at independently of Article 24.1 and 24.2, which were of a broader nature and raised the question of the meaning of the term "review". Work under these two other provisions might be more productive if the Council followed the wording of Article 24.2 and not consider the thorny question of the extension of the scope of the higher level of protection at the outset. The review under Article 24.2 could cover a number of areas and he quoted the reference in its second sentence to "[a]ny matter affecting the compliance with the obligations under these provisions". The question of scope, rather than substance, could be included in the review if there were a consensus, but he suggested an objective look at the terms of Article 24.2.

14. The representative of Canada thought that Members were running the risk of mixing apples and oranges by confusing between what they liked to have in the Agreement and what they did have in the Agreement. It was important for Members to have a clear understanding of these distinctions and know when they were departing from what they had already agreed to do. Echoing the comments by New Zealand, Australia, the United States and Argentina, he emphasized that, at the moment, there was no mandate to broaden the scope of protection for geographical indications beyond what was currently contained in Articles 22, 23 and 24. The great number of proposals before the Seattle Ministerial Conference to expand the scope of additional protection under Article 23 to products beyond wines and spirits simply reconfirmed the fact that there was no mandate at the moment to discuss or to negotiate additional protection for geographical indications for products beyond wines and spirits. No such mandate had been achieved at Seattle either. Thus, the mandate as it currently existed concerned negotiations on a multilateral register, which were under way, and a quite extensive ongoing work programme under Article 24.2. In response to the Council's Checklist, extensive information had already been received from many Members on a variety of protection systems that

they had in place for geographical indications. For the moment, the Council should continue to focus on work on these items and his delegation looked forward to participating in that work. Again, while some had suggested that the Agreement might not be logical or balanced, it was as it currently read. It was for the Ministerial Conference to decide whether anything should be added to the mandate of the Council, including any negotiations, but since currently there was no mandate, at this stage, his delegation could not agree to having the Chairperson conduct consultations to negotiate on expanding the scope of protection for geographical indications.

15. The representative of Mauritius said that his delegation would like to associate itself with the comments made by Poland on behalf of the CEFTA countries, Estonia and Latvia and supported by others. There was an urgent need to correct the imbalances in the TRIPS Agreement as pointed out by other delegations. He agreed that time-frames needed to be to be spelt out. He strongly supported the suggestion that the Chairperson hold consultations with Members on how to proceed further with the work under Article 24.

16. The representative of Argentina wished to comment on the link made between Articles 23 and 24 and said that there was nothing in the General Council Decision of 7 and 8 February 2000 which obliged the TRIPS Council to deal with these together. It was erroneous to read the situation as if the General Council had decided, in fact, to broaden the scope of mandated negotiations. It could never have been possible to reach such a decision. He had no objections to the Chairperson holding consultations on specific issues regarding Article 23, which, as he understood, were covered by the General Council mandate, but there was no mandate for consultations on Articles 23 and 24 beyond that.

17. The representative of Chile said that the negotiations required under Article 23.4, which concerned the establishment of a multilateral system of notification and registration for a specific product, should not be mixed up with demands to broaden the scope of application of the provision of the section on geographical indications of the Agreement. In the view of his delegation, the main reason which had prevented the Council from making any progress on the notification and registration system was precisely because Members tended to confuse mandates with ambitions. His delegation shared the view that there was no mandate for negotiations to extend product coverage and Members should abide by the mandate that they had in Article 23.4. He thought it premature to think in terms of entering into a negotiation that would broaden the scope of application of geographical indications at the present stage. There was a lot of legislation still to be reviewed and indeed a lot of work to be done and concluded. Therefore, consultations should not be held as yet. Some delegations had referred to what they believed was a lack of balance in these provisions of the Agreement since they referred only to one product and excluded others. However, in order to be fair in assessing the TRIPS Agreement, one must not look just at the TRIPS Agreement but indeed look at it in light of the whole package of Agreements which stemmed from the Uruguay Round, where delegations had established links between the TRIPS area and other areas of the negotiations.

18. The representative of Sri Lanka supported other delegations which had argued in favour of extending the scope and coverage of geographical indications to products other than wines or spirits. Reiterating her position on the issue, she said that there was a logical sequence in the three Articles contained in Section 3 of Part II of the TRIPS Agreement. Article 22 gave the definition of geographical indications; Article 23, touched only on two products, i.e. wines and spirits; and Article 24.1 said in particular that protection could be extended to products other than wines and spirits and provided the mandate for Members to enter into negotiations with an aim to increasing the protection of individual geographical indications to other products. As to the modalities under which the negotiations could be carried out, her delegation endorsed the view expressed in the Council that the Chairperson should hold consultations as to how these negotiations should be carried out.

19. The representative of the Czech Republic, while endorsing the statement made by Poland on behalf of the CEFTA countries, Estonia and Latvia and expressing his appreciation for the interest

shown by a number of Members on the issues which were under discussion, wished to react to a number of the interventions made and offer some additional thoughts with a view to clarifying what was behind his delegation's request for consultations to be conducted by the Chairperson. Products with characteristics attributable to geographical origin were often the subject of imitations, counterfeits and other such practices and for this reason there was a need to have a meaningful and effective tool to deal with those practices. For his country, as well as for many others, the lack of a sufficient level of protection for geographical indications was not an issue of hypothetical or academic nature, but a real economic problem with concrete negative economic implications. That was why his country was interested in putting into effect the commitment undertaken in the Uruguay Round, when governments had consented to the method for providing additional protection for geographical indications and the method was to conduct negotiations in the TRIPS Council. As for wines, in Marrakesh, governments had agreed to conduct negotiations regarding a multilateral system of notification and registration. Later on, in Singapore, issues relevant to notification and registration of spirits had been brought on board and, since then, a lot of useful analytical work had been done enabling a better understanding of practices and approaches developed by different Members. However, no substantial progress had been achieved so far. In his delegation's understanding, Members had never been in full negotiating mode and he believed that that needed to be changed. What was needed was a more structured and result-oriented approach. Regarding the issue of the extension of additional protection of geographical indications to products other than wines and spirits, he had no intention to repeat in length what had been said on earlier occasions by his delegation and many others. From his delegation's perspective, the existing provisions of the TRIPS Agreement together with the Singapore Ministerial Declaration offered a sufficient legal basis for extending legal protection. His delegation was of the view that the respective provisions of Article 24 which applied to all products provided the mandate for extending additional protection also to other products and the method was the same as for the establishment of a multilateral registration system for wines and spirits, i.e. negotiations in the TRIPS Council. Consequently, Members had agreed in 1996 to allow inputs from delegations on the issue of scope. Since then, the issue had been addressed in the review under Article 24.2 and in the context of the preparations for the Seattle Ministerial Conference, when a large number of delegations had attached great importance to the issue of the extension of the coverage. His delegation believed, therefore, that the time was ripe to move ahead, to change gear and to put an end to the endless legal and procedural discussions. This would be in everyone's interest and clearly in conformity with the objectives of the TRIPS Agreement.

20. The representative of Egypt said that his delegation's views had already been reflected by the delegations of the CEFTA countries, India, Pakistan and Switzerland. The protection of geographical indications was an investor-friendly measure that should be available for the protection of any product, whether man-made or natural, that distinguished itself by its quality, reputation and any other characteristics attributable to its geographical origin and should not be limited in any way to wines and spirits. He agreed that the Council should conduct substantial consultations on this issue during the year.

21. The representative of Hungary said that, as far as the potential economic impact of mandated negotiations was concerned, his delegation readily agreed that negotiations in areas like agriculture and services were by nature more wide-ranging and had larger potential economic implications. However, as far as the legal status of the establishment of the register under Article 23.4 was concerned, he took issue with these delegations that believed that such negotiations were at a lower level. While there were obligations to negotiate further trade liberalization in the area of agriculture and services, he wished to reiterate that four years had passed since Members had agreed on a clear mandate under Article 23.4 to set up a register but the progress made, so far, had been disappointing. He could imagine that Members primarily interested in, for example, agriculture, would be somewhat irritated if they would be in the same situation in four years time. As to the extension of the scope of the product coverage under Article 23, his delegation was ready to start negotiations and believed that it followed from the logic of the TRIPS Agreement that, at some stage, negotiations had to be started on this. He strongly urged the Chairperson to conduct informal consultations on this subject.

22. The representative of Mexico said that her delegation attached great importance and priority to the establishment of a multilateral notification and registration system for geographical indications for wines and spirits under the built-in agenda of the TRIPS Agreement and pursuant to the Singapore Declaration in which the Ministers had given their support for the work programme of this Council. Progress should not be delayed because of the lack of results in Seattle. Nor should there be any form of linkage with the existing proposals to study the possibility of granting additional protection under Article 23 to other products, apart from wines and spirits. Her delegation did not agree with the interpretation currently being given to Article 24.1 and 24.2 according to which there was a mandate to extend the scope or coverage of additional protection provided for in Article 23. Article 23 clearly referred only to wines and spirits. Proposals for broadening the coverage could be made and studied in the Council. However, this did not imply that Members had a mandate for entering into negotiations for an extension of coverage. Mexico's position was that the Council should first focus on work for which it had a mandate and her delegation looked forward to the proposal that would shortly be submitted by the European Communities in this regard. Consequently, she believed that it was premature currently for Members to launch into a process of informal consultations for a specific discussion on the question of a possible extension of the protection to be granted under Article 23. As to Article 24.2, Mexico agreed that the Council should continue with the review exercise. The information that was available to date did not give a full picture and probably the time had come to collate information and also to obtain information from those who had not yet provided it. Her delegation was also awaiting with interest the summary document which the Secretariat was preparing and which should assist Members in studying the issues more systematically, i.e. how delegations had been applying Section 3 of Part II of the TRIPS Agreement. At the Council meeting held in October 1999, several delegations had expressed the desire for negotiations aimed at setting up a multilateral notification and registration system to be continued with new impetus this year. Her delegation agreed with these delegations and was ready to participate actively in these discussions.

23. The representative of Japan said that his delegation was of the view that the scope of the negotiations under Article 23.4 was limited to the covered products only and the expansion of the covered products had to be dealt with under Article 24.2. Consequently, Japan was looking forward to the proposal announced by the European Communities. Japan was ready to actively join the discussion.

24. The representative of Cuba supported the extension of the additional protection for geographical indications under the Agreement to other product areas and supported the idea of informal, broad and transparent consultations to be carried out by the Chairperson for this purpose.

25. The representative of Brazil, referring to the statements of the delegations of Argentina, Canada, Mexico, Australia, the United States and New Zealand, said that the provisions of Articles 23 and 24 had rather different scopes and did not provide a mandate to undertake negotiations at this stage on extended scope of protection for geographical indications.

26. The Chairperson noted that the work on the negotiations on setting up of a multilateral notification and registration system for geographical indications for wines was under way. He recalled that the European Communities had indicated that they would submit shortly a new proposal. He noted that work was also under way in regard to Article 24.2, and recalled that the Secretariat was preparing its summary of the responses to the Checklist. In accordance with the General Council decision at its meeting of 7 and 8 February 2000, the TRIPS Council needed to take account in this work of the impact on the trade and development prospects of developing countries. He believed that all Members had shown a willingness to expedite the work on the question of geographical indications, and recalled that the Swiss delegation had indicated that it would submit a document in the context of the review under Article 24.2. He noted certain divergences in views as regards the interpretation of the provisions of the Agreement concerned and on how to carry the work forward. More particularly, there were different interpretations concerning the mandate, or absence thereof, currently in the TRIPS Agreement pertaining to the extension of product coverage of Article 23 to

other products. While the interpretation of some countries that had taken the floor was that currently there was no specific mandate for this, it was also true that a series of proposals had been tabled by some countries on the theme of the possible extension of this protection to other products. As had been suggested, the Chairman might be asked to smooth out the path and facilitate the work by having some further consultations on this subject. There appeared to be, however, divergences about the nature of those consultations, in particular on whether they should address the possible extension of the product coverage under the provisions of the Agreement. The Chair might hold informal consultations, not on substantive aspects, but to garner those elements which could help to define the best path to take with this work in the year 2000.
